



New York State Bar Association
Committee on Professional Ethics

Opinion: 1165 (05/07/2019)

Topic: Unpaid Client Fees

Digest: Lawyer may not remove amounts from client's trust account if in dispute. Lawyer may only charge reasonable interest if provided for in the engagement letter.

Rules: 1.15(b)(4)

FACTS

1. The inquirer, a New York lawyer, was retained nine years ago to represent a client in numerous litigations arising out of an estate matter. The client is executor of the estate and sole beneficiary of various annuity contracts of the decedent that the Surrogate's Court ruled, in response to interpleader litigation, were the client's property and not part of the estate. A sum of money was received into the inquirer's escrow account while the interpleader litigation regarding the annuity contracts was pending. The Surrogate's Court has now authorized the distribution of those funds to inquirer's client.

2. The inquirer had previously sent the client invoices for legal fees and expenses while the litigation was ongoing, but the inquirer agreed at the client's request to defer payment until the end of the litigation. The client raised no objection to the invoices at the time. The principal balance of the bill is now an amount greater than \$50,000, which the inquirer observes is the ceiling set forth for mandatory fee arbitration under 22 N.Y.C.R.R. § 137.1. The client refuses to pay the bill, demanding that the inquirer cut the bill by approximately 20%. The inquirer claims that the inquirer has repeatedly and voluntarily reduced the amount of the bill over the years, and has recently evinced a willingness further to negotiate, but now wants the client to pay the outstanding amount. The inquirer asserts that a "written formal fee agreement" exists. The inquirer wants to withhold payment of the escrowed funds in an amount equal to the fees the inquirer says are due and owing, as well interest on those fees and an amount to cover fees and expenses should litigation arise over the amount the inquirer says is due and owing, which the inquirer proposes to seek by litigation after what the inquirer asserts is some statute of limitations.

QUESTIONS

3. May the inquirer remove from the trust account the sums equal to what the inquirer believes are due and owing, and, if so, may this amount include payment of interest due on the unpaid bill?

4. May the inquirer also withhold from distribution to the client an amount the inquirer

depicts as a “cushion” to cover fees and expenses in the event that the fee dispute results in litigation?

OPINION

5. The answer to each question is no.

6. Rule 1.15(b)(4) of the New York Rules of Professional Conduct (the “Rules”) states that a lawyer may withdraw funds from a trust account “when due, unless the right of the lawyer to receive it is disputed by the client . . . in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.” The client’s insistence on the discount is a dispute for purposes of the Rule and so the inquirer may retain but must not remove from the trust account those sums that the client questions until the dispute is resolved, whether by settlement or through some dispute resolution process. Insofar as the client concedes that some of the amounts in the account are properly the lawyer’s property, the lawyer may distribute the same to the lawyer’s account; to the extent the client disputes any portion of those sums, the lawyer must retain them in escrow.

7. Absent a prior written agreement, the lawyer may not unilaterally charge interest on a delinquent client account. “[I]n 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.” N.Y. State 399 (1975). “A law firm may seek its clients’ agreement to modify its retainer agreement with the clients during the pendency of a current matter to secure payment, by confessions of judgment and collateral mortgages, of fully earned but unpaid legal fees and expenses in an amount on which the parties agree, if the law firm complies with the rules governing business transactions with clients and is mindful of ongoing obligations to avoid general conflicts of interest.” N.Y. State 1139 ¶ (2017). *See* N.Y. State 910 (2012) (“A lawyer may request a client to amend a retainer agreement. Whether such an amendment must meet the requirements for fee agreements under Rule 1.5 or for business transactions between the lawyer and client under Rule 1.8(i) depends on the circumstances in which the amendment is requested and the nature of the amendment.”); N.Y. State 783 (2005) (“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 representation 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”). Accordingly, absent a prior written agreement, the inquirer may not charge interest on the amounts the inquirer believes are due and owing.

8. Nor may the inquirer decide to withhold from the escrowed funds an amount that the inquirer deems apt to indemnify the inquirer for fees and expenses that the inquirer may incur in the event that litigation arises from the dispute with the client over the appropriate amount of fees for services rendered. In our view, the inquirer is ethically obligated to pay to the client those sums that are not part of the fee dispute – that is, the amount the client agrees the lawyer is due, without reference to interest or other holdbacks unless the client explicitly agrees. *See* Rule 1.15(c)(4) (lawyer must promptly pay to the client as requested by the client funds the client is entitled to receive). Absent some agreement, no authority exists for a lawyer to use disputed funds for self-help in the event that a dispute arises between a lawyer and a client over legal fees.

CONCLUSION

9. A lawyer may not remove any amounts from the client's trust account if the client disputes the lawyer's entitlement to them. The lawyer may charge only a reasonable rate of interest on any unpaid bills if provided for in the written fee agreement.

(07-19)