

INTENTIONAL FEE CUTTING

Our opinion has been requested as to the propriety of a member of the Bar knowingly and intentionally setting his fees at less than established by a minimum fee schedule.

Clearly there is authority for a local bar association to adopt a minimum fee schedule, as the same is provided for in Rule 187, Section X, of the Rules of the Supreme Court governing the Board of Commissioners of the Idaho State Bar. This section, which is a part of the Uniform By-laws of local bar associations, reads:

"SECTION X--RULES AND REGULATIONS

"The Association is empowered to adopt such rules and regulations as it shall see fit, including a minimum fee schedule as hereinafter defined, to fix and prescribe penalties for the violation thereof and the machinery for the enforcement thereof not inconsistent with the rules and regulations of the Supreme Court, the State Bar or Board of Commissioners of the State Bar.

"Any minimum fee adopted shall not be construed as fixing the maximum fee or the reasonable fee to be charged in any given case or situation; in determining the amount of fee to be charged for any legal service, there should be taken into consideration the actual time required, the character of the questions involved and their difficulty, and the skill required to properly conduct the business; the possibility of an acceptance of the particular business precluding the lawyer's representing other persons in similar cases, or cases likely to arise out of the transaction, and when there is a reasonable expectation that otherwise he would be employed on the other side of the transaction; the customary charges for similar services; the amount involved in the service or in the controversy; the contingency or certainty of the compensation; the character of the employment as being casual or for an established and constant client; the standing, experience and ability of the

lawyer; the relations existing between the attorney and the client in reference to other business, particularly the annual retainers; the ability to pay and the result obtained--the reasonable or maximum fee being ultimately a question between the attorney and the client."

Canon 12 of our professional ethics similarly provides in part:

"In fixing fees, lawyers shall avoid charges which over estimate their advice and services, as well as those which undervalue them.

"In determining the customary charges for the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee."

The American Bar Association Committee on Ethics has ruled twice regarding obligatory fee schedules. In its Opinion No. 28 is found the following cautionary language:

"Aside from such bearing as Canon 12 may have on the matter, it is the committee's opinion that any obligatory fee schedule must necessarily conflict with that independence of thought and action which is necessary to professional existence. The usefulness and capacity for service of the members of the profession must vary with their character, learning and experience, and to place the compensation of all of them on a labor union basis, irrespective of their ability or experience, would soon lessen the usefulness of the profession to the public." ABA Opinion 28 (1930).

In a later opinion the committee dealt with minimum fee schedules, and held:

"If guides for the determination of the amount of the charge be required, they are supplied by Canon 12. The third touchstone therein referred to is 'The customary charges of the Bar for similar services.' Insofar as a minimum fee schedule reflects this, and only this, it is not to be condemned. But a binding obligation to adhere,

regardless of circumstances, to a rate charge or published tariff of fees for legal services is contrary to the genius of the profession as well as to its best traditions. Hence, no lawyer should permit himself to be controlled by an obligatory minimum fee schedule nor should any bar association undertake to impose such restrictions upon him." ABA Opinion 171 (1937).

The State Bar of Wisconsin in 1957 (Opinion No. 8) held that lawyers who habitually and notoriously offer to perform legal services for less than the fees set forth as a guide in a duly adopted fee schedule are engaged in a vicious form of "solicitation" in violation of Canon 29 which states:

"Efforts, direct or indirect, in any way to encroach upon the business of other lawyers are unworthy of those who should be brethren at the bar."

It is the opinion of this committee that any lawyer who, in setting his fees, deliberately and habitually undercuts the customary charges of the Bar for similar services, the effect of which is to solicit business, and such fees cannot be justified under the guideposts outlined in Canon 12, is violating the Canons of Ethics. This would be true regardless of the existence of a minimum fee schedule.

DATED this 11th day of March, 1958.

*This opinion is obsolete. The opinion was authored prior to the adoption of the Idaho Code of Professional Responsibility and the decision of Goldfarb v. Virginia, 421 U.S. 773 (1975), striking down minimum fee schedules as being in violation of anti-trust laws. See, DR 2-106 of the Idaho Code of Professional Responsibility.