The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 3370, COLUMBUS, OH 43215-6105
(614) 644-5800 FAX: (614) 644-5804

OFFICE OF SECRETARY

OPINION 87-001
October 16, 1987

[Withdrawn by Board on Aug. 11, 2000 due to amended DR 5-103(B), eff. Jun. 14, 1999]

SYLLABUS: It is ethically proper for an attorney to advance expenses of litigation on behalf of a client, provided the client remains ultimately liable for such expenses. To what degree the lawyer attempts to seek reimbursement from his or her clients is a legal or business decision for the individual lawyer to make.

OPINION: We have before us your request for our opinion concerning advancement of costs and expenses of litigation by a contingent fee attorney in both the traditional two-party situation and in complex multi-party litigation. In your request letter you inquire:

1. Whether it is ethically proper to advance expenses,

2. Whether it is ethically proper not to seek reimbursement of expenses from a client if the suit is unsuccessful, and

3. Whether it is ethically proper to advance expenses in a situation where it appears at the outset of the litigation that the client may never be able to reimburse the lawyer for expenses advanced.

Your first question can be answered in the affirmative. An attorney can ethically advance expenses for the costs of litigation according to DR 5-103(B) and EC 5-8 of the Code of Professional Responsibility (the Code). Specifically, DR 5-103(B) of the Code states:

> [w]hile representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may 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. Id.

Your second and third questions cannot be as easily answered because the Code does not specifically address them[1]. In addition, the law, as you will see, is not perfectly clear.

The basic premise behind the Code's requirement that the client remain "ultimately liable" for any expenses advanced by the attorney is to prevent an attorney from acquiring an interest in the litigation which might interfere with his exercise of independent professional judgment. See, e.g., Brame v. Ray Bills Finance Corp., 85 F.R.D. 568, 578 (N.D.N.Y. 1979). Among the alleged dangers of acquiring an interest in the litigation is the possibility the attorney will settle the case

---

[1] The Model Rules of Professional Conduct adopted by the ABA, although not adopted in Ohio, address these issues and can be considered persuasive but not binding. Rule 1.8 (e) (1) and (2) of those rules state:

(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 costs and expenses of litigation on behalf of the client.

prematurely in order to guarantee the recovery of expenses. See, e.g., In Re Mid-Atlantic Toyota Antitrust Litigation, 93 F.R.D. 485, 490 (D. Md. 1982). Consistent with this, the court in Mid-Atlantic held that an agreement by attorneys to advance costs of litigation while informing the clients that the attorneys had a practice of never seeking reimbursement if the suit were unsuccessful violated the Code of Professional Responsibility DR 5-103(B). Id. at 490.

Before a lawsuit is brought, the lawyer should point out to his client that ultimate responsibility for payment of all costs lies with the client. A.B.A. Comm. on Ethics and Professional Responsibility, Opinion No. 1283 (1973). If the client refuses to agree to be ultimately responsible for the costs so advanced, the lawyer should withdraw from the case. Id Whether or not the attorney pursues collection of the costs and expenses is not an ethical, but a legal question for the individual attorney to decide. However, in this regard, EC 2-22 of the Code states:

> [a] lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client. Id.

We believe that this ethical consideration applies to costs and expenses as well as fees.

With regard to clients who apparently are unable to pay for litigation expenses, we direct you to Canon 2 of the Code. This Canon states that a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available. Furthermore, it was held in a federal disbarment proceeding that "whether it be attorney's fees, the expenses of litigation, or unconditional loans, the fact that it might be difficult or unlikely that the client will be able to reimburse the attorney for the same, absent a recovery on his claim, should not render the attorney's conduct improper." In the Matter of John Ruffalo, Jr., 249 F. Supp. 432, 445 (N.D. Ohio 1965).

In light of the staggering costs of litigation today, the advancement of litigation expenses by attorneys is commonplace. The Court in Ruffalo, citing an Ohio Supreme Court opinion held: "[i]ndeed, such advances by attorneys in the progress of litigation are so common that to denounce the practice as

improper would be to condemn the daily acts of most honorable members of the profession." Id. at 443-444, citing Reece v. Kyle, 49 Ohio St. 475 (1892). The Court went on to say that such advancements by attorneys allow many poor people to obtain justice where without such aid, they would be remediless. Id. at 444. In addition, the U.S. Supreme Court held that "a state cannot, through its power to regulate the conduct of attorneys, infringe in any way the right of individuals to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." Brotherhood of R.R. Trainmen v. Virginia, 84 S.Ct. 1113, 1117 (1964).

In the context of class actions, the advancement of expenses has become a significant issue. Because the Code applies to all types of litigation, DR 5-103(B) of the Code presents a "formidable obstacle to the practical ability of counsel to prosecute class litigation." In Re Agent Orange Product Liability Litigation, 611 F. Supp. 1452, 1459 (D.N.Y. 1985). However, the circumstances of complex litigation require a more sophisticated analysis than would be appropriate in the traditional two-party case that furnishes the model for much of the relevant ethical guides. Id. at 1460.

The alternatives to the attorney advancing the expenses of complex litigation, it has been argued, are often impractical or unfair. Developments in the Law-Class Actions, 89 Harv. L.R. 1318, 1619-1620 (1976). One alternative is an expense arrangement that is binding on some of the members of the class, ordinarily the named plaintiffs. Although such an agreement complies with the Code, it could nonetheless create a conflict of interest for the class attorney between his duty to the entire class and his felt obligation to the financing class members. Id. at 1620. Moreover, financing of the class suit by the named plaintiff or a small group of plaintiffs might well exceed the amount of their expected recovery, in which case the class action suit would never become a reality. Id. at 1620. Essentially, "an ironclad requirement that class representatives remain ultimately liable for expenses incurred would prevent many meritorious cases from ever reaching the courts." In Re Agent Orange Product Liability Litigation, 611 F. Supp. 1452, 1460 (D.N.Y. 1985). In short, the importance of class actions for handling multi-party litigation dictates avoiding any disincentives that may unnecessarily discourage counsel from undertaking the expensive and protracted cases necessary to vindicate the rights of a class. Id. at 1460.

Another argument against an attorney advancing litigation costs to a client who is unlikely to be able to repay, is that the attorney would be acquiring an interest in the outcome of the litigation. This argument is undermined in any contingency fee case inasmuch as these cases already have the effect of giving the attorney a financial stake in the outcome of the litigation. Developments in the Law-Class Actions, 89 Harv. L.R. 1318, 1622 (1976). Therefore, any "danger" in advancing costs in a contingency fee arrangement pale in comparison to efficiently resolving complex legal actions that involve hundreds of individual litigants.

Moreover, class actions have additional safeguards designed to protect the interests of the class members. The courts in certified class actions are given enormous control over the litigation including judicial review of all settlements and assessing of attorneys' fees. Fed. R. Civ. P. 23(e). These safeguards spill over to ethical considerations, thereby alleviating much of the concerns discussed herein. In other words, the court has the inherent power to prevent any abuses, which includes ethical violations. See, Manual for Complex Litigation §20.1 (1982).

In conclusion, it is our opinion, and you are so advised, that in class action litigation, multi-district or mass litigation, as well as the traditional two-party litigation, a lawyer may advance the expenses of litigation, provided the client remains ultimately liable for such expenses. To what degree the lawyer attempts to seek reimbursement from his or her clients is a legal or business decision for the individual lawyer to make.

This is an informal, non-binding advisory opinion, based upon the facts as presented and limited to questions arising under the Code Professional Responsibility.

James W. Mason, Esq.
Secretary, Board of Commissioners
on Grievances and Discipline