CONFLICTS OF INTEREST

FINANCIAL ASSISTANCE TO CLIENT

PRACTICE GUIDE

Attorneys generally are prohibited from providing financial assistance to their clients in connection with litigation, with the exception of advancing court costs and expenses of the litigation itself.

Traditionally, clients have been ultimately liable for repayment of all advanced costs. The modern approach, however, is to allow repayment to be contingent upon the outcome of the litigation. This approach also allows lawyers representing indigent clients to pay the costs and expenses of litigation without a promise of repayment.

Other forms of financial assistance during the course of litigation, such as advancing living expenses to a client, are usually prohibited, although a minority of jurisdictions permit some assistance in cases involving financial hardship.

BACKGROUND

Model Rules

“Rule 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

…

“(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

“(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

“(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.”

Rule 1.8(i) (Rule 1.8(j) before the 2002 amendments) provides:

“A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

“(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

“(2) contract with a client for a reasonable contingent fee in a civil case.”

Model Code

“DR 5-103 Avoiding Acquisition of Interest in Litigation.

…

“(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.”

DR 5-103(A) prohibits a lawyer from acquiring a proprietary interest in a cause of action or subject matter of litigation, with exceptions for attorneys' liens to secure a fee and expenses, and contingent fees. The rule is the direct predecessor of Model Rule 1.8(i).
In the following jurisdictions, ethics rules on financial assistance differ significantly from Model Rule 1.8(e):

Alabama excepts “emergency” financial assistance from the general prohibition against helping clients financially, provided that repayment is not contingent on the outcome of the matter and that the lawyer did not promise the assistance before being hired. Alabama permits a lawyer who has a contingent fee arrangement to pay the court costs and litigation expenses, in which case the fee paid to the lawyer may include the amount of the costs and expenses.

California Bar Rule 4-210 prohibits a lawyer from paying a client's personal or business expenses, but the rule allows loans to a client if they are made after the lawyer's hiring and the client promises in writing to repay the money. Another exception specifies that a lawyer is not prohibited from advancing all reasonable expenses of litigation “or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter.”

Colorado follows DR 5-103(B), but adds that a lawyer may forgo reimbursement if it becomes apparent that the client would suffer substantial financial hardship in repaying the money.

The District of Columbia's rule includes the general prohibition against financial assistance in connection with litigation, but allows lawyers to “pay or otherwise provide” litigation expenses, including court costs, investigation expenses, expenses of medical examination, and costs of obtaining and presenting evidence. The rule also permits other financial assistance that is “reasonably necessary to permit the client to institute or maintain” the proceeding.

Georgia authorizes payment of litigation expenses and court costs on behalf of a client who is “unable to pay court costs and expenses of litigation,” rather than referring, as in the ABA model, to an “indigent client.”

Illinois excepts from the general prohibition an advance or guarantee for the expenses of litigation, including but not limited to court costs, expenses of investigation, medical examination expenses, and costs of obtaining and presenting evidence, if (1) the client remains ultimately liable for the expenses, (2) repayment is contingent on the outcome of the matter, or (3) the client is indigent.

Maine follows DR 5-103(B), but omits the final clause requiring that the client remain ultimately liable for the advanced expenses.

Michigan's Rule 1.8(e)(1) requires that a client remain ultimately responsible for any advances of funds from a lawyer.

Minnesota's Rule 1.8(e)(3) allows a lawyer to guarantee a loan “reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client.”

Mississippi follows the general prohibition against financial assistance but permits lawyers to advance needy clients $1,500, and sometimes more, for reasonable and necessary medical and living expenses. A lawyer's advertisements cannot include a promise to make such advances. No advances are permitted until 60 days after the lawyer is hired, and the expenses must be repaid upon successful conclusion of the matter.

Montana's Rule 1.8(e)(3) is similar to the corresponding part of the Minnesota rule. It allows a lawyer, for the sole purpose of providing basic living expenses, to guarantee a loan that is reasonably needed for the client to withstand delay that would otherwise pressure the client to settle because of financial hardship rather than on the merits. The client must remain ultimately liable for repayment of the loan, and the lawyer must not offer, promise, or advertise such financial assistance before being retained by the client.

New Jersey follows the ABA model but adds that certain nonprofit organizations may provide financial assistance to indigent clients whom they are representing without fee.
New Mexico requires that the client remain ultimately liable for advanced costs and expenses.

