NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1181 (01/17/2020)

Topic: Charging interest on expenses

Digest: A New York contingency-fee attorney may impose an interest charge on unpaid disbursements if a written agreement signed by the client fully discloses the terms on which interest may be charged and the terms are reasonable.

FACTS

1. The inquirer is a New York lawyer whose practice includes matters done on a contingency fee basis. We are told that recent changes in the law concerning contingency fee cases have sowed some confusion about our prior opinions on a lawyer's ability to charge interest on disbursements. This confusion, we are told, stems from the laws allowing a lawyer to fund disbursements rather than seeking immediate reimbursement from the client.

QUESTIONS

2. The inquirer asks the following:

(a) May a lawyer impose a flat interest charge on lawyer-funded disbursements?

(b) Must the lawyer advise the client of each individual expense and be offered the chance to pay the expense as incurred?

(c) May the lawyer use the statutory interest rate of 9% set forth in CPLR § 5004 as guidance for a reasonable interest rate or may the lawyer charge a higher rate based either on the lawyer's cost of money from the lawyer's bank or other factors?

OPINION

3. Assorted laws and court rules govern a lawyer's obligations in contingency fee cases. We address questions arising solely under the N.Y. Rules of Professional Conduct (the "Rules"), so nothing in this opinion should be construed as overriding or interpreting the laws and regulations that govern the practices of contingency fees as set forth by the legislature and the courts, including those statutes and rules that mandate the disclosures a lawyer must provide a client. *See, e.g.,* 22 NYCRR 806.27(c)(2) (3d Dept.) (in certain actions, "[I]n the event that the attorney agrees to pay costs and expenses of the action pursuant to Judiciary Law section 488(2)(d), on the gross sum recovered before deducting expenses and disbursements, [then] [t]he retainer agreement or letter of engagement shall describe these alternative methods, explain the financial consequences of each, and clearly indicate the client's selection"); *see also* 22 NYCRR 603.25 (e)(3)(ii) [Schedule B] [1st Dept.]; 691.20 (e)(3)(ii) [Schedule B] [2d Dept.]) Here, our focus is only on the lawyer's

ethical responsibilities.

4. Whether a lawyer may charge interest on disbursements in a contingency fee case is not a new issue for us. In N. Y. State 729 (2000), which was issued under a substantially identical rule in the prior Code of Professional Responsibility (the "Code"), we said that a lawyer may do so provided certain conditions are met. These conditions were: (a) that the client is clearly advised in writing that disbursements not paid within an expressly stated time period would be subject to an interest charge; (b) that the client is billed for the disbursement promptly after the disbursement is incurred so that the client may pay the disbursement, if the client so chooses, before the client incurs an interest charge; (c) that the period of time between the bill and the imposition of the interest charge is reasonable; (d) that the disbursement is itself appropriate (*see, e.g.,* ABA 93-379 (1993) (citing appropriate disbursements); (e) that the interest rate is reasonable; and (f) that the client gives informed consent in writing to the arrangement before the arrangement goes into effect. We believe that the conditions set forth in Opinion 729 are equally applicable under the Rules, and we thus continue to endorse them as appropriate conditions when a lawyer seeks to charge interest on disbursements in a contingency fee case, whether the interest rate is flat or fluctuating.

5. Our adherence to Opinion 729 answers the inquirer's first two questions, namely, that a lawyer may charge interest on disbursements but must offer the client a reasonable chance to pay the expense before the interest charge is incurred. This leaves only the inquirer's question about whether the statutory provision for 9% interest on pre- and post-judgments may (or must) serve as a yardstick for the amount of interest a lawyer may charge for unpaid disbursements.

6. In Opinion 729, we declined to opine on the amount of interest a lawyer may charge other than to conclude that the amount must be reasonable. We adhere to that view. Nothing in the Rules dictates a particular amount as reasonable, and this Committee interprets the Rules, it does not make them. That said, we see no obvious relationship between, on the one hand, a legislative policy on the interest that must be paid on judgments (that is, 9%) and, on the other, the ethical reasonableness of an interest charge on unpaid disbursements in a contingency case. It is possible that one may bear on the other, but the connection is not ineluctable. We believe, instead, that the reasonableness of an interest rate varies with the facts and circumstances of a particular lawyer-client relationship. It follows that, in our view, a lawyer is not required to use the statutory interest rate as an interest charge, and that whether a lawyer may do so depends on the facts and circumstances.

7. For example, we have previously opined that a lawyer may pass on to a client the interest rate (but no more) that the lawyer actually incurs if the lawyer borrows from a bank to fund the disbursements. N.Y. State 754 (2002); *see* N.Y.C. 1997-1 (1997). In our Opinions 729 and 754, we said, too, that whether the lawyer uses the lawyer's own funds to finance the disbursements rather than borrowing those funds should not matter; in each instance, there is an economic cost to the lawyer which the lawyer may ethically pass on to the client provided the conditions set forth above are satisfied. The factors comprising the lawyer's cost of money in the absence of bank financing are impossible to identify to any useful effect, except to note that laws exist (such as usury laws) that regulate these matters and hence apply.

CONCLUSION

8. A New York contingency fee attorney may impose an interest charge on unpaid disbursements as long as (a) the agreement describes the alternative methods of payment of such disbursements, explains the financial consequences of each, and clearly indicates the client's

selection, (b) the client is clearly advised, indicating 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, (c) 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, (d) the period of time between the bill and the imposition of the interest charge is reasonable, (e) the disbursement itself is appropriate, and (f) the interest rate is reasonable. The reasonableness of the interest rate depends on the facts and circumstances of the case.

(12-19)