



COMMITTEE ON PROFESSIONAL ETHICS

Opinion 840 (3/26/10)

Distinguishing N.Y. State 786 (2005) in light of rule changes

TOPIC: Lawyer paying *pro bono* client's litigation expenses.

DIGEST: Under the New York Rules of Professional Conduct, a lawyer is ethically permitted to pay the litigation expenses of a *pro bono* client whether the *pro bono* client is indigent or not.

RULES: 1.8(e)(2)

CODE: DR 5-103(B)

QUESTION

1. Is a lawyer ethically permitted to pay the litigation expenses of its *pro bono* client, an organization that provides legal services to the indigent, even though the organization itself is not indigent?

OPINION

2. A lawyer represents, on a *pro bono* basis, a non-profit organization that provides legal services to indigent people. The lawyer wishes to pay the organization's expenses in the litigation, but the organization itself is not indigent. In N.Y. State 786 (2005), decided under the former New York Code of Professional Responsibility, this Committee concluded that a lawyer was ethically prohibited from paying the litigation expenses of a *pro bono* organizational client that provided legal services to the poor unless the organization itself was indigent.¹ We now examine whether the question would be answered differently

¹ N.Y. State 786 adopted a test for indigence of an organization relating to "objective financial wherewithal, and not one that is based on the worthiness of" the organization's cause or motivations.

under the New York Rules of Professional Conduct that took effect on April 1, 2009 (the “Rules”).² We conclude that it would.

3. At the time N.Y. State 786 was issued, DR 5-103(B)(2) of the New York Code of Professional Responsibility required that a client be *both* pro bono *and* indigent in order for the lawyer to be permitted to pay the client’s litigation expenses. In contrast, Rule 1.8(e)(2) of the New York Rules of Professional Conduct provides that “a lawyer representing an indigent *or* pro bono client may pay court costs and expenses of litigation on behalf of the client.” (Emphasis added). Therefore, under the new Rules, as long as the lawyer is representing the client on a *pro bono* basis, the lawyer may pay the *pro bono* client’s court costs and expenses of litigation whether the *pro bono* client is indigent or not.

CONCLUSION

4. A lawyer providing *pro bono* legal representation to an organization that provides legal services to the indigent is ethically permitted to pay the organization’s litigation expenses whether or not the organization is indigent.

(47-09B)

² The rule amendments addressed in this opinion pre-date the April 1, 2009 amendments (which included adoption of the ABA Model Rules format). Specifically, the rule amendments at issue here originally took effect on February 1, 2007 in conjunction with extensive amendments to the advertising and solicitation rules in the old New York Code of Professional Responsibility.