New York follows DR 5-103(B), but adds that unless prohibited by law or court rule, a lawyer representing an indigent client on a pro bono basis may pay court costs and reasonable litigation expenses on behalf of the client.

North Dakota's Rule 1.8(e)(3) is nearly identical to the corresponding part of the Minnesota rule.

Ohio follows DR 5-103(B), except that it allows the repayment of advances to be contingent on the outcome of the matter.

Oklahoma makes no provision for lawyers to pay costs or expenses on behalf of indigent litigation clients.

Oregon excludes from the general prohibition against financial assistance “the expenses of litigation, provided the client remains ultimately liable for such expenses to the extent of the client's ability to pay.”

Texas Rule 1.08(d)(1) excepts from the general prohibition against financial assistance court costs, expenses of litigation, and “reasonably necessary medical and living expenses,” the repayment of which may be contingent on the outcome of the matter.

Vermont specifies that advances for court costs and litigation expenses may include expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence. Vermont's rule allows a lawyer representing an indigent client “or a party to a class action” to pay court costs and litigation expenses on the client's behalf.

Virginia requires that the client remain ultimately liable for court costs and litigation expenses that the lawyer has advanced.

Washington follows DR 5-103(B), but provides that repayment of financial assistance may be contingent on the outcome of the matter in class actions.

The current ethics restrictions on financial assistance to litigation clients are traced to the common law prohibitions against champerty (investing in another person's litigation in exchange for part of the recovery) and maintenance (supporting another person's lawsuit). The rules against champerty and maintenance evolved to prevent third parties from stirring up needless litigation and to protect commoners against powerful land owners. Although those doctrines have been abandoned in some states, they are alive and well in other jurisdictions. E.g., Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 19 Law. Man. Prof. Conduct 371 (Ohio 2003).

These common law doctrines furnish part of the justification for the modern rule against providing financial assistance to clients in connection with litigation. There is concern that if lawyers have freedom to lend clients money for living expenses, clients may pursue lawsuits that would not otherwise be brought. Model Rule 1.8 cmt. [10]; Maryland Ethics Op. 2001-10, 17 Law. Man. Prof. Conduct 527 (2001).

Several more justifications have been advanced for the rule against providing financial assistance to a client in connection with litigation:

- Conflict of interest. Client loans can place a lawyer in the conflicting roles of advocate and creditor, tempting the lawyer to steer the litigation to his own advantage, favor his own financial interests over those of his client, and try to control settlement decisions. The prohibition against providing financial assistance is thought to help attorneys maintain their independent judgment about what is best for the client. Kentucky Bar Ass'n v. Mills, 808 S.W.2d 804 (Ky. 1991); State ex rel. Oklahoma Bar Ass'n v. Smolen, 17 P.3d 456, 16 Law. Man. Prof. Conduct 698 (Okla. 2000); Shea v. Virginia State Bar, 374 S.E.2d 63 (Va. 1988); Restatement (Third) of the Law Governing Lawyers §36 cmt. c (2000); Arizona Ethics Op. 03-05, 19 Law. Man. Prof. Conduct 515 (2003).

- Improper incentive. A lawyer's offer of financial assistance to a prospective client has been viewed as an improper inducement to hire the lawyer. If attorneys are allowed to make loans for living expenses,

- Unfair competition. The rule against advancing money to clients for nonlitigation expenses is said to help prevent competition among lawyers on the basis of their willingness to make loans. The competitive advantage that could inure to an attorney who is willing to make loans for a client's personal expenses is deemed unfair by some courts and ethics committees. E.g., Maryland Attorney Grievance Comm'n v. Kandel, 563 A.2d 387 (Md. 1989); Maryland Ethics Op. 2001-10, 17 Law. Man. Prof. Conduct 527 (2001).

A complementary justification is that the rule helps protect lawyers from being pressured by clients to lend them money for expenses unrelated to their litigation.

A number of commentators have questioned the soundness of these rationales, contending that the conflict-avoidance explanation is patronizing and contrary to the interests of needy clients, that the improper incentive rationale needlessly deprives clients of important information relevant to choice of counsel, and that little reason exists to prevent competition among lawyers.


But see Watrous, Lawyer or Loan Shark? Rule 1.8(e) of Louisiana's Rules of Professional Conduct Blurs the Line, 48 Loy. L. Rev. 117 (2002), which contends that Rule 1.8(e) should be amended to prohibit attorneys from lending money to clients for any reason.

