

New York State Bar Association

Committee on Professional Ethics

Opinion 783 – 1/12/05

Topic: Interest on delinquent accounts

Digest: If a client deliberately disregards an agreement to pay legal fees and expenses, and the letter of engagement or retainer agreement is silent as to interest charges on the delinquency, a lawyer may condition continued representation on the client's agreement to prospectively pay interest on any past due balance for services rendered or to be rendered in the future.

Code: DR 2-106(A); 2-110(C)(1)(f); 2-110(A)(1).

QUESTION

If a client deliberately disregards an agreement to pay legal fees and expenses, and the letter of engagement or retainer agreement is silent as to interest charges on the delinquency, may a lawyer condition continued representation on the client's agreement to prospectively pay interest on any past due balance?

OPINION

In N.Y. State 399 (1975), this Committee held that in order to charge interest on delinquent accounts, a lawyer must advise the client prior to performing services of the fact that interest will be so charged, the definition (time period) of delinquency, and must obtain the client's consent thereto. In addition, the delinquency period, the interest rate and the fee must be reasonable.¹

If the issue of interest is not discussed prior to commencement of the engagement, and the client deliberately refuses to pay the lawyer's fees or ex-

¹ Id. (citing EC 2-16; EC 2-17; EC 2-19; EC 2-23; DR 2-106). See also N.Y. State 729 (2000) (permitting an agreement to pay interest charges on disbursements in contingent fee cases, provided the same "minimum conditions" are met).

penses, DR 2-110(C)(1)(f) allows a lawyer to withdraw from representation or, where permission of a tribunal is required, to seek permission to withdraw.²

However, we do not believe that a lawyer's only recourse is withdrawal. We believe it is permissible for a lawyer to negotiate the terms of an amended agreement with a deliberately delinquent client and, in consideration of the attorney's not withdrawing, for the client to agree to pay reasonable interest prospectively on any past due balance for services previously rendered or to be rendered in the future. In so finding, we note that the proposed conduct seeks to avoid disruption of the attorney-client relationship and provides the attorney with an alternative to the pre-judgment interest rule of CPLR 5001 so that the attorney is not forced to withdraw and sue the client in order to be made whole.

Allowing an attorney to negotiate reasonable interest on a deliberately delinquent account is also accommodated by New York's engagement letter rules.³ Generally, these rules require that a lawyer provide a client with an engagement letter that includes "an explanation of attorney's fees to be charged, expenses and billing practices."⁴ An "updated" letter of engagement must be provided "[w]here there is a significant change in the scope of services or the fee to be charged."⁵ Although questions of law are beyond our jurisdiction, it appears that the rule would require an "updated" letter of engagement to reflect the new interest arrangement.

This Committee expresses no opinion on whether it would be ethical for an attorney unilaterally to impose reasonable interest on unpaid charges where the letter of engagement or the retainer agreement is silent on the issue.⁶ In addition, all fee arrangements between attorney and client, including amended fee arrangements, are subject to DR 2-106(A)⁷ as well as pertinent laws, rules and regulations.⁸

CONCLUSION

If a client deliberately disregards an agreement to pay legal fees and expenses, and the letter of engagement or retainer agreement is silent as to interest charges on the delinquent accounts, a lawyer may condition continued repre-

² See DR 2-110(A)(1). In N.Y. State 598 (1989) we held that withdrawal may "not necessarily be appropriate where the client is financially unable to pay." But in this opinion we assume that the client is able to pay so that nonpayment is clearly "deliberate."

³ 22 NYCRR Part 1215, entitled "Written Letter of Engagement."

⁴ 22 NYCRR §1215.1(b)(2)(emphasis added).

⁵ 22 NYCRR §1215.1(a).

⁶ Cf. N.Y. City 2000-2 (permitting such unilaterally imposed interest charges provided the lawyer notifies the client that the lawyer intends to charge a reasonable interest rate on unpaid charges and provided the lawyer allows the client a reasonable opportunity to pay the outstanding unpaid balance before interest accrues).

⁷ "A lawyer shall not enter into an agreement for, charge or collect an illegal or excessive fee."

⁸ E.g., truth-in-lending or usury laws.

sensation on the client's agreement to prospectively pay interest on any past balance due for services previously rendered or to be rendered in the future.

(46-03)