Ethics Opinion

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QUESTION PRESENTED: May an attorney borrow money in their firm name and then advance the loan proceeds to their clients during the pendency of the client's lawsuit or guarantee a loan which is made to the client during the pendency of a claim or litigation?

ANSWER: No.

ANALYSIS: The Disciplinary Rule 5-103 of the Model Code of Professional Responsibility, which pertains to this situation, does not appear verbatim in the Model Rules of Professional Conduct which were adopted by the Montana Supreme Court in 1985. DR 5-103 stated:

Avoiding acquisition of an interest in litigation:

> (a) A lawyer shall not acquire a proprietary interest in a cause of action or subject matter of litigation he is conducting for a client, except that he may:
>
> (1) Acquire a lien granted by law to secure his fee or expenses;
>
> (2) Contract with a client for a reasonable contingency fee in a civil case.
>
> (b) While 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 investigation, expense of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

The new Rules of Professional Conduct Rule 1.8, Conflict of Interest: Prohibited Transactions provides:

> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> > (i) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
> >
> > (ii) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
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> * * *

> (j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
>
> (i) acquire a lien granted by law to secure the lawyer's fee or expenses; and
>
> (ii) contract with the client for a reasonable contingent fee in a civil case.

It is obvious that DR 5-103(a) has been retained, virtually verbatim, in Rule 1.8(j). The changes in the text of the rule do not produce any substantive change. The substantive thrust of the old DR 5-103(b) has been retained in our new Rules. The old rule provided that a lawyer could not advance or guarantee financial assistance to a client. It further provided that a lawyer could advance or guarantee litigation expenses so long as the client remained ultimately responsible for such expenses. The new Rules do not make specific reference to either the advance or guarantee. It simply says a lawyer shall not provide financial assistance to a client in connection with contemplated or pending litigation. It goes on to say that the lawyer may advance litigation expenses and that such an advance may be contingent upon a recovery being made. Further, the new rules provide that when representing an indigent client, the lawyer can pay court costs and expenses without any such contingency. The rule does not allow the advance of payment of money under any other circumstance.

The clear purpose of the rules, both old and new, is to preclude any transaction where the lawyer's interest could, under any circumstances, become adverse to those of the client. Clearly, if a lawyer borrows money for the purpose of advancing the funds to the client or guarantees the client's loan, the economic interests of the client and attorney are potentially adverse. It should be noted that there was a conflict in the authority of earlier cases concerning the advance of monies for purposes other than costs and expenses of the client's litigation. The proposed Final Draft of the Model Rules of Professional Conduct dated May 30, 1981 provided:

> 1.8(e)(1) A lawyer may advance court costs, expenses of litigation, and reasonable and necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter;

The ABA House of Delegates struck the language allowing advance of medical and living expenses when the Rule was finally adopted. Our court did not adopt the language which authorizes the advance of medical or living expenses either. Borrowing money for the purpose of advancing funds to a client or guaranteeing a loan for a client produces the same result and are in direct contravention of Rule 1.8(e and (j). In this regard, a situation where a lawyer was providing living expenses for a client during the pendency of a case was addressed by the Ohio Supreme Court in 1967. The Court's interpretation of Canon 42 was:

> It is clear that the words "expenses" appearing after the semi-colon refers to "expenses of litigation." It would not include advances of the kind admittedly made

> by respondent for "living expenses during the period between the filing and the trial or disposal of a case."
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> * * *
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> It is obvious that, where the advancement of living expenses is made, as in the instant case, to enable the disabled client and his family to survive, any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting. The Cannons contemplate that this will be proper only where the advance is for "expenses of litigation."

Mahoning County Bar Association v. Ruffalo, 199 N.E.2d 396 at 398, 176 Ohio 263 (1964). This case is correctly decided. Its logic continues to apply under our Rules of Professional Conduct. It is noteworthy that the Ohio court suspended the respondent from the practice of law for an indefinite period of time as a result of the lending transactions at issue.

While not part of the opinion requested, there are attorneys in this state who have engaged in prohibited lending transactions under the mistaken impression that the same are now permitted, they should not necessarily be subject to disciplinary proceedings for those transactions.

Section 37-61-408(2), MCA, provides:

> (2) An attorney and counselor must not, by himself or by or in the name of another person, either before or after action brought, promise or give or procure to be promised or given a valuable consideration to any person as an inducement to placing or in consideration of having placed in his hands or in the hands of another person a demand of any kind for the purpose of bringing an action thereon. This subsection does not apply to an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received.

The statute indicates that an attorney cannot provide valuable consideration in the form of a loan or guaranty to a client or potential client. It has always been deemed unseemly and improper for an attorney to purchase an interest in any litigation. Clearly, if the attorney is personally responsible for the repayment of any client's loan, whether directly or indirectly, the attorney has necessarily, as a matter of economic reality, purchased an interest in the litigation.

Section 37-61-409, MCA, provides:

> Penalty for violation. An attorney and counselor who violates 37-61-409 is guilty of a misdemeanor and on conviction thereof shall be punished accordingly and must be removed from office by the Supreme Court.

While the legislature's capacity to mandate the Montana Supreme Court's regulation of practice of law is questionable, the statutory message which embodies the common law rules against champerty and maintenance is clear. The Bar should not continue activities which violate common law, the announced position of the Montana Legislature and the Rules of Professional Conduct.

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