Notwithstanding the scholarly debate over the soundness of the rule, the prohibition against lending money to litigation clients except for court costs and litigation expenses remains strong today. The rule is far from a technicality, and lawyers ignore it at their peril.

‘In Connection With’ Litigation

Model Rule 1.8(e) and Section 36(2) of the Restatement (Third) of the Law Governing Lawyers (2000) express the same basic prohibition in slightly different wording. The model rule forbids a lawyer to “provide financial assistance to a client in connection with pending or contemplated litigation,” except advances for litigation expenses and court costs. The Restatement likewise forbids a lawyer to “make or guarantee a loan to a client in connection with pending or contemplated litigation that the lawyer is conducting for the client,” except loans for litigation expenses and court costs. See, e.g., Arizona Ethics Op. 2003-05, 19 Law. Man. Prof. Conduct 515 (2003) (promise to indemnify opposing counsel is prohibited financial assistance).


Although a lawyer is not forbidden to loan money to a client that the lawyer represents in a nonlitigation matter, a lawyer who chooses to do this must comply with the requirements of the rule on business transactions with clients, and must ensure that her judgment as the client's counsel is not impaired by the loan.

- See the chapter on Business Transactions With Clients behind this tab.

Proprietary Interest in Litigation

A lawyer is forbidden to acquire a proprietary interest in litigation that the lawyer is conducting for a client. Model Rule 1.8(i) (formerly Rule 1.8(j)); Restatement (Third) of the Law Governing Lawyers §36(1) (2000). E.g., Maryland Attorney Grievance Comm'n v. Harris, 810 A.2d 457 (Md. 2002) (lawyer's purchase of bankruptcy client's home at foreclosure and then renting it to her violated Rule 1.8(j) even though property was not acquired directly from client).
Similar to the ban on providing financial assistance to litigation clients, the rule against acquiring an ownership interest in a client's litigation matter grew out of the common law doctrines of champerty and maintenance. The underlying concern is that an attorney who possesses an ownership interest in a client's cause of action may be tempted to assert control over settlement decisions or favor his own interests over those of the client. Restatement §36 cmt. b. Also, when a lawyer acquires a proprietary interest in the subject of litigation, it may be more difficult for the client to fire the lawyer. Model Rule 1.8 cmt. [16].

Rule 1.8(i) and Section 36(1) of the Restatement contain exceptions that allow lawyers to acquire liens to secure fees and to contract for a reasonable contingent fee in a civil case.

- For further discussion of these exceptions, see the chapters on Contingent Fees and Attorneys' Liens behind the Fees tab.

Court Costs and Litigation Expenses

Although Model Rule 1.8(e) generally prohibits the advancement or guarantee of financial assistance by a lawyer to a client in connection with litigation, the rule provides an exception for the expenses of the litigation itself, including court costs.

Allowing lawyers to advance court costs and litigation expenses is comparable to allowing lawyers to charge contingent fees, and rests on the same justification of ensuring access to justice for those who could not otherwise afford to pursue their claims. Model Rule 1.8 cmt. [10]; Restatement (Third) of the Law Governing Lawyers §36 cmt. c (2000).

DR 5-103(B) of the Model Code took the position that clients must remain liable for expenses paid on their behalf even if the litigation does not prove successful. A minority of states, including Michigan, New York, New Mexico, Virginia, and Washington, still use the Model Code's approach.

Model Rule 1.8(e) allows a lawyer to make a client's repayment of expenses contingent upon recovery. Most states follow the ABA's lead on this point. See, e.g., Ohio Ethics Op. 01-01 (2001) (lawyer and client may agree that client will not be responsible for litigation costs and expenses absent recovery).

- To avoid misunderstandings with clients about arrangements for payment and repayment of costs and expenses, lawyers should cover this subject in their retainer agreements with clients. See the chapter on Fee Agreements behind the Fees tab.

Comment c to Section 36 of the Restatement takes the position that the rule governing lawyer-client business transactions does not apply to a client's undertaking to repay litigation costs and expenses out of the proceeds of a recovery, but that any more extensive obligation on the client's part—such as payment of interest—is subject to that rule.

Forgoing Repayment

Model Rule 1.8(e) permits an attorney to pay litigation expenses and court costs on behalf of an indigent client without any expectation of repayment. Most states follow the ABA model and allow lawyers the same leeway.

