

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-342
Issued: November 1990

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May a lawyer representing commercial creditors in collection cases on a contingent fee basis agree to advance litigation expenses without the clients having liability to repay these advances (under any circumstances of success or failure of the case)?

Answer: No.

References: Rule 1.8(e)(1).

OPINION

Rule 1.8(e)(1) permits the lawyer to advance court costs and expenses of litigation, and allows the client's responsibility for repayment to be contingent on the outcome of the litigation. In other words, if the case fails to generate a fund for repayment of the advances, the lawyer need not sue the client, and it is proper to declare in the fee contract that the client need not repay the advances if the case is not won.

This represents a modest change from DR 5-103(B), according to which the client had to be "ultimately responsible" for repayment of advances even when a case was lost.

Neither the letter nor the spirit of the new Rule permits the practice suggested. What is being suggested is that litigation expenses simply be absorbed by the lawyer in every case - no doubt as a condition of employment. In other words, the lawyer is invited - indeed required - to buy the client's legal work. This practice cannot be reconciled with either the old Code or the new Rules.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.