

New York State Bar Association

Committee on Professional Ethics

Opinion 754 – 2/25/02

Topic: Expenses of litigation; interest charged to lawyer passed on to clients.

Digest: Plaintiff's counsel in contingent matter may, under certain conditions, pass on to client as costs the interest charged to lawyer on borrowings made to fund litigation expenses.

Code: DR 2-106(D); DR 5-103(B)(1); EC 5-8.

QUESTION

May a lawyer borrowing funds to advance expenses in contingent fee litigation pass on to the client the interest charged on such borrowings?

OPINION

Although a lawyer may not “advance or guarantee financial assistance to the client” in connection with contemplated or pending litigation, A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses. DR 5-103(B)(1). *See also* EC 5-8.

Whether a lawyer who borrows funds in order to advance the expenses of litigation may charge the client the interest incurred by the lawyer on such borrowings is an issue not previously considered by this Committee. In N.Y. State 666 (1994), we held that a lawyer could refer a client to a lender who would provide economic support to the client during the pendency of the case, provided the lawyer had no interest in the lender, received no payment for the referral, and did not compromise client confidentiality in making the referral. In N.Y. State 399 (1975), the Committee held that a lawyer may ethically charge interest on a delinquent account provided the client was given adequate advance notice of and consented to the arrangement, the interest rate and the time period after which interest is charged are reasonable, and the total charges are not

excessive. More recently, we considered whether interest could be charged to the client on disbursements paid by the lawyer but not yet repaid by the client. In N.Y. State 729 (2000), we held that it is not unethical for a lawyer to charge interest on unpaid disbursements in a contingent fee matter, provided that

(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 that the client consents to the 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 ... and (5) the interest rate is reasonable.¹

Id. at 2.

The opinion also noted in passing that it did not seem economically significant whether the lawyer actually borrowed funds to pay the disbursement or used funds already on hand. In either event the lawyer “has incurred a cost and seeks to pass it on to the client.” *Id.* (citing N.Y. City 1997-1). That holding is dispositive here.

Thus, if the five conditions described in N.Y. State 729 are met and the lawyer receives no other benefit from the lender than the loan itself, the lawyer ethically may borrow to finance disbursements and pass on the interest incurred to the client. As noted in N.Y. State 666, the lawyer may not compromise client confidentiality in connection with the financing arrangement. Further, in a contingent fee matter the interest charge arrangement must be set forth in the writing required by DR 2-106(D). Finally, whether and how such an arrangement comports with the court rules governing fee calculations in many contingent fee cases (*see* 22 NYCRR §§603.7([e]; 691.20[a]-[c]; 806.13[b] and 1022.31[b]) is a question of law beyond this Committee’s jurisdiction.

CONCLUSION

Subject to the conditions described -- including that the client remains ultimately liable for the expenses paid under DR 5-103(B)(1); that the lawyer has no interest in the lender; that client confidences and secrets are not compromised; that the terms of the borrowing are on adequate advance notice to the client; that the time periods after which interest is charged the client and the interest rate are reasonable; that the client consents in advance; that the client

¹ The Committee believes that to satisfy the requirement regarding the reasonableness of the interest rate, the borrowing lawyer must investigate alternative borrowing opportunities.

may avoid the interest charge by paying the disbursements; and that the disbursements are themselves appropriate -- a lawyer may borrow to finance litigation expenses in a contingent fee matter and pass on to the client the interest costs incurred in connection with such borrowings.

(27-01)