Even for clients who are not indigent, some ethics opinions indicate that an attorney may agree that the client will not have to repay advanced costs and expenses. Maine Ethics Op. 153 (1996) (lawyer may enter into contingent fee agreement providing that client will not be responsible for disbursements, regardless of outcome); Maryland Ethics Op. 87-15 (law firm that performs collection work may pay court costs and collection fees without holding client ultimately responsible for such costs and expenses); Rhode Island Ethics Op. 94-33 (1994) (lawyer may waive costs in matter where there is successful recovery for nonindigent client); Utah Ethics Op. 02-09, 19 Law. Man. Prof. Conduct 16 (2002) (lawyer may unconditionally assume all litigation fees, expenses, and costs).

Cf. Arizona Ethics Op. 91-13 (1991) (lawyer's waiving repayment of expenses at conclusion of litigation would not violate Rule 1.8(e) because lawyer's independent judgment would not be affected).

But see Kentucky Ethics Op. 342 (1990) (lawyer who represents commercial creditors may not advance litigation expenses without clients having any liability to repay; such agreement is tantamount to lawyer's
buying client's legal work); Minnesota Ethics Op. 6 (1986) (lawyer may agree to absorb advances for costs and expenses only if litigation proves unsuccessful).

Interest on Loans

Attorneys lacking deep pockets may want to borrow the money needed to advance litigation expenses on behalf of their clients. It is not inherently improper for a lawyer to borrow money for this purpose; however, the lawyer must not let the arrangement or the lender influence his independent professional judgment as the client's counsel. Philadelphia Ethics Op. 2003-15, 19 Law. Man. Prof. Conduct 612 (2003).

A lawyer who borrows to pay a client's litigation expenses may pass the interest and finance charges on to the client, but should observe several precautions:

* Obtain the client's written, informed consent to the arrangement in advance, and comply with all other aspects of the rule on lawyer-client business transactions.
* Offer the client the opportunity to avoid interest by paying the expenses directly.
* Ask for the client's permission before disclosing any information about the litigation to the lender.
* Make sure the interest rate charged on the loan is commercially reasonable.
* Do not make a profit from the arrangement.
* Allow the client to prepay any balance without penalty.


Living Expenses

In most jurisdictions the general prohibition against providing financial assistance in connection with litigation has almost invariably been construed to forbid advances to clients for living expenses. See, e.g., Kentucky Ethics Op. E-375 (1995) (lawyer may not lend client money for medical and living expenses unless Rule 1.8(e) is amended); Maryland Ethics Op. 2001-10, 17 Law. Man. Prof. Conduct 527 (2001) (lawyer may not provide free housing or make gifts of other necessities for financially strapped clients in litigation matters).

No court has held this construction of Rule 1.8(e) to be unconstitutional. On the contrary, courts have upheld it against constitutional challenges. In re Minor Child K.A.H., 967 P.2d 91, 14 Law. Man. Prof. Conduct 576 (Alaska 1998) (rejecting argument that Rule 1.8(e) unconstitutionally infringes on indigent clients' access to courts); State ex rel. Oklahoma Bar Ass'n v. Smolen, 17 P.3d 456, 16 Law. Man. Prof. Conduct 698 (Okla. 2000) (rejecting argument that Rule 1.8(e) violates equal protection clause by treating clients who need humanitarian loans differently from clients who receive advances of litigation costs and expenses).

The fact that a loan was made for humanitarian purposes may be considered a mitigating factor in a disciplinary proceeding but does not excuse a violation of the rule. State ex rel. Oklahoma Bar Ass'n v. Smolen; see also Connecticut Informal Ethics Op. 90-3 (lawyer may not advance money to client for rent payments even under threat of client's eviction).

Nor does it matter for disciplinary purposes that without financial assistance the client will be forced to accept an exceedingly low settlement. Pennsylvania Ethics Op. 95-16 (1995) (lawyer whose client suffered injury at work and was forced into bankruptcy when employer refused to settle may not lend money to client to allow client to subsist during upcoming litigation).

Finally, the fact that the loan was made after the attorney-client relationship got underway, rather than to entice the client in the first place, does not prevent a finding that the rule was violated. State ex rel. Oklahoma Bar Ass'n v. Smolen.

