

## ETHICS ADVISORY OPINION

23-01

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

### **SC Rules of Professional Conduct: 1.5(a)**

**Facts:** Lawyer prepares estate planning documents for clients, such as wills, trusts, powers of attorney, and beneficiary designations. Lawyer would like to include in the firm's retainer agreement a provision providing that the lawyer is to be paid his or her hourly rate for time spent responding to discovery or testifying as a fact witness in the event such testimony is required after the lawyer's legal work is concluded.

**Question Presented:** May an attorney include in a fee agreement a provision for payment of the lawyer's hourly rate for the lawyer's fact-witness testimony?

**Summary:** An attorney is permitted to charge his or her hourly rate for potential future time spent testifying as a fact witness relating to the representation, subject to the requirement that the rate must be reasonable. Therefore, an attorney is permitted to include such a provision in the client engagement agreement.

This committee does not opine on whether such a fee agreement binds a future personal representative or anyone else managing the client's financial affairs, or heirs or beneficiaries, as this is a matter of substantive contract law. The committee also does not opine on any particular language to include in the fee agreement, as opposed to the general concept outlined above.

**Discussion:** The question whether an attorney may include in a fee agreement a provision for payment of the lawyer's hourly rate for the lawyer's fact-witness testimony depends on whether it is permissible to charge the hourly rate for those services. In other words, if it is permissible to charge it, it is permissible to say so in a fee agreement.

South Carolina Ethics Advisory Opinion 97-42 answered a related question. In that inquiry, after a divorce hearing, the husband subpoenaed three of the wife's previous attorneys to prove that the wife had the benefit of independent legal counsel before entering into various property settlement agreements during the course of the marriage. After the hearing, each of the wife's three former attorneys submitted bills to the husband for their time in appearing at the hearing. The reasonableness of the rates was not disputed, and this committee opined that it was ethically permissible for husband's lawyer to pay these witnesses a fee in excess of the fee specified by the South Carolina Rules of Civil Procedure, provided the payment was solely for the lawyer's time and not for the content of the testimony. 97-42 did not address whether the lawyer-witness could have compelled the payment from his own client.

Comment 1 to Rule 1.5 states that a lawyer may seek reimbursement for the cost of services performed in house "either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer." Charging a reasonable amount for the lawyer's time performing non-legal services that may be compelled by and ancillary to the legal representation is not inherently unreasonable. Therefore, as long as the lawyer's hourly rate complies with the reasonableness requirement of Rule 1.5(a), this kind of charge is not categorically unethical, provided the client agrees to it when the lawyer's services are first engaged.

We express no opinion whether an attorney could compel payment from an opposing party or counsel.