NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1066 (7/13/15)

Topic: Loan to client (making or guaranteeing); legal fees

Digest: A lawyer may not guarantee repayment of a loan made to a client for the purpose of paying legal fees.

Rules: 1.8(e)

FACTS

1. The inquirer represents individuals who are charged with drunk driving offenses. Many of the clients have difficulty obtaining funds to pay the firm's required retainer. The inquirer proposes to introduce each such client to a bank to lend the funds. However, many of the clients' credit scores are too low to qualify for a loan.

QUESTION

2. May the lawyer's firm guaranty the client's obligation to repay a bank for financing, where the financing was incurred to pay the lawyer's retainer?

OPINION

3. Rule 1.8(e) of the New York Rules of Professional Conduct (the "Rules") provides: "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client" except as provided in subparagraphs (1) – (3). The rule's three exceptions are discussed below.

4. Traditionally there have been two reasons for prohibiting a lawyer representing a client in connection with contemplated or pending litigation from providing financial assistance to the client: (1) such assistance would encourage clients to pursue lawsuits that might not otherwise be brought, and (2) such assistance gives the lawyer a financial stake in the litigation. *See* Rule 1.8, Cmt. [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 . . . because these advances are virtually

indistinguishable from contingent fee agreements and help ensure access to the courts.

5. The first reason for the prohibition derives from the common law of champerty and maintenance, which prohibited lawyers from acquiring an interest in the client's litigation because such interests were thought to breed needless litigation. *See* American Law Institute, Restatement of the Law Governing Lawyers, § 36, Cmt. b. The second is designed to ensure that the lawyer's independent professional judgment on behalf of the client is not affected by a personal stake in the client's matter. It is not clear that either rationale should apply to criminal defense work. Enabling a criminal defendant to defend himself will not result in litigation that would not otherwise be brought. Moreover, the exceptions to Rule 1.8(e) authorize the lawyer to have a financial stake in the litigation to a certain extent.

6. The first issue raised by the inquiry is whether a criminal case is considered to be "litigation" within the meaning of Rule 1.8(e), which prohibits a lawyer from advancing or guaranteeing financial assistance to a client while representing a client in connection with contemplated or pending litigation.

7. The Rules do not define "litigation." Black's Law Dictionary defines "litigation" as a "contest in a Court of Justice for the for the purpose of enforcing a right." Such a right could include that of the People of the State of New York to prosecute a criminal defendant and the right of the defendant not to be summarily punished. Indeed, Comment [23] to Rule 1.7, in discussing the conflict analysis of representing multiple clients in "litigation" notes among its examples "co-defendants in a criminal case."

8. Rule 1.8(e) contains three exceptions:

> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
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> (2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and
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> (3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

9. The first exception allows the lawyer to advance court costs and expenses of litigation the repayment of which may be contingent on the outcome of the matter. We believe this would include advances of expenses in a criminal matter, even if repayment is contingent on the outcome of the matter. Rule 1.5(d)(1) prohibits a lawyer from charging a contingent *fee* for representing a defendant in a criminal matter. As EC 2-20 to the former Code of Professional Responsibility explained, the prohibition resulted from the fact that criminal representation does not create a *res* with which to pay the fee. However, there is no reason to believe that the drafters of Rule 1.8(e)(1) intended to distinguish between civil and criminal matters. Thus we believe that the first exception allows the lawyer to advance court costs and expenses of litigation, whether the client remains liable for them or repayment is contingent on the outcome

of the matter.

10. Rule 1.8(e)(1), however, does not authorize a guarantee of such court costs. Although the drafters did not explain the rationale for this omission, the introductory language of the rule clearly prohibits both advances and guarantees, and Rule 1.8(e)(1) permits only advances of court costs and expenses of litigation and does not specifically authorize guarantees of such costs and expenses. The language of the exceptions in Rule 1.8(e) is the same as that contained in Section 488 of the New York Judiciary Law, which generally prohibits a lawyer from giving valuable consideration to any person as an inducement for hiring the lawyer, except as provided therein. Section 488(2)(c) includes advancing court costs and expenses of litigation on behalf of the client.

11. The second exception applies only in the case of an indigent or pro bono client and the inquiry does not state that the client here is indigent or pro bono.

12. The third exception applies where the fee is a contingency fee, which cannot apply in a criminal matter.

13. Because the introduction to Rule 1.8(e) prohibits a lawyer from advancing or guaranteeing costs and expenses and none of the three exceptions authorizes the guarantee at issue here, the inquirer is prohibited from guaranteeing a loan to the client to pay a bank loan incurred by the lawyer's client to pay the lawyer's fees.

14. If the inquirer helps the client to negotiate a loan from the lender to the client, there are a number of other ethical issues. *See* N.Y. State 769 (2003) (if a proposed transaction with a litigation financing company is legal, the lawyer may represent a client in negotiating and carrying it out); N.Y. State 666 (1994) (lawyer may refer a client to a lender who would provide economic support to the client during the pendency of the case, provided the lawyer had no interest in the lender, received no payment for the referral, and did not compromise client confidentiality in making the referral); N.Y. City 2011-2 (2011) (when client enters into litigation financing arrangement with a third party lender, lawyer must be cognizant of ethical issues, including compromise of confidentiality, waiver of attorney-client privilege and potential impact on lawyer's exercise of independent professional judgment).

CONCLUSION

15. A lawyer may not guaranty repayment of a loan made to a client for the purpose of paying legal fees.

(4-15)