Numerous lawyers have received a disciplinary sanction—usually a reprimand, occasionally a short suspension—for lending clients money for living ex-

On the other hand, disqualification of counsel from representing a personal injury client at an impending retrial was held not to be warranted by the law firm's payment of housing expenses for the client's family. *Shade v. Great Lakes Dredge & Dock Co.*, 72 F. Supp. 2d 518, 15 Law. Man. Prof. Conduct 576 (E.D. Pa. 1999).

Although the prohibition against advancing funds for living expenses has been criticized as overly rigid and inhumane, critics of the rule have had little success in getting it changed. The drafters of the original Model Rules proposed to permit lawyers to lend clients money for living expenses under some circumstances, but their proposal did not make its way into the final version of the rules. 1 G. Hazard & W. Hodes, The Law of Lawyering §12.12 (Supp. 2004); Watrous, *Lawyer or Loan Shark? Rule 1.8(e) of Louisiana's Rules of Professional Conduct Blurs the Line*, 48 Loy. L. Rev. 117, 128 (2002).

Similarly, an early draft of the American Law Institute's Restatement (Third) of the Law Governing Lawyers would have permitted lawyers to make loans for living expenses if necessary to enable the client to withstand litigation delays that otherwise might force the client to settle because of financial hardship rather than on the merits, but a majority of the ALI members vetoed that idea.

Minority View

A few states permit lawyers to advance living expenses to clients. The ethics rules in California, the District of Columbia, and Texas provide broad leeway for a lawyer to advance living expenses to clients whom they are representing in litigation. A slightly larger number—Alabama, Minnesota, Mississippi, Montana, and North Dakota—allow loans for a litigation client's living expenses in limited circumstances involving financial hardship.

The Mississippi Supreme Court decided that changes to Rule 1.8(e) were needed to permit some degree of financial assistance to clients who are in dire circumstances. The court modified the rule to allow payment of a client's medical and living expenses under certain circumstances, and applied the new rule retroactively to conclude that a lawyer's loans under the $1,500 limit to a client for medical and living expenses did not amount to an ethics violation. *Attorney AAA v. Mississippi Bar*, 735 So. 2d 294, 15 Law. Man. Prof. Conduct 145 (Miss. 1999). See also *In re Ex Parte Application of G.M.*, 797 So. 2d 931, 17 Law. Man. Prof. Conduct 280 (Miss. 2001) (under Mississippi's unique rule, lawyer may advance money to cover client's health insurance premiums during litigation).

Although Louisiana follows Model Rule 1.8(e), case law in that state allows lawyers to lend funds for living expenses to their litigation clients under limited circumstances and for humanitarian purposes. The leading case, *Louisiana State Bar Ass'n v. Edwins*, 329 So. 2d 437 (La. 1976), held that neither the spirit nor the intent of the disciplinary rule under the Model Code was violated by a lawyer's advance of minimal living expenses to prevent foreclosure and to guarantee necessary medical treatment for the client. The court said that the rule prohibiting such loans placed an unreasonable burden on an individual's right to enforce claims and might violate the constitutional guarantee of access to the courts. See also *Simmons v. Chambliss*, 852 So. 2d 1237 (La. Ct. App. 2003) (advances for client's car rental expenses held permissible under Edwins and Rule 1.8).

Gifts

While the ethics rules clearly regulate advancing or guaranteeing financial assistance to clients, their effect on outright gifts of money to clients is less clear.

Arizona Ethics Op. 91-14 (1991) permitted a lawyer's financial gift to a client for the payment of substantial medical expenses so long as the gift was truly charitable and the lawyer maintained no expectation of repayment. The decision extended an earlier opinion that limited gifts of money or tangible goods to pro bono clients. Arizona Ethics Op. 89-3 (1989).

In contrast, Maryland Ethics Op. 00-42 (2000) advised that a lawyer could make small gifts to a financially strapped client; however, a subsequent opinion took the position that the only gifts permitted under Rule 1.8(e) are de minimis gifts and payment of litigation.
costs and expenses on behalf of an indigent client. The committee acknowledged that gifts to a client do not trigger any concern about the lawyer's turning into a creditor; however, the committee insisted that to permit gifts would give firms with deep pockets an unfair advantage in obtaining clients and would violate the public policy against stirring up litigation. Maryland Ethics Op. 2001-10, 17 Law. Man. Prof. Conduct 527 (2001).

