Informal 94-13

March 14, 1994

INFORMAL OPINION 94-13

Letter Outlining Fee Arrangements Including Value-Added Billing, Finance Charge, Guaranty of Fee by Third Party, and Client's Funds in Excess of FDIC Protection

Attorney A proposes supplying a letter to A's corporate clients which will outline in general terms the legal services to be performed by A and the fee arrangements for the same. Among other things, the letter states that:

a. The hourly rate quoted in the letter may be departed from and a "value-added billing" used, for example, when there is a particularly satisfactory or quickly arrived at resolution, which may result in a fee in excess of the straight hourly charge;

b. There will be a finance charge of 1.5% per month (18% annual rate) on balances unpaid after 30 days;

c. There must be a personal guaranty of fees charged (to be given by individuals associated with the corporation);

An advisement that funds of the client deposited in A's clients' funds account may be uninsured if the client's aggregate deposits exceed the FDIC $100,000 maximum.

Attorney A inquires about the propriety of the above items as stated in his proposed letter.

A. Value-added billing

Alternative billing methods have been described as forms of value-added billing allowing attorneys to use a variety of formulas to value legal work on a number of factors in addition to an hourly rate. Result-oriented billing, or premium billing, is one method. This is a system in which the client is charged a premium rate or bonus charge in addition to the hourly rate depending on the outcome of the matter. *The National Law Journal,* 11/7/88, p. S-2.

Rule 1.5(a) provides that a lawyer's fee shall be reasonable. Among the factors that may be considered in determining the reasonableness of a fee is "(4)% the results obtained." Thus, a result-oriented billing method is permissible if the fee charged is reasonable and if the provisions of part (b) of Rule 1.5 are followed.

Rule 1.5(b) emphasizes the importance of early communication with the client about the basis or the rate of the fee to be charged for contemplated services. Unless the terms of an alternative billing method are clearly defined at the outset, its unilateral use with respect to a service later performed may run afoul of Rule 1.5's implicit requirement that the basis of the fee first shall be consented to by the client.

In Attorney A's letter the client is advised that in addition to an hourly rate, an alternative billing method may be used when a particularly satisfactory or quick result is achieved.

Some courts treat with great suspicion post-inception contract changes which increase the lawyer's

remuneration. Such changes could be regarded as presumptively fraudulent. *See, Wolfram, Modern Legal Ethics,* pp. 503-504; *see, also*, 7 *Am Jur* 2d, *Attorney At Law,* secs. 250 and 251. Our Supreme Court has held that fee agreements made during the existence of the relationship will be scrutinized with great care and if there are doubts they will be resolved in favor of the client. *DiFrancesco v. Goldman,* 127 Conn. 387, 392.

We do not pass on whether a value-added fee charged on the basis of Attorney A's letter would survive a court challenge, but the attitude of the judiciary reinforces Rule 1.5's requirements of reasonableness and a client's prior consent. Thus, using value-added billing at the conclusion of a task customarily charged at an hourly rate should not be a lawyer's unilateral decision. It only should be utilized after the client's consent is obtained after the client has been advised of the services performed and the reasons for the deviation from the customary method of billing. *DiFrancesco, supra* (Fee contracted for after the fact is not improper if it is fair.)

Attorney A's letter properly advises the client that there may be occasions when value-added billing may be utilized, but the letter itself is not advance consent to any particular invoice using that method.

B. Interest

An attorney may charge interest on overdue accounts provided notice is given and the client agrees. *See* Informal Opinion 90-25. Attorney A's letter properly advises that interest will be charged on overdue bills. We do not opine on the legality of the interest rate which is indicated in the letter.

Attorney A's letter properly advises that interest will be charged on overdue bills. (See Rule 7.2(h)(7) which provides that a lawyer's ad may state that the lawyer accepts credit cards.) We do not opine on the legality of the interest rate indicated in the letter.

C. Guaranty

In Informal Opinion 89-27, the committee ruled that it was not improper for a real estate agency to pay the fee of an attorney selected by it to represent a seller, if the seller listed the property for sale with the agency. It was pointed out that Rule 1.8(f) provides that a lawyer shall not accept compensation for representing a client from one other than the client unless (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to the representation of a client is protected as provided by Rule 1.6. The above opinion also states that the comment to 1.8(f) provides that the arrangement must conform to the requirements of Rule 1.7 concerning conflict of interest.

The above applies to the guaranty provision in Attorney A's letter. We add that Attorney A's guaranty arrangement must conform to the requirements of Rule 1.13 (Organization as Client).

With the above qualifications in mind, the guaranty arrangement in Attorney A's letter is permissible under the Rules. *See also*, Penn. Op. 88-237, ABA/BNA Lawyer's Manual On Professional Conduct 901:7317 (A lawyer who represents a corporation without assets may seek a personal guarantee for the attorney's fees from the president of the corporation if the corporation consents.)

D. Client's Funds in Excess of $100,000 FDIC Limit

Attorney A's letter cautions the client that funds in the firm's clients' funds account if in excess of $100,000 may not be protected in the event of a bank's failure; and that the client's money deposited in the firm's clients' funds account may be aggregated with the client's other accounts in the same bank, and the excess above the $100,000 insured amount may not be protected under the FDIC.

The second part of the above statement is accurate. The first part is ambiguous. It would be clearer if it stated that *funds of the client* in excess of $100,000 deposited in the firm's clients' funds account may not be protected by FDIC insurance.

The problems of excess funds on deposit was the subject of Informal Opinions 91-2 (Revised) and 92-8. The latter also discussed the ethical obligations of the attorney when it appeared that a client might have funds on deposit in excess of the FDIC limit.
