

State Bar of South Dakota

Ethics Opinion 2000-1

March 31, 2000

- **Rules: 1.8(e), 8.4(d)**
- **Subject: Lawyer responsibility to pay for consultants hired by lawyer in representation**
- **Summary: Absent a written agreement to the contrary with the consultant, lawyer must pay for litigation services lawyer ordered on behalf of client even if the attorney/client relationship terminates.**

**FACTS**

South Dakota Lawyer represented a client in a personal injury action. Lawyer retained a consulting expert who performed professional service pursuant to the retention. Lawyer evaluated the case as lacking merit, asked the expert consultant to cease work, and withdrew from the representation. Expert consultant demands payment from Lawyer for the services rendered. Lawyer seeks the opinion of the Ethics Committee concerning whether Lawyer must pay the consultant's bill, and, if so, whether Lawyer can seek reimbursement from former client.

**DISCUSSION**

Ethics Opinion 80-6 states:

It is professional misconduct for an attorney to deny responsibility for the payment of compensation for services rendered by doctors, engineers, accountants, other attorneys, or other persons, if the attorney has ordered or requested the services without informing the provider of the service, by express written statement at the time of the order or request, that [lawyer] will not be responsible for payment.

Ethics Opinion 80-6 neither states nor suggests which rule or rules of professional conduct it is based upon.

However, Rule 1.8(e) forbids lawyers from providing financial assistance to a client in connection with litigation, except:

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which shall be the ultimate obligation of the client; and

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

In addition, Rule 8.4(d) prohibits conduct which is "prejudicial to the administration of justice."

More recently, in Ethics Opinion 94-15, the Ethics Committee was asked whether a lawyer could advise his or her clients to refuse to pay medical expenses until the litigation was complete. The Committee found no rule, but opined that such advice was contrary to the Preamble of the Rules of

Professional Responsibility which provides that some issues "must be resolved through the exercise of sensitive, professional and moral judgment guided by the basic principles underlying the rules."

Whether the Committee membership deciding 80-6 considered any of the above sections of the Rules is unknown. However, it is the opinion of this Committee that the question of responsibility for payment for services ordered by Lawyer implicates each and that the administration of justice is hampered if consultants can't rely on lawyers to pay for services lawyers ordered.

In addition to the above, Lawyer also had a responsibility pursuant to Rule 1.8(e) to have a fee arrangement providing for the client to be ultimately responsible for that expense. The Committee was *not* provided any fee agreement for review. However, it is irrelevant to the question of who, in the first instance, is responsible to pay the consultant. Under the facts as provided, this Committee believes that the conclusion stated in Ethics Opinion 80-6 remains applicable.

***Lonnie R. Braun***  
**Chair, Ethics Committee**