

State Bar of South Dakota

Ethics Opinion 2000-3

March 31, 2000

- **Rules: 1.8(e), 8.4(d)**
- **Subject: Lawyer advancing money to a client; Expenses of medical treatment**
- **Summary: Rule 1.8(e) prohibits an attorney from advancing any money on behalf of a client that is not necessary to prosecute the action.**

FACTS

Lawyer represents a personal injury client. The client requires surgery to treat injuries sustained in the accident that is the subject of the representation. The client is unable to pay for the surgery. The doctors are unwilling to proceed without payment. Lawyer believes that liability and causation are clear. The insurance carrier for the defendant has not contested liability. Lawyer is willing to advance the costs of the surgery as a litigation expense. The client agrees that the costs may be treated as a litigation expense.

DISCUSSION

SDCL 16, 18 Appx., Rule 1.8(e) provides:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (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.

Financial assistance to a client is prohibited unless one or the other of the above exceptions applies. First, medical expenses are clearly not "court costs." Second, medical expenses are not "expenses of litigation." The comment to Rule 1.8 points out that "expenses of litigation" is not a catchall.

Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception of certain advances of the costs of litigation set forth in paragraph (e).

Comment to 1.8 (emphasis added). The word "certain" is a limiting adjective, the obvious limitation being that the costs must be costs of prosecuting the action. The surgery is not necessary to prosecute the action.

This seems to be the rule followed by other jurisdictions. "A lawyer who is handling a personal injury case for a client may not advance or guarantee financial assistance to the client for medical reasons regardless of the severity of the medical circumstances." Arizona EO 91-14. The Illinois

Ethics Committee opined that a lawyer may advance funds for medical examination where necessary for litigation, but is prohibited from paying medical expenses for a client as "expenses of litigation." Illinois EO 95-6. Likewise, the Rhode Island Ethics Committee opined that a lawyer may not "lend a personal injury client money for monthly mortgage payments." Rhode Island EO 91-26.

Lawyer advises that "client agrees that the costs may be treated as a litigation expense." However, no authority was found permitting either Lawyer or client to agree that a payment is something other than what it is.

Based upon the foregoing, it is the opinion of the Committee that Lawyer is prohibited from advancing funds for Client's medical expenses which are for treatment.

Lonnie R. Braun
Chair, Ethics Committee