

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 91-12

Issued June 14, 1991

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: The Code of Professional Responsibility does not prohibit an attorney from charging interest on a client's delinquent account. However, a lawyer as soon as feasible after employment should reach an agreement with the client, preferably in writing, as to the basis of the fee including whether or not interest will be charged for accounts delinquent beyond a certain time period. If interest will be charged, there should be an agreement with the client as to the time period beyond which interest will be charged and the rate of interest. Interest charges must be in compliance with any applicable statutory requirements relating to interest rates and charges.

The Code of Professional Responsibility does not prohibit the use of credit cards for payment of client accounts. However, the restrictions related to fees contained within DR 2-106 must be observed even when credit cards are used.

OPINION: We have before us a request for an opinion on issues related to attorneys charging interest on unpaid client accounts. The specific questions posed are as follows:

1. Whether a lawyer may charge his client interest on a delinquent account even though the client was not advised at the beginning of the relationship that interest would be charged on accounts delinquent for more than a stated period;
2. Whether the use of a credit card by a client where there existed no arrangement for its use at the beginning of the relationship is barred because the charging of interest is a necessary corollary to the use of credit cards;
3. Whether the Code of Professional Responsibility requires conformance with the protective features of the Fair Debt Collection Practices Act?

Question 1

The charging of interest by an attorney on a client's past due account is not specifically prohibited by the Code of Professional Responsibility (Code). Hence, on its face, the charging of interest does not violate the broad mandate of DR 2-106 that "a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."

The Code does suggest that "[a]s soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made . . . It is usually beneficial to reduce to writing the understanding of the parties regarding the fee." EC 2-18. Ohio's DR 2-106 and EC 2-18 are identical to provisions within the ABA Model Code of Professional Responsibility. The ABA Model Rules of Professional Conduct, which have been adopted by many states but not Ohio, require that "[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." ABA Model Rule 1.5(b).

It is the general rule that a "fee contract can provide for a stipulated rate of legal interest on amounts due." C. Wolfram, Modern Legal Ethics 506-07 (1986). The ABA Committee on Ethics and Professional Responsibility has suggested that "a lawyer can charge his client interest providing the client is advised that the lawyer intends to charge interest and agrees to the payment of interest on accounts that are delinquent for more than a stated period of time." Formal Op. 338 (1974).

Several state ethics committees have expressed opinions on whether it is ethical to charge interest on delinquent client accounts. For example, an Arizona committee has advised that a lawyer may not charge clients interest on past due accounts unpaid for 30 days or more unless a prior written fee agreement providing for such interest exists . . . or the client consents to the arrangement after notice with an opportunity to bring the account current." State Bar of Arizona, Op. 86-9 (1986). A Michigan ethics opinion states that "a lawyer may charge interest on the unpaid balance of his client's account if the client agrees in advance and the fee, including the interest, is reasonable." State Bar of Michigan, Op. RI-40 (1989). A Nebraska opinion advises that the charging of interest is ethical only if the arrangement "(1) is in writing, (2) is entered into prior to or at an early stage during the provision of legal services; (3) clearly states a reasonable rate of interest, and (4) clearly sets forth when the account

becomes past due, which must not be less than 30 days after the billing date." Nebraska State Bar Ass'n, Op. 86-3 (undated). It should be noted that Arizona and Michigan are states whose ethical rules are based on the Model Rules of Professional Conduct.

The ethics committee of the Cleveland Bar Association has issued two opinions on charging interest on delinquent client accounts. A lawyer can charge his client interest on accounts delinquent for more than a stated period of time, provided that the client is advised that the lawyer intends to charge interest and agrees to the payment of interest. Cleveland Bar Ass'n, Op. 134 (1978). In a later opinion the committee stated that as a general rule, absent an express agreement with a client to the contrary, an attorney is not entitled to recover interest on a delinquent fee account. The committee advised that interest on a delinquent account may be charged by an attorney if a written fee agreement anticipates a delay in payment and explicitly sets forth the terms on which interest will be assessed. Cleveland Bar Ass'n, Op.145 (1980).

It is this Board's opinion that DR 2-106 of the Code does not prohibit an attorney from charging interest on a client's delinquent account. However, a lawyer as soon as feasible after employment should reach an agreement with the client, preferably in writing, as to the basis of the fee including whether or not interest will be charged for accounts delinquent beyond a certain time period. If interest will be charged, there should be an agreement with the client as to the time period beyond which interest will be charged and the rate of interest. Interest charges must be in compliance with any applicable statutory requirements relating to interest rates and charges.

Question 2

The Code currently contains no reference to a client's use of a credit card to satisfy his debt to an attorney. In the past, a 1977 amendment to the Code contained a provision related to advertising [DR 2-101 (B) (11)] which stated that an attorney could publish or broadcast whether credit cards or other credit arrangements were accepted. This provision was deleted by the 1986 amendments to DR 2-101. However, the purpose of the 1986 amendments was not to disapprove of credit card use, but rather to loosen restrictions on advertising by eliminating a listing of what was permissible. In fact, one commentator has noted that "[m]ost states now permit lawyers to make credit arrangements through the payment of fees, such as through client use of credit cards." C. Wolfram, Modern Legal Ethics 506 (1986).

The ABA Committee on Ethics and Professional Responsibility has approved the use of credit cards as an acceptable billing practice. According to the committee it is proper under the Model Code of Professional Responsibility to use a credit card system which involves the charging of interest on delinquent accounts provided that certain guidelines are followed. Formal Op. 338 (1974). The guidelines include restrictions related to advertising the use of credit cards. *Id.* A similar opinion was issued by the Ohio State Bar Association, but was withdrawn because the guidelines did not comport with 1977 amendments to DR 2-101 (B). Ohio State Bar Ass'n, Op. 29 (1975, withdrawn 1979). The ethics committee of the Cleveland Bar Association also retired an opinion containing guidelines on credit card use. Cleveland Bar Ass'n, Op. 85 (1972, retired 1990).

It is the opinion of this Board that the use of credit cards in fulfilling a client's account is not prohibited by the Code. However, the restrictions related to fees within DR 2-106 must be observed even when credit cards are used.

Question 3

The statutory scope of the Fair Debt Collections Practices Act poses a legal question and is not one the Board has authority to answer.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, non-binding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.