

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 729 (5/10/00)

Topic: Fees -- interest on disbursements in contingency fee cases.

Digest: Not improper for a lawyer to charge interest on disbursements in contingency fee matters under certain conditions.

Code: DR 2-106(A), (B) & (D).

QUESTION

May a lawyer charge interest on disbursements paid by the lawyer on the client's behalf in a contingency fee representation?

OPINION

This Committee has previously opined that it is not *per se* improper for a lawyer to charge interest with respect to delinquent accounts for payment of professional fees as long as (1) the lawyer clearly advises the client before performing services of the fact that interest will be charged on accounts which are delinquent for more than a stated period of time, (2) the stated period is reasonable under all the circumstances of the matter, (3) the rate of interest is reasonable, (4) the fee is not excessive, and (5) the client consents to the interest charge. N.Y. State 399 (1975).

The issue addressed in this Opinion is whether a similar interest charge may be imposed on disbursements in contingent fee cases. Although this Committee has not addressed that specific question, the Association of the Bar of the City of New York's Committee on Professional and Judicial Ethics has addressed a somewhat similar situation. In N.Y. City 1997-1, that committee concluded that a lawyer in contingent fee matter who actually borrowed funds from a bank in order to advance litigation expenses for the client could charge the client interest on the funds advanced to pay these litigation expenses at the rate charged by the bank, as long the interest charge did not exceed the interest charges actually incurred by the lawyer, the provision was clearly explained to the client in advance and agreed to by the client, and, pursuant to DR 2-106(D), the lawyer pro-

vided the client with a writing stating the method by which the fee is to be determined.

The present inquiry differs from that posed to the City Bar in that the inquirer does not intend to borrow the funds that will be advanced to the client. However, this distinction is not necessarily material. A lawyer who advances funds for a client is losing the use of those funds, which has an economic cost. While one lawyer is out of pocket, and the other lawyer is not, in both scenarios a lawyer in a contingency matter has incurred a cost and seeks to pass it on to the client.

Accordingly, we conclude that under the Code (and subject to any legal restrictions), a contingent fee attorney may impose an interest charge on unpaid disbursements as long as (1) the client is clearly advised that an interest charge will be imposed on disbursements that are not paid within a stated period of time and the client consents to that arrangement before it goes into effect, (2) the client is billed for the disbursements promptly after they have been incurred so the client may decide whether to pay the disbursements or incur the interest charge, (3) the period of time between the bill and the imposition of the interest charge is reasonable, (4) the disbursement itself is appropriate, *see generally* ABA 93-379 (1993), and (5) the interest rate is reasonable. Cf. DR 2-106(A) & (B) (a fee cannot be excessive). Although the reasonableness of a rate cannot be determined in the abstract, we do not believe that an interest rate exceeding the lawyer's actual or putative cost of obtaining funds would ever be reasonable in a contingency fee matter.

In addition, because the interest charge is part of a contingent fee arrangement, the interest charge must be included in the written statements required at the beginning and end of a contingent fee representation. *See* DR 2-106(D).

Finally, it is important to note that the amount of and methodology for calculating contingent fees in wrongful death and personal injury cases are governed by court rule. *See* 22 NYCRR § 603.7(e) (1st Dep't), § 691.20(a)-(c) (2nd Dep't), § 806.13(b) (3rd Dep't), § 1022.31(b) (4th Dep't). Whether the proposed interest charge is permissible under these provisions is a question of law on which we do not opine. Contingent fees in other kinds of cases may be subject to court review and/or approval. Whether a court would consider an interest charge appropriate in reviewing and/or approving a contingency fee is also beyond the scope of this Opinion.

CONCLUSION

If not prohibited by law, a lawyer may charge clients in contingency fee cases interest on unpaid disbursements if the conditions enumerated in this Opinion are met.

(26-99)