

INTEREST ON ATTORNEYS FEES

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May an attorney charge interest on legal fees? If so, how much? Must the client agree in advance? In writing? Does the attorney have to make federal truth-in-lending disclosures? These questions have been posed recently in advisory opinion inquiries and in private disciplines.

Several Minnesota attorneys have recently received admonitions for charging 18 percent interest on unpaid legal fees.[Ftn 1](#) These attorneys did not make required truth-in-lending disclosures or obtain the client's advance agreement to pay 18 percent interest. One attorney's retainer agreement stated that interest would be charged "at the highest legal rate." Two other attorneys merely included on their fee statements an indication that monthly interest of 1.5 percent would be charged after 30 days.

Each of the attorneys receiving admonitions violated Rule 1.5(a) of the Minnesota Rules of Professional Conduct, which states in part: "A lawyer's fee shall be reasonable." An illegal fee is unreasonable. The Office of Lawyers Professional Responsibility takes the position that the charging of interest on attorney's fees is unreasonable, and therefore a violation of Rule 1.5(a), if: 1) the rate of interest is usurious; or 2) Minnesota law requires that the client agree in writing to the imposition of the interest charges, and there is no such written agreement; or 3) federal truth-in-lending disclosures for consumer credit sales are required and have not been made.

The Minnesota usury statute states in part:

The interest for any legal indebtedness shall be at the rate of \$6 upon \$100 for a year, unless a different rate is contracted for in writing. No person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum, or any greater value, for the loan or forbearance of money, goods, or things in action, than \$8 on \$100 for one year. Minn. Stat. §334.01 (subd. 1) (1988).

Note that the statute prescribes *annual*, not monthly, maximum interest rates. Interest cannot be compounded on a monthly basis so as to exceed these amounts.

Note also that interest in excess of 6 percent must be "contracted for in writing."

Unless an exception applies, the charging of interest in excess of the 6 percent or 8 percent rate (whichever is applicable) is usurious. There are, however, a number of exceptions. The three most likely to apply to interest on attorney's fees are the exceptions for corporate loans, business and agricultural loans, and open-end consumer credit sales.[Ftn 2](#)

Generally, a consumer credit sale pursuant to an open-end credit plan may include a finance charge

of 18 percent annually. Minn. Stat. §334.16 (1988). The open-end consumer credit sale exception only applies, however, if (among other things): 1) the client has agreed in advance, in writing, to the imposition of the finance charge; 2) there is an “open-end credit” situation, as defined by federal truth-in-lending law;^{Ftn 3} and 3) the attorney is a “creditor” as defined by federal truth-in-lending law.^{Ftn 4} Moreover, an attorney who is asserting the open-end consumer credit sale exception must make the disclosures required by federal truth-in-lending law. See 12 C.F.R. §226.5 *et. seq.* (1988).

Must an attorney who is charging consumers 6 percent or (if there is a written agreement) 8 percent interest make truth-in-lending disclosures? It is unclear. At least one case suggests that federal truth-in-lending disclosures may not be required. See *Bright v. Ball Memorial Hospital Association*, 463 F. Supp. 152 (S.D. Ind. 1979). In any event, attorneys who charge consumers interest at an annual rate of 6 percent or less, or 8 percent or less if there is a written agreement, will not be disciplined for possible failure to comply with any truth-in-lending disclosure requirements.

With respect to corporations, Minnesota law provides that no corporation may interpose the defense of usury. Minn. Stat. §334.021. (1988). Also, loans for business or agricultural purposes can generally include finance charges at a rate of up to 4.5 percent over the 90-day discount rate. *Id.* §334.011. Does this mean that an attorney may, without a written agreement, charge interest of over 6 percent to corporate clients or other clients consulting the attorney for business or agricultural purposes? No. All clients, including corporate, business, and agricultural clients, must agree in writing to an interest rate over 6 percent.^{Ftn 5} Even when a written agreement is required, however, Minnesota courts will sometimes honor an implicit agreement for the payment of interest.^{Ftn 6}

