

NEW YORK STATE BAR ASSOCIATION

ONE ELK STREET

ALBANY NEW YORK 12207

TEL (518) 463 3200



Committee on Professional Ethics

Opinion #563 - 10/1/84 (23-84)

Topic: Advertising; fees;
discount from customary
fees.

Digest: Improper to offer and
advertise discounted fees
unless customary fees are
readily ascertainable.

Code: DR 2-101.

QUESTION

Is it proper for a lawyer to offer or to advertise a discount from his customary fees to all members of a civic organization to which he belongs or to the general public for a limited period of time?

OPINION

The principal concern with offering a discount from customary fees is the potential that the offer may be misleading in violation of DR 2-101(A) of the Code of Professional Responsibility. If the lawyer has customary fees for various services that are readily ascertainable, then it is permissible to offer to discount them. The difficulty is in determining what is a "customary fee."

It would be deceptive, and therefore improper for a lawyer advertising a discount from "customary fees" to apply the discount to a fee that he does not regularly charge. For example, if he quotes \$500 as his customary fee for an uncontested divorce but in fact charges many of his clients only \$400 for that service, to offer a discount from a \$500 "customary fee" would be misleading and improper.

Another question is whether there can be "customary fees" for all types of legal services. Certain routine legal services, e.g., uncontested divorce actions, residential real estate transactions, and individual bankruptcies, are amenable to fixed fees which may then be discounted.

More difficult to ascertain, and therefore to discount, would be fees that are based in part on results achieved or time spent. However, the Committee does not foreclose the possibility of a lawyer being able truthfully to offer a discount from time or results based billing where he can in fact establish ascertainable fees that he consistently charges for the offered or advertised services. For example, a lawyer who customarily charges one-third of the recovery in a plaintiff's negligence action could state that and then offer to discount the customary one-third fee. Similarly, a

lawyer who customarily charges \$100 per hour for corporate advice, regardless of results or the novelty of the question involved, may offer to discount that \$100 by some percentage or amount.

Thus, the Committee finds that it is not per se improper to offer a discount from customary fees so long as customary fees are reasonably ascertainable. At the very least, for a fee to be customary, it must be the fee charged by the lawyer for most of his engagements involving similar work. The Committee hesitates to establish a specific percentage of cases that the lawyer must handle at the full fee for it to be deemed customary and rather leaves it to the members of the bar to apply a good faith interpretation to the term "customary." It is something substantially more than a majority of similar cases handled.

In addition, if the discount is offered as available only to members of the civic organization or only for a limited period of time, the limitations must be stated and observed. It would be improper to give the discount to the general public if it is offered only to the membership. It would be similarly improper to grant the discount indefinitely if it is offered only for a limited period of time.

If a discounted fee is offered or advertised, the full customary fee which is being discounted must also be stated so that the offer of discounted fees will be intelligible and not misleading.

If discounted fees may be offered under the guidelines set forth above, it is also permissible to advertise the discount offer. Any such advertisement, of course, must comply with DR 2-101. See DR 2-101(A), (C)(4), (E)-(I). Further, any offer or advertisement of discounted fees must comply with all applicable statutes and court rules.

For the reasons stated, subject to the qualifications set forth above, the question posed is answered in the affirmative.
