

LOS ANGELES COUNTY BAR ASSOCIATION  
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

**OPINION NO. 479: NOVEMBER 21, 1994**

ATTORNEY-CLIENT. An attorney has a duty to inform a client of the fees charged for legal services, of the methods used for calculating fees, and of any alternative fee arrangements applicable to the client, and to obtain the consent of the client to the fee arrangements. An attorney violates this duty by changing the agreed upon fees or the agreed upon methods of calculating fees without the informed consent of the client.

CONFLICTS OF INTEREST-ATTORNEY PERFORMANCE STANDARD. A law firm may establish an attorney performance standard based upon the number of hours an attorney bills to clients, however, the law firm should determine the possible adverse effects of such performance standard to clients, to attorneys within the firm, and to the firm itself.

**AUTHORITIES CITED**

California Business and Professions Code sections 6068 and 6128.  
California Rule of Professional Conduct 3-110, 3-500 and 4-200.  
Los Angeles County Bar Association Formal Opinion 391 (1981).  
Grossman v State Bar, 34 Cal.3d 73, 192 Cal.Rptr. 397 (1983).  
Severson & Werson. et.al. v Bolinger 235 Cal.App.3d 1569, 1 Cal. Rptr.2d 531 (1991).

**FACTS AND ISSUES**

Law Firm has a defense practice representing insurance companies, third-party administrators and self-insured businesses. Law Firm calculates the fees billed to clients on a fixed-fee basis [a flat fee] for some services, or on a per-hour, actual time, basis for other services. The fee calculation may vary depending upon the nature of the service to be performed. A client may be billed for actual time on one matter, such as legal research, and on a fixed-fee basis for another matter, such as a court appearance. The fee calculation is determined by Law Firm on a task-by-task basis, without notice to the client. Law Firm wishes to know the ethical propriety of its fee practice.

Law Firm also wishes to implement an attorney productivity standard expressed as a monthly minimum number of hours billed to clients, and seeks advice on the ethical propriety of this action.

**DISCUSSION**

The Committee finds no ethical impropriety in billing a client on the basis of actual time, using an hourly rate, for certain legal services and billing the same client on a fixed-fee basis for other legal services, provided that the client is adequately informed and consents to the fee arrangements, preferably prior to the commencement of work on behalf of the client.

An attorney has a duty to keep clients reasonably informed of all significant developments

regarding the legal services provided. California Rule of Professional Conduct 3-500, and Business and Professions Code section 6068(m). The duty to communicate with the client includes the responsibility to inform the client of the fees to be charged for the legal services and the methods by which those fees will be calculated. The duty requires that the attorney determine that the client understands and consents to the fee arrangements. This duty precludes unilateral changes in the agreed upon fee arrangements, and requires the attorney to notify the client of any changes in the arrangements and secure the client's consent to any changes. Severson & Werson, et.al. v. Bolinger, 235 Cal.App.3d 1569, 1Cal.Rptr.2d 531(1991).

In Severson, the law firm represented that the client would be charged at "the regular hourly rate" and quoted the client an hourly rate. The firm later unilaterally raised their hourly rates and billed the client at the higher rate without notice. In a subsequent lawsuit by the firm to collect the fees, the appellate court found against the firm and stated,

"Attorney fee agreements are evaluated at the time of their making and must be fair, reasonable and fully explained to the client. Such contracts are strictly construed against the attorney...."

Attorneys have always had a professional responsibility to make sure clients understand their billing procedures and rates. This responsibility logically precludes any changes in agreed-upon rates without notification...."

The bills which were sent by Severson did not set forth the hourly rates of the attorneys or contain information from which, on their face, changes in the hourly rates could be determined...."

The Court concluded,

"Bolinger's primary contention is that as a matter of law Severson could not unilaterally change the hourly rates. We agree."

California Rule of Professional Conduct 4-200(A) states, "A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee." Section 4-200(B) (11) establishes as one factor [among 10 other factors] in determining unconscionability "[t]he informed consent of the client to the fee " Any change in the agreed upon fee arrangements would, likewise, require the informed consent of the client to the changes.

>Where a law firm has an on-going relationship with a client, with prior consent to certain fee arrangements, any unilateral change in the fee agreement, which results in an increase of the fee charged to the client, can raise the issue of unconscionability, absent the informed consent of the client to the changes. Consent of the client to changes in the fee arrangements should be obtained prior to the commencement of legal services to avoid the possibility of an ethical violation. At a minimum, an attorney must inform the client, in the billing or fee statement, of any changes in the fees charged, in the method of calculating the fee, or of any deviation from a previously agreed upon fee arrangement, and must provide the client with a reasonable opportunity to object to the fee. In relation to first-time clients, a law firm must determine, preferably through the use of a written fee agreement setting forth the possible alternative fee arrangements, that the client understands and consents to the possible fee arrangements.

Law Firm must inform its clients of any changes in the fees charged or in the methods used

for calculating fees, and must disclose the basis of the charges in order to permit clients to understand and consent to the fees being charged for the legal services rendered.(1)

## II

The California Rules of Professional Conduct do not prohibit a law firm from establishing an attorney productivity standard based upon a minimum number of hours billed to clients, or other measure, such as the number of cases completed or the completion of cases within specified parameters.

Prior to implementing an attorney productivity standard the law firm should carefully analyze and evaluate the effects of such standard upon the firm, the attorneys within the firm, and the clients of the firm. The use of an attorney productivity standard based upon a minimum number of hours billed carries the possibility that the attorney, in order to meet the standard, will either perform unnecessary work, thus "padding" the client's fees; will bill the client for work not actually performed, thus defrauding the client; or will fail to act competently in performing legal services due to the pressure or fatigue of working an excessive number of hours, or to the lack of personal capacity, of the attorney to work a sufficient number of hours in order to meet the productivity standard. Alternatively, an attorney productivity standard which limits the amount of time an attorney may spend on a matter may have the effect of preventing an attorney from allocating sufficient time to handle a matter competently. Any of these consequences would violate ethical standards, and could preclude the recovery of any fees for services. California Rule of Professional Conduct 3-1 10(A).

The effects of an attorney productivity standard will vary among law firms. Much depends upon the number of attorneys in the firm, the overall volume of business coming into the firm, the personal abilities and capabilities of the individual attorneys, the management philosophy of senior and supervisory attorneys, and the commitment of the firm to the standards of professional conduct.

Before implementing an attorney productivity standard law firm should determine, after due consideration of all factors, that such standard will not lead to a violation of ethical standards nor cause clients to be charged fees in a manner inconsistent with the client's expectations under the fee agreement.

This opinion is advisory only. The Committee acts on specific questions submitted ex-parte, and its opinion is based on such facts as are set forth in the question submitted.

### FOOTNOTE:

(1). Also see:

Grossman v State Bar, 34 Ca3d 73, 192 Cal.Rptr. 397 (1983), affirming the suspension of an attorney who had breached a fixed fee agreement, finding, in part, "It is well settled that under a fixed fee contract an attorney may not take compensation over the fixed fee without the client's consent to a renegotiated fee agreement."

Los Angeles County Bar Association Formal Opinion 391 (1981), finding it to be a fraudulent

and illegal practice to bill secretarial, paralegal, or law clerk time at the attorney's rate, and not differentiate the different rates on the billing to the client.

Business & Professions Code section 6148(b), while not directly applicable to this inquiry, is instructive as to the attorney's duty in regard to billing procedures. "All bills rendered by an attorney to a client shall clearly state the basis thereof. Bills for the fee portion of the bill shall include the amount, rate, basis of calculation, or other method of determination of the attorney's fees and costs."