

You have presented a hypothetical situation in which a three-attorney firm represents a large number of clients in litigation on a contingent fee basis. The majority of the firm's practice consists of representing plaintiffs in civil rights matters, including discriminatory discharge from employment on the basis of sex, race, religion, age, or disability.

You indicate that the standard written fee agreement used by the firm provides, in pertinent part, that costs and expenses are separate and distinct from the fee for professional services charged by the firm, and that the client remains ultimately responsible for costs and expenses regardless of the outcome of the matter. The agreement also recites that "the recovery of damages, whether at trial or through settlement, is an inherently uncertain process, and no member or employee of the firm has represented to me that any recovery, or any level of recovery, is assured."

You also indicate that the firm routinely requests payment of a modest advance against costs from each contingent fee client, which funds are deposited in a trust account. In matters which do not settle before filing, the advanced amount usually is exhausted quickly, and additional costs and expenses are incurred on behalf of the client. Further, the agreement executed by each client also provides: "I understand that the amount of the initial [funds] requested is not an estimate of the total amount of costs and expenses which may be incurred in my case, which may be substantially higher than the amount of the initial [advance]." The hypothetical facts you provide also indicate that these costs, including copying expenses, deposition transcripts, and expert witness fees, are often substantial.

Furthermore, the fee agreement signed by each client also contains the following provisions:

"I agree that I will replenish this . . . account, if necessary and if requested by the Firm, to maintain a sufficient balance in the account to cover projected costs and expenses."

"I understand that the Firm may request payment and reimbursement of costs and expenses in advance of any recovery with respect to my claims."

You indicate that, despite these provisions, in the normal course [of representing a client], the firm usually advances costs and expenses on behalf of the client, whether or not the client reimburses these costs on a current basis. In many cases, despite request by the firm, the client does not replenish the advance account and does not pay for costs and expenses on a current basis. Where costs and expenses are outstanding at the conclusion of the matter, reimbursement is made from the proceeds of settlement or judgment.

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Finally, you advise that the firm is relatively new and has relatively limited resources. Clients currently owe this firm approximately \$150,000 in outstanding cost advances. Nonpayment of this amount on a current basis has forced the firm to draw down a line of credit, personally guaranteed by the principals of the firm, at a certain rate of interest.

You have asked the committee to opine whether, under the facts of the inquiry,

1. the firm may incorporate in its fee agreement offered to new prospective clients the following provision:

For all costs and expenses not paid within 30 days of billing to the Client by the firm, the Client hereby agrees to pay to the Firm interest at the rate of 12% per annum on the outstanding balance, accrued on a monthly basis, until such costs, expenses and interest are fully paid;

2. the firm may begin charging interest on unpaid cost and expense balances to existing clients of the firm, and, if so, whether the written agreement of the existing client is required prior to imposition of an interest charge; and

3. if charging interest on overdue cost and expense balances is permissible, what, if any, limit on the rate of interest would be appropriate.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:2-105(A), which provides that a lawyer's fees shall be reasonable and adequately explained to the client; and DR:5-103(B), which states that a lawyer shall not advance or guarantee financial assistance to the client, except that the lawyer may advance or guarantee the expenses of litigation, provided the client remains ultimately liable for such expenses.

As applied to prospective clients, in response to your first question, the committee is of the opinion that the provision as articulated is not improper, provided that the costs and expenses are reasonable and adequately explained to the client. The committee also cautions that the firm must explain to the client that, under DR:5-103(B), he is to remain ultimately liable for such expenses. Additionally, as the committee has earlier opined, any deferred payment must be for the client's convenience; the interest rate must not be in violation of state laws; and the client must have the unrestricted right to prepay any balance of the costs, without penalty. *See* LE Op. 642, LE Op. 1247.

As applied to existing clients of the firm, in response to your second question, the committee has previously opined that an automatic (and unilateral) imposition of an interest or finance charge on client's overdue accounts is improper. The committee believes, then, that there must be an agreement between the firm and client prior to imposition of an interest charge. Furthermore, although not required by the Code of Professional Responsibility, the committee suggests that a written agreement is appropriate. *See* LE Op. 186B.

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Finally, in response to your third question as to the limit on the rate of interest, the committee believes that this question raises a legal issue requiring a determination which is beyond the committee's purview. Similarly, the committee expresses no opinion as to whether the imposition of interest, where permissible, requires compliance with any consumer credit protection laws.