The safe course is to avoid gifts to needy clients in litigation matters, and instead try to help the client secure financial help from another source.

Class Actions

A lawyer may advance costs and expenses in class actions in the same manner as any other lawsuit. Class actions present special problems, however, in jurisdictions such as New York that follow DR 5-103(B)'s mandate that clients remain ultimately liable for advanced costs and expenses. Clients may not have the financial resources to repay the very substantial costs and expenses of class action litigation, or they simply may be unwilling to serve as class representatives if they are obligated to shoulder the ultimate responsibility for all of the costs and expenses regardless of the outcome.

The Seventh Circuit described DR 5-103(B) as a "relic" that should be disregarded for purposes of deciding class certification under the pertinent federal civil procedure rule. The court noted that the plaintiff in a class action need only be willing to pay a pro rata share of expenses. Rand v. Monsanto, 926 F.2d 596 (7th Cir. 1991). See also Rivera v. Fair Chevrolet Geo P'ship, 165 F.R.D. 361 (D. Conn. 1996) (following Rand). But see North Carolina Ethics Op. 124 (1991) (under professional conduct rule that requires client to remain ultimately liable for advanced litigation expenses, lawyer may not agree to bear costs of class action in federal court).

The same problem is not presented under Model Rule 1.8(e), which specifically permits lawyers to advance funds with repayment contingent on the outcome of the matter. See Maryland Ethics Op. 90-9 (1989) (lawyer may advance costs of litigation to client in class action without expecting reimbursement).

See generally Miller, Payment of Expenses in Secur-


Third-Party Funding

Regarding the booming business of lawsuit-funding, ethics committees generally advise—with plenty of caveats—that a lawyer may assist a client in obtaining funds from a company that advances cash to litigants in return for a portion of the client's recovery.


For several reasons, it is wise to explore alternative, less burdensome financial solutions before assisting a client in such a transaction. Among other problems, these arrangements can severely encumber the client's recovery and make it more difficult to get a client to agree to settlement. See Florida Ethics Op. 00-3 (discouraging use of funding companies); Galati, Getting Involved in Getting Money for Your Civil Litigation Clients: An Ethical Quagmire, 10 Nev. Law. 15 (March 2002) (urging lawyers to be wary of these arrangements); Jorgensen, Presettlement Funding Agreements: Benefit or Burden?, 61 Bench & B. Minn. 14 (June 2004) (discussing perils lurking for lawyers and clients in this situation).

N.E.2d 217, 19 Law. Man. Prof. Conduct 371 (Ohio 2003), dealt a more serious blow to the business of litigation funding. The Ohio Supreme Court voided a personal injury plaintiff's contract with two litigation investment firms that had advanced her money in exchange for a promised cut of the final settlement. The bargain constituted champerty and maintenance, the court held.

Other decisions have not found any blanket rule against these agreements. In Saladini v. Righellis, 687 N.E.2d 1224 (Mass. 1997), the court did away with the doctrines of champerty, barratry, and maintenance in Massachusetts, holding that if an agreement to finance a lawsuit is challenged the court will consider whether the fees charged are excessive or whether any recovery by the prevailing party is vitiated because of some impermissible overreaching by the financier.

Similarly, the South Carolina Supreme Court held in Osprey Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 16 Law. Man. Prof. Conduct 261 (S.C. 2000), that champerty is not a defense to an agreement to finance a lawsuit, and that various factors must be considered to determine the validity of such a contract.


APPLICATION

Costs and Expenses

DR 5-103(B) of the Model Code listed several examples of litigation expenses that may be advanced on a client's behalf: “court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence.” Most of these examples are not listed in Model Rule 1.8(e) or in Section 36(2) of the Restatement (Third) of the Law Governing Lawyers (2000), both of which simply authorize lawyers to advance money for “court costs and expenses of litigation.”

“Court costs” include filing fees, fees for service of process, and other disbursements that are includable in the judgment. Sellers v. Johnson, 719 P.2d 476 (Okla. 1986).

Allowed

“Litigation expenses” have been deemed to include:


Lawyers who advance funds on behalf of litigation clients should take care to document that the payments are for expenses or costs connected to the litigation. Nicholson v. HMI Astrachem, 2002 WL 31056582 (E.D. La. 2002); In re Mines, 612 N.W.2d 619 (S.D. 2000).

