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Lawyer May Negotiate Interest On Delinquent Accounts

In NYSBA Opinion 783, dated January 12, 2005, the Committee on Professional Ethics took up this simple question: In the absence of a provision to the contrary in the letter of engagement or in the retainer agreement, may a lawyer negotiate with the client for the payment of interest on past due balances before he goes on with the representation?

The Committee had previously held (N.Y. State 399 (1975)) that in order to charge interest on a delinquent account the lawyer had to: 1) advise the client that interest would be charged; 2) define the terms of delinquency; 3) obtain the client's consent; and 4) limit the interest and fee to a reasonable rate.

The Committee recognized that a lawyer may have the option of withdrawal when a client refuses or neglects to pay a bill for services. If the rules of a tribunal require its permission before withdrawal, the lawyer may not withdraw from a proceeding in that tribunal without its consent (DR 2110(A)(1)). Otherwise, the lawyer may withdraw if…"the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees." (DR 2110(C)(1)(f)).

But a lawyer whose bills are not paid has another option than withdrawal – to negotiate a reasonable interest charge with the client. The Committee said:

> 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.

The Committee noted that this flexibility in the negotiation of interest would avoid disruption of the client lawyer relationship and provide the attorney "with an alternative to the prejudgment interest rule of CPLR 5001 so that the attorney is not forced to withdraw and sue the client in order to be made whole."

What about the requirements of New York's rules on letters of engagement, which stipulate that these letters include "an explanation of attorney's fees to be charged, expenses and billing practices." 22 NYCRR, §1215.1(b)(2). These rules anticipate that there may be a significant change in the terms of engagement:

> Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client. 22 NYCRR §1215.1(a).

The Committee recognized that it would appear that a new agreement imposing a charge for interest would constitute a significant change requiring an updated letter, but it also recognized that this was an issue of law beyond its jurisdiction.

The Committee expressed no opinion on whether it would be ethical for a lawyer to impose a charge for interest unilaterally when the letter of engagement or the retainer agreement is silent on the issue of interest. The Committee quoted an earlier opinion of the City Bar (N.Y. City 20022), which would permit a lawyer to charge interest unilaterally provided the lawyer notifies the client that he intends to charge interest and gives the client a reasonable opportunity to pay the outstanding bills before accruing interest (See, footnote [6].).

In all events, "a lawyer shall not enter into an agreement for, charge or collect an illegal or excessive fee." DR 2106(A).

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