

Committee Opinion
July 8, 1996

LEGAL ETHICS OPINION 1667

COLLECTION OF UNPAID FEES;
CLAUSE IN RETAINER AGREEMENT
SETTING ATTORNEY'S FEE FOR
COLLECTION.

You have presented a hypothetical situation in which it is proposed that an attorney's standard fee agreement with clients will include a clause that a set fee of \$500 will be due if the attorney must institute collection proceedings to collect unpaid fees for legal services.

Under the facts you have presented, you have asked the committee to opine as to the propriety of including such clause in the fee agreement.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:2-105(A) which requires that an attorney's fees be reasonable and adequately explained to the client and DR:5-104(A) which provides that a lawyer shall not enter into a business transaction with a client if they have differing interests and if the client expects the lawyer to exercise his professional judgment for the protection of the client, unless the client has consented after full and adequate disclosure and provided that the transaction is not unconscionable, unfair or inequitable when made.

In the facts you present, the committee believes that the automatic imposition of a \$500 collection fee in all fee agreements, in the event that the attorney has to initiate collection proceedings against the client for unpaid legal fees is violative of DR:2-105(A). In some instances, for example, the collection fee itself could well exceed the unpaid balance owed by the client. The committee recognizes that such collection fee clauses are used frequently by other professions or businesses. However, our Supreme Court has recognized the unique nature of agreements between attorney and client, and has stated, in regard to fees in general:

It is a misconception to attempt to force an agreement between an attorney and his client into the conventional modes of commercial contracts. While such a contract may have similar attributes, the agreement is, essentially, in a classification peculiar to itself. Such an agreement is permeated with the paramount relationship of attorney and client which necessarily affects the rights and duties of each.

Heinzman v. Fine, Fine, Legum and Fine, 217 Va. 958, 962 (1977). Thus, as the committee has stated previously, regardless of the agreed terms in a written contract of employment between attorney and client, the lawyer cannot legitimize a fee that is otherwise prohibited under the Disciplinary Rules. LE Op. 1606. Moreover, a determination of the reasonableness of a fee is not necessarily limited to the circumstances existing at the time of the agreement. The occurrence of events not contemplated by the parties at the outset of the representation may also be relevant to the reasonableness of the fee. In your hypothetical, for example, it would not be known at the outset what, if any, unpaid legal fees are due and owing to the attorney.

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Therefore, the committee is of the opinion that it would be improper for an attorney to automatically impose in the initial fee agreement with his clients a clause that imposes a flat fee if collection proceedings are initiated to collect unpaid fees for legal services. However, it is not improper for an attorney to place in the initial fee agreement a clause that permits recovery of reasonable attorney's fees if collection proceedings are initiated.