



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1044 (1/8/15)

Topic: Attorney Payment of Expense of Litigation

Digest: Whether an attorney may advance the client's taxi and other transportation costs to and from (i) an independent medical examination under the New York no-fault insurance law or (ii) other appointments with doctors or for other medical treatments, depends on whether the cost qualifies as an expense of the litigation. Transportation to an IME clearly qualifies as such an expense, since an IME is a condition to receiving no-fault payments. Whether the cost of transportation to and from other appointments with doctors or for medical treatment are expenses of litigation depends on whether they are necessary to diagnose, assess or demonstrate the client's condition, or the client's efforts to treat that condition, for litigation purposes. We believe many such costs will qualify as expenses of litigation. However, some costs of routine medical care necessary to treat the client's injuries may not so qualify. The determination of what is a necessary expense of litigation is a question of fact that is beyond our jurisdiction to determine. If a client is indigent or pro bono, the attorney may pay qualifying expenses without seeking reimbursement.

Rules: 1.8 (a) & (e)

FACTS

1. The inquiring attorney represents a client in a matter covered by no-fault insurance. Once a claim for coverage is filed with the insurance carrier, the carrier may demand that the client-claimant see a doctor chosen by the insurance company for an Independent Medical Examination or "IME". Failure to attend the IME may result in a cut-off or reduction in benefits. The client also may have appointments with treating physicians or for other medical treatments. In either case, the client will incur taxi and other transportation costs to and from appointments with doctors or for other medical treatments. These transportation costs are included in the client's claim under the no-fault law for "basic economic loss" arising out of the accident, up to \$25 per day. The client is indigent and unable to pay these transportation expenses and has asked the inquirer to advance them.

QUESTION

2. May the inquiring attorney advance the client's taxi and other transportation costs to and from (i) the IME, and (ii) appointments with doctors or for other medical treatments, either subject to repayment out of the no-fault insurance, or on a contingent basis?

OPINION

3. Rule 1.8(e) of the New York Rules of Professional Conduct (the "Rules") provides:

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, 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;

(2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client

4. As stated in Comment [9B] to Rule 1.8, paragraph (e) limits permitted financial assistance to court costs and expenses directly related to litigation. Comment [9B], however, cautions that permitted expenses do not include "living or medical expenses" other than those listed in Comment 9B. Comment [10] provides the rationale for this Rule:

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee arrangements and help insure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

5. Assuming that the representation involves a pending or contemplated litigation,¹ the issue under Rule 1.8(e)(1) is whether the transportation expenses constitute "expenses of litigation." As examples of permitted litigation expenses that a lawyer may advance, Comment [9B] to Rule 1.8 lists "expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence." Professor Simon indicates that "expenses of litigation" would include such items as fees of a private investigator, the lawyer's travel expenses to visit witnesses or attend depositions, long distance phone bills, costs of clandestine videos and any other expenses that a lawyer or lawyer's agents incur while investigating the facts of the case. R. Simon, *Simon's New York Rules of Professional Conduct Annotated* 484 (2014 ed.).

¹ If there were no contemplated or pending litigation, Rule 1.8(e) would not by its terms apply. The lawyer could make a gift of the travel expenses. If the lawyer advanced the expenses, the financial arrangement would be subject to the provisions of Rule 1.8(a) on lawyer-client business transactions.

6. The cost of the client's transportation to and from the IME is clearly an expense of the litigation, since it is a condition to receiving no-fault payments. Without it, the goal of the proceeding is unlikely to be met. With respect to transportation to other doctors or medical treatment, whether these costs are expenses of litigation depends on whether they are necessary to diagnose, assess or demonstrate the client's condition, or the client's efforts to treat that condition, for litigation purposes. For example, if the doctor or service provider will be testifying about the extent of the client's injuries, or, if the client otherwise cannot afford to travel to treatment and if failure to obtain treatment may be used by the insurer to minimize the extent of the client's injuries, then such costs certainly would qualify as costs of litigation. They are essentially "costs of obtaining . . . evidence" of the fact that the client requires and is obtaining ongoing medical treatment because of the injury. We believe many such expenses would qualify.

7. However, some costs of routine medical care necessary to treat the client's injuries may not qualify as costs of litigation, and the lawyer would not be authorized to pay them under Rule 1.8(e). The dividing line between what is and is not a necessary cost of litigation is a question of fact that is beyond our jurisdiction to determine.

8. Under Rule 1.8(e), the lawyer may advance permitted transportation costs, contingent on the outcome of the matter. In addition, if the client is indigent or represented on a pro bono basis, the lawyer may pay such costs. See Comment [9B] to Rule 1.8(e) (quoted above), as well as N.Y. State 852 (2011) and N.Y. State 840 (2010). In N.Y. State 786 (2005), interpreting the predecessor to Rule 1.8(e) in the Code of Professional Responsibility, we noted that the Code contained no definition of "indigent," but that New York courts have defined the term as "destitute of property or means of comfortable subsistence; needy; poor; in want; necessitous," (citing *Healy v. Healy*, 99 N.Y.S.2d 874, 877 (Sup. Ct. Kings County 1950)). We note that Comment [3] to Rule 6.1 now contains a definition of "poor person" in the context of pro bono representation.² Such a person would in our opinion be "indigent" under Rule 1.8(e).

CONCLUSION

9. Whether an attorney may advance the client's taxi and other transportation costs to and from (i) an independent medical examination under the New York no-fault insurance law or (ii) other appointments with doctors or for other medical treatments, depends on whether the cost qualifies as an expense of the litigation. Transportation to an IME clearly qualifies as such an expense, since an IME is a condition to receiving no-fault payments. Whether transportation to other appointments with doctors or for medical treatment are "expenses of litigation" depends on whether they are necessary to diagnose, assess or demonstrate the client's condition or the client's efforts to treat that condition, for litigation purposes. We believe many such expenses would qualify as expenses of litigation. However, some costs of routine medical care necessary to treat the client's injuries may not so qualify. The determination of what is a necessary expense of litigation is a question of fact that is beyond our jurisdiction to determine. If a client is indigent

² "Poor persons" under Rule 6.1 include both individuals who qualify for participation in programs funded by the Legal Services Corporation and individuals whose incomes and financial resources are slightly above the guidelines utilized by Legal Services Corporation programs but nevertheless cannot afford counsel. The Legal Services Corporation services those with annual income at or below 125% of the federal poverty guidelines, which, in 2014, were \$14,588 for an individual and \$29,813 for a family of four.

or pro bono, the attorney may pay qualifying expenses without seeking reimbursement.

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