May an attorney charge a client annual interest of 6 percent or less if the client does not agree in advance? No advance written agreement is required. Is an advance oral agreement necessary? For an interpretation of whether an agreement is necessary or whether section 334.01 implies a 6 percent interest rate, see *Lund v. Larsen*, 222 Minn. 438, 441-42, 24 N.W.2d 827, 829 (1946); *American Druggists Insurance v. Thompson Lumber Co.*, 349 N.W.2d 569, 573 (Minn. App. 1984). Although the best practice is to obtain clients' advance agreement to pay any interest charges, attorneys who charge annual interest of 6 percent or less will not be disciplined, even if the clients have not agreed to pay interest.

This is an attempt to summarize portions of usury and truth-in-lending law as they relate to attorney discipline. It is not an exhaustive description of relevant usury or truth-in-lending law, and is not an adequate substitute for consulting the underlying statutes, regulations, and caselaw.

Usury and truth-in-lending are complex areas of civil law that have implications for attorney discipline. There are numerous other areas of law that are related to attorney discipline – for example, property law is relevant in determining the file “to which the client is entitled” under Rule 1.16(d). Attorneys who wish to charge interest on legal fees must keep abreast of developments in the substantive law of usury and truth-in-lending to avoid running afoul not only of those laws but also of the Rules of Professional Conduct.

NOTES

¹ *The longstanding practice in Minnesota has been to discipline attorneys for charging usurious interest. See Hoover, “Report . . . Lawyers Professional Responsibility Board,” 36 Bench & Bar 29 (Jan. 1980) and Bench & Bar Interim 15 (July, 1981). There is no published Minnesota disciplinary case on the charging of interest by attorneys. The only public discipline cases on usurious interest charges involve Florida attorney Alan Fields. The Florida Bar v. Fields, 520 So.2d 272 (Fla. 1988); The Florida Bar v. Fields, 482 So.2d 1354 (Fla. 1986).*

² *In addition to statutory exceptions, the “time price doctrine” is recognized in Minnesota. See, e.g., Schauman v. Solmica Midwest, Inc., 283*

Minn. 437, 168 N.W.2d 667 (1969). Under the “time price doctrine,” a seller may charge a buyer a higher purchase price if the buyer will pay over time rather than paying cash. This price differential is not considered interest, and is therefore outside the scope of usury law.

³ See 12 C.F.R. §226.2(a)(20)(1988); Minn. Stat. §334.16 (subd. 2)(1988).

⁴ See Minn. Stat. §334.16 (subd. 2) (1988). In general, Regulation Z of the Federal Reserve Board defines “creditor” as a person “who regularly extends consumer credit that is subject to a finance charge or payable by written agreement in more than payable.” 12 C.F.R. §226.2(a)(17)(i) (1988) (footnote omitted). One “regularly extends consumer credit” who does so more than 25 times a year. *Id.* n.3.

⁵ See *Wolpert v. Foster*, 312 Minn. 526, 254 N.W.2d 348 (1977). The Court concluded that the §334.01 requirement of a writing for interest charges greater than 6 percent is not a “defense of usury” within the corporate loan exception set forth in §334.021. *Id.* At 533, 254 N.W.2d at 352. The Court reasoned that the requirement of a writing is an evidentiary requirement, and is not based on the public policy rationale for an 8 percent interest rate cap or the corporate exception. *Id.* at 534, 254 N.W.2d at 353.

⁶ The Minnesota Court of Appeals has held that a corporation agreed to pay 12 percent annual interest when the corporation received monthly invoices showing the interest charges and did not object to the invoices. *Am. Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 573 (Minn. App. 1984). It was also held that a corporation was bound to pay annual interest of approximately 16 percent because the corporation had acquiesced to the interest charge by paying it previously. *Lampert Lumber Co. v. Ram Constr.*, 413 N.W.2d 878, 883 (Minn. App. 1987).