

# ADVISORY ETHICS OPINION 1998-04

## **SYNOPSIS:**

A lawyer may not agree to waive the expenses of court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence unless the client is indigent or a party to a class action, and unless the client remains ultimately liable for such expenses.

## **FACTS:**

The inquiring attorney asks the following:

“Is it legal or ethical for a personal injury attorney to orally or in writing, at the signing of a retainer for a personal injury case with the plaintiff, agree to waive the costs advanced by the attorney’s office on behalf of the client in the event that the case is lost?”

## **DISCUSSION:**

Disciplinary Rule 5-103 (B) amended December 8, 1988, effective March 1, 1989, reads as follows:

“(B)While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, unless the client is indigent or party to a class action; a lawyer may, however, advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.”

Also see EC 5-8.

## **CONCLUSION:**

The Committee does not comment as to whether or not it is “legal” for an attorney to waive costs in advance, but Rule 5-103 (B) makes it clear that unless the client is indigent or party to a class action, the attorney may not advance or guarantee costs, unless the client remains ultimately liable for such expenses. The Rule does not define “indigent”, so the lawyer must make an actual, good faith attempt to ascertain the client’s ability to pay costs. Therefore, we conclude that an advance waiver of costs would amount to “guaranteeing” financial assistance which is impermissible under the Rule.

In passing, the Committee notes that the Vermont Supreme Court is currently considering whether or not to adopt the ABA Model Rules of Professional Conduct.

Rule 1.8 (e) of the Model Rules reads as follows:

“(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 court costs and expenses of litigation, 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 expense of litigation on behalf of the client.”

Sub (e) is similar to DR 5-103 (B) but eliminates the requirement that “the client remains ultimately liable for such expenses.”

Sub (e) (2) has no counterpart in the Vermont Code.