

### Opinion 2013-3

Synopsis: A lawyer representing an indigent client may pay the interest charges accruing on a “non-recourse” loan made to the plaintiff in a lawsuit if the proceeds of the loan are used to pay court costs or expenses of litigation but not if the proceeds of the loan are for personal expenses of the client. A lawyer representing a non-indigent client may advance such costs, the repayment of which may be contingent on the outcome of the matter.

Question Presented: May a lawyer who represents a plaintiff in a personal injury claim pay the interest charges accruing on a “non-recourse loan” obtained by the plaintiff to help fund court costs and other expenses of litigation?

Facts: Attorney represents plaintiff in a personal injury case. Attorney and plaintiff have a written fee agreement providing for a contingency fee. The fee agreement provides that the clients are ultimately responsible for case costs. Plaintiff is considering entering into a “no-recourse loan” with a company that advances funds against future recoveries. Plaintiff has insisted that Attorney’s firm pay the interest on the non-recourse loan and has threatened to hire a new lawyer if Attorney does not.

Discussion: The initial inquiry posed the question whether the arrangement suggested by the plaintiff constituted champerty. Champerty is a common law doctrine not directly related to ethics. The Professional Responsibility Section is without authority to respond to the question whether the proposed conduct may constitute champerty.

There is an ethics issue raised by the question presented that the Section may address. The relevant rule is VRPC 1.8(e) which provides:

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

(1) a lawyer may advance or guarantee court costs and expenses of litigation, including expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, the repayment of which may be contingent on the outcome of the matter; and

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

Rule 1.8 was likely created prior to the rise of “lawsuit funding” companies that provide advances or loans against future judgments or settlements and, thus, the rule does not expressly address the interest question. However, the rule expressly allows a lawyer to advance<sup>1</sup> court costs or expenses of litigation

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<sup>1</sup> Rule 1.8(e)(1) permits a lawyer to advance of such expenses for a non-indigent client, with the expectation the expenses will be repaid from a recovery. Rule 1.8(e)(2) permits a lawyer to pay these expenses for an indigent client, with no requirement that they be repaid from a recovery.

with the understanding recovery of those advances is contingent on a recovery. The Professional Responsibility Section interprets the language allowing advancement of “court costs and expenses of litigation” to include advancement of any interest on loans taken to pay court costs or expenses of litigation. To our thinking, there is no principled distinction between a policy allowing advancement of expenses of litigation and one allowing advancement of interest necessary to fund such expenses. Therefore, we opine that a lawyer may advance or pay interest on funds borrowed to fund court costs or expenses of litigation.

Comment 10 to the Rule provides further support for this conclusion.

[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 on a lawyer lending a client court costs and litigation expenses, including the expenses of investigation and medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts.

The Rule and Comment make it clear payment of the interest by the lawyer would be unethical if the purpose of the loan is to pay the living expenses of the litigant. On the other hand, if the purpose of the underlying loan is to pay court costs or expenses of litigation, as it is in this case, we believe the rule permits the lawyer to advance or pay the interest on this loan, pursuant to Rule 1.8(3)(1) or (2).