Not Allowed

The following items have been disapproved as litigation expenses that may be advanced to clients:


* Personal property taxes. Lawyer Disciplinary Bd. v. McCormick.


* Debts unrelated to litigation. South Carolina Ethics Op. 02-10.

Bail

Ethics committees disagree whether bail is a litigation expense that may be advanced on behalf of a client. Compare Oregon Ethics Op. 1991-4 (1991) (lawyer may advance bail money to client), with Maryland Ethics Op. 2003-03 (bail is not permissible litigation cost).

The ABA ethics committee has taken the position that bail can be viewed as a litigation expense, and therefore may be posted for a client, if securing the client's release is a tactical objective of the representation. ABA Formal Ethics Op. 04-432, 20 Law. Man. Prof. Conduct 119 (2004).

Living Expenses

Lawyers frequently are disciplined for lending clients money for living expenses during litigation. The sanction is usually a reprimand, but sometimes a short suspension is imposed; harsher discipline is unusual unless the case also involves other serious misconduct.

The Ohio Supreme Court publicly reprimanded a lawyer who advanced $26,000 for living expenses to a personal injury client who was severely injured and unable to work. Cleveland Bar Ass'n v. Nusbaum, 753 N.E.2d 183, 17 Law. Man. Prof. Conduct 530 (Ohio 2001).


A West Virginia lawyer was reprimanded for making a loan to a personal injury client to pay personal property taxes and car insurance. Lawyer Disciplinary Bd. v. McCormick, 483 S.E.2d 866 (W. Va. 1997).

A Virginia lawyer was suspended 90 days for lending a client more than $6,000 from his personal funds to pay the client's creditors, which included a landlord threatening eviction. Shea v. Virginia State Bar, 374 S.E.2d 63 (Va. 1988).

An Oklahoma lawyer who lent a needy client $1,200 for living expenses was suspended for 60 days. A more severe sanction than public censure was warranted, the court found, because the lawyer had been disciplined for the same misconduct eight years earlier and he admitted that this loan was not an isolated incident. State ex rel. Oklahoma Bar Ass’n v. Smolen, 17 P.3d 456, 16 Law. Man. Prof. Conduct 698 (Okla. 2000).

A New Jersey lawyer was disbarred for using runners and advancing funds to clients in 10 cases up to the amount he thought would be the net settlement of their claims. In re Pajerowski, 721 A.2d 992, 14 Law. Man. Prof. Conduct 582 (N.J. 1998).

No Discipline
In rare cases, courts have declined to discipline lawyers who provided money to clients for living expenses.

In *Louisiana State Bar Ass'n v. Edwins*, 329 So. 2d 437 (La. 1976), the lawyer advanced to his maritime client a total of $4,210, of which $1,480 was for the direct expenses of litigation. The remainder was used to make payments for loans, car repairs, medical treatment not related to the litigation, and other living expenses. In a disciplinary proceeding relating to these advances, the court was “unwilling to hold that the spirit or the intent of the disciplinary rule is violated by the advance or guarantee of a lawyer to a client (who has already retained him) of minimal living expenses, of minor sums necessary to prevent foreclosures, or of necessary medical expenses.”

The court read DR 5-103(B) as not prohibiting a lawyer from advancing necessary medical or living expenses to an existing client; such advances or fee arrangements are the only way some clients are able to enforce their causes of action, the court said. It found the rule's list of expenses for which lawyers may advance payment to be illustrative only and not exclusive.

On the other hand, the same lawyer's monetary advances to a second maritime client for expenditures that were not justified as necessary living or medical expenses were deemed to violate DR 5-103(B). The court suspended the lawyer for 30 days.

In *Florida Bar v. Taylor*, 648 So. 2d 1190 (Fla. 1994), the attorney issued a $200 check drawn on his firm's account to an indigent client, and provided used clothing for the client's child. Although the payment was referred to as a “loan,” the lawyer testified that he provided the money without any expectation of repayment. The bar charged the lawyer with improperly providing financial assistance to a client and with violating the prohibition against acquiring a proprietary interest in a client's litigation.

The Florida Supreme Court refused to discipline the lawyer, noting that there was no agreement for repayment and that the gifts were not made in an effort to maintain employment. The lawyer's conduct was essentially a humanitarian act and did not violate professional conduct rules, the court said. A dissent, which would have admonished the lawyer, argued that the prophylactic intent of the rule required a strict prohibition against such advances.

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