

# New York State Bar Association

## Committee on Professional Ethics

Opinion 744 – 5/25/01

Topic: Litigation costs

Digest: When plaintiff retains lawyer to bring multiple lawsuits, plaintiff must ultimately be responsible for all litigation expenses, but lawyer may agree that expenses arising from unsuccessful lawsuits will be paid out of recoveries obtained in successful lawsuits, provided the total amount recovered is greater than the total cost of litigation.

Code: DR 5-103(B)

### QUESTION

While representing a plaintiff in multiple lawsuits (e.g., collection matters) pursuant to a single retainer agreement, may an attorney agree that the recoveries obtained on successful claims will be used to offset litigation costs associated with unsuccessful lawsuits?

### OPINION

The inquiry is governed by DR 5-103(B), which establishes the client's ultimate responsibility for the costs of litigation. DR 5-103(B) provides that "[a] lawyer may advance or guarantee the expenses of litigation ... provided the client remains ultimately liable for such expenses."

As long as there are sufficient funds recovered on successful claims to offset the expenses associated with the unsuccessful claims, the proposed arrangement would not violate DR 5-103(B) because the client would then bear the ultimate responsibility for litigation costs. The lawyer's understanding with the client must provide, however, that if the total costs and expenses of litigation exceed the amounts recovered on the client's claims, the client will be responsible to pay the difference.

## **CONCLUSION**

When a plaintiff retains a lawyer to bring multiple lawsuits, the plaintiff must be ultimately responsible for all litigation expenses, but the lawyer may agree that expenses arising from unsuccessful lawsuits will be paid out of recoveries obtained in successful lawsuits, provided the total amount recovered is greater than the total cost of litigation.

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