

ADVISORY ETHICS OPINION 97-13

SYNOPSIS:

A lawyer may agree with a client to charge an hourly fee which includes some or all disbursements, provided the client remains ultimately liable for actual litigation costs and the fee is “reasonable”.

FACTS:

A lawyer has been asked by a prospective client, who seeks to use his services to defend anticipated claims, to quote the prospective client an hourly rate which includes all disbursements. Three proposals have been outlined.

The first proposal is to agree to charge the client an hourly rate which includes all anticipated disbursements, including both general disbursements and litigation disbursements.

The second proposal is to agree to charge the client an hourly rate which includes anticipated general disbursements, with the client being billed separately for itemized litigation disbursements.

The third proposal is to agree to advance all anticipated disbursements, including both general disbursements and litigation disbursements, to keep a record of the disbursements incurred during a billing period, and to recover those amounts by means of a billing rate surcharge in a subsequent billing period, which surcharge is designed to recover the recorded disbursements, but which may or may not recover the exact amount. Under this arrangement, it is contemplated that the client would not receive a bill itemizing the disbursements. However, the client would receive a copy of the recorded disbursements and the calculations showing that the surcharge is designed to recover the amount of those disbursements. For example, if the law firm disbursed \$100 during the first billing period, and reasonably anticipated that it would provide 100 hours of services during the next billing period, it would impose a billing surcharge of \$1 per hour.

DISCUSSION:

This request involves two well-settled principles - that clients must remain ultimately liable for the expenses of litigation and that fees must be “reasonable”. The “ultimate liability” rule is fairly straightforward in its application; the “reasonableness” rule can be complicated for reasons including those articulated in ABA Formal Opinion 93-379. The relevant DRs provide:

DR 2-106 Fees for Legal Services

- (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
- (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
 - (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
 - (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
 - (3) The fee customarily charged in the locality for similar legal services.
 - (4) The amount involved and the results obtained.
 - (5) The time limitations imposed by the client or by the circumstances.
 - (6) The nature and length of the professional relationship with the client.
 - (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
 - (8) Whether the fee is fixed or contingent.
- (C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

DR 5-103 Avoiding Acquisition of Interest in Litigation

- (B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, unless the client is indigent or a party to a class action; a lawyer may, however, advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

CONCLUSION:

Thus, a lawyer and client are free to agree on an hourly or other type of fee which is estimated to include expenses of litigation and other disbursements so long as the fee is reasonable and actually covers expenses of litigation or the client is liable for the difference between the fee and litigation expenses. Inclusion of general overhead expenses (such as for rent, malpractice insurance, computers and books) is expected in a lawyer's hourly rate. Disbursements for in-house services (such as photocopying) and to third parties (such as long distance phone bills and plane tickets) are to be passed on at actual cost absent agreement to the contrary. ABA Opinion 93-379. In this case, the client is proposing that all overhead and all disbursements be included in the hourly rate and that arrangement does not per se violate the standards set in the DRs. However, a situation should not be created in which the lawyer is discouraged from incurring expenses (for example on experts) he would otherwise incur if not for the fact that it would cut into his fee too much. In other words, the lawyer must maintain his duty of competence.

As stated in ABA Opinion 93-379, "[t]he lawyer's conduct should be such as to promote the client's trust of the lawyer and the legal profession. This means acting as the advocate for the client to the extent necessary to complete a project thoroughly." Depending on the circumstance of the project, then, a lawyer must use good judgment on fee quotes which include all expenses, even though there is no per se rule prohibiting such fees. When a problem is foreseeable possibility, the lawyers should make sure the client understands the value of separate billing for expenses. If the client is concerned with monitoring expenses, the lawyer may suggest that expenses in excess of a certain amount will not be incurred without the client's consent.

Turning to the three specific proposals submitted, the second proposal, to bill separately for litigation expenses, is the preferred model. The first proposal to charge an hourly fee including all estimated disbursements would be inconsistent with DR 5-103(B) as soon as litigation expenses exceeded the fee because the DR is clear that the client must remain ultimately liable, and the exceptions for indigent clients and class transactions, we assume, do not apply. Like the first proposal, the third proposal has the greater potential of violating DR 5-103(B), and we believe the first and third proposal also have a greater potential of creating a conflict between the lawyer's duty to providing quality service and the natural desire to earn as much of the fee as payment for services rather than reimbursement of expenses.