

11/19/91

N. H. ETHICS OPINIONS ANNOTATED

FO 1988-89/25

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1988/9-25
Charging Interest on Unpaid Statements
November 9, 1989

RULE REFERENCES:

- *Rule 1.5(a)
- *Rule 7.1(a)
- *Rule 8.4(b)

STATUTORY REFERENCES:

- *15 USC §§1611, 1640 (Truth in Lending Act)

SUBJECTS:

- *Client Communications
- *Consent
- *False Advertisement
- *Fees

ANNOTATIONS:

An attorney may charge interest to clients on unpaid fees, as long as two conditions are met: 1). The attorney must comply with applicable federal and state laws. 2). Each client must be notified in advance of the proposed interest charge and must agree to that charge. (Rule 1.5(a); Rule 7.1(a); Rule 8.4(b).)

QUESTION:

May a New Hampshire attorney charge interest of 1.5% per month on fees billed to clients that remain unpaid for 30 days consistent with the New Hampshire Rules of Professional Conduct?

RESPONSE:

The Ethics Committee is of the opinion that interest may be charged so long as two conditions are met.

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First, the attorney must comply with applicable federal and state laws, otherwise charging interest would be illegal and subject to criminal (for a willful and knowing violation) and civil sanctions. E.g., 15 U.S.C. §§ 1611 and 1640 (Truth in Lending Act). Failure to comply with federal and state law, probably would be considered "professional misconduct" under Rule 8.4(b). A criminal act that "reflects adversely on the lawyer's honesty [or] trustworthiness" constitutes professional misconduct under that rule. The Ethics Committee is of the opinion that charging interest in a manner proscribed by federal or state law would be found to reflect adversely on a lawyer's honesty or trustworthiness. See also Rule 1.5(a) ("illegal fees") and discussion infra.

The second condition is that each client must be notified in advance of the proposed interest charge and must agree to that charge. Although no provision of the Rules of Professional Conduct expressly imposes this requirement, the Ethics Committee believes that Rule 7.1(a) would be held to require it. That rule "governs all communications about a lawyer's service," Id. (ABA Model Code Comments), and prohibits a lawyer from making "a false or misleading communication about...the lawyer's services." To charge interest when a client does not timely pay for legal services, without advance notice to the client, would omit a material term of the lawyer's engagement by the client. This interpretation of Rule 7.1(a) is consistent with American Bar Association Formal Opinion 338 issued in November 1974. There, the ABA interpreted the Code of Professional Responsibility to require advance notice to the client and client agreement before interest could be charged. That opinion has been followed by a number of state bar associations.