

OCBA PROFESSIONALISM & ETHICS COMMITTEE

FORMAL OPINION 99-001 (HOURLY BILLING)

STATEMENT OF FACTS

An attorney prepares standard wills, with several modifications; standard partnership agreements; and other standard form legal documents which the attorney keeps on computer, then modifies, as needed, for each client who so requests this kind of work be performed. The attorney's work is unquestionably good and he complies with all of the applicable *California Rules of Professions Conduct* and applicable portions of the *California Business & Professions Code*—with the possible exception of *fees*.

In billing the client, the attorney bills by the hour. In tabulating the hour total, the attorney refers to records this attorney made at the *first* drafting of, e.g., the will. This particular drafting, for example, took seven hours. Then, the attorney adds on the additional time it takes to *customize* this will for this client, for example, one hour; and additionally adds on the time it takes to research if any changes in the law have occurred. In this instance, this research took one hour.

The attorney bills at an hourly rate of \$250 per hour and bills this client for nine hours, or \$2,250.

QUESTIONS PRESENTED

- 1) Whether this billing is violative of the *California Rules of Professional Conduct* or the *California Business & Professions Code*;
- 2) If violative, or in any case, is there a more prudent and professional manner in which to bill?

DISCUSSION

The questions presented mandate an analysis of the standards regulating the determination of the *dollar amount* of the client bill. This question does *not* discuss the related issues of the requirement of a written fee agreement, full disclosure to the client, consent of the client, use of a client trust account, or moral turpitude based on fraud.

The questions are narrow: Is this fee properly determined and if not, is there a better manner in which to determine the fee?

A. CALIFORNIA RULE OF PROFESSIONAL CONDUCT 4-200

Unfortunately this rule does not directly answer the questions presented. Instead the rule mandates that fees neither be "illegal" nor "unconscionable." *California Rule of Professional Conduct* 4-200 (A). This stated rule then proceeds to list factors to determine illegality and unconscionability. These factors include: difficulty; results; time spent; etc.

It would seem that using this general approach, the attorney's billing is illegal in that it misstates the hours the attorney actually spent (two hours). However, this rule is not dispositive, based on the fact that it does not address this problem.

B. CALIFORNIA BUSINESS & PROFESSIONS CODE §6148

This provision offers somewhat more assistance, but nevertheless does not directly answer the questions presented. Part (a)(1), dealing with calculation and communication to the client of the fee, begins with the mandate that the calculation and communication include: "Any basis of

compensation including, but not limited to, hourly rates, statutory fees or flat fees” This clause makes a distinction between flat fees and hourly fees. Thus by implication, an attorney who writes up the bill as if it were a straight hourly fee is violating the spirit . . . if not the letter of this clause. The attorney in this hypothetical was essentially billing seven hours as a flat fee (\$1,750) and then billing at an hourly rate. This appears to be an inaccurate communication to the client regarding the basis of calculation of the fee.

Additionally, clause (b) of this section presumably mandates accurate communication of the “basis of calculation.”

C. CONCLUSION

As discussed, particularly in section B, above, the attorney in this fact pattern did not accurately communicate the method of calculation. Although it can be argued that it *would* have taken nine hours, the fact is that the will required only two hours of work for this attorney. Thus this practice is subject to criticism.

There is a painless alternate. That is that the attorney indicates to the client that there is an initial flat fee of \$1,750 and then the attorney will bill at the rate of, e.g., \$250 per hour in order to “tailor” the will to fit the needs of this client. In order to protect the attorney from a vacillating and “difficult” client, the attorney should consider a flat fee and then an hourly fee for changes to the first drafting and for in-person or telephonic conversations. The billing difficulty is obviated by more accurate, yet acceptable, communication to the client both verbally and in the drafting of the fee contract.

In the alternative, it might be simpler for all involved for the attorney to make a flat fee calculation, e.g., for \$2,500 or whatever, within reason, the attorney deems appropriate.

Either of these two alternatives are more within the guidance given and mandated by the applicable California statutes.