

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-375
Issued: March 1995

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: During the course of the representation, may a lawyer loan money to his or her client for financial assistance other than the expenses of litigation.

Answer: No.

References: Rule 1.8(e); Model Code DR 5-103(A) and EC 5-8; KBA E-51 (1971); selected state versions of ABA Rule 1.8(e); Charles Wolfram, Modern Legal Ethics (St. Paul: West, 1986); KBA v. Mills, 808 S.W.2d 804 1991.

OPINION

Advancing or lending money to the client for medical and living expenses, to be repaid from the proceeds of the litigation, may seem to some a decent and humanitarian thing to do. However, this was punishable at common law as criminal maintenance and champerty. These old crimes have been “defanged”, but the notion that the lawyer should not acquire an interest in the litigation was carried forward in DR 5-103(B) and now in Rule 1.8(e). See Wolfram at pp. 489-490, 507-509. “Both the Code and the Model Rules [and the Kentucky Rules] - implicitly but clearly - prohibit a lawyer from making any other financial assistance available to a client.” Id at 509. The answer to the question is still “no.” The Rule makes an exception for the “expenses of litigation.”

A few jurisdictions have amended Rule 1.8 to allow for some advances along these lines, which would be prohibited by the Model Rule and by Kentucky Rule 1.8(e). See, e.g., District of Columbia Rule 1.8(d)(2); Minnesota Rule 1.8(e)(3); Texas Rule 1.08(d). The thought behind these amendments is obvious. The argument is that poor clients may need help to sustain the burden of litigation, and litigation delay that otherwise favors their opponent. Critics contend that dropping the time-honored rule will invite bidding by lawyers for clients, and investment in the cause of action.

A majority of the Committee is persuaded that the Rule is, for the most part, well understood, and generally accepted. See KBA E-51 (1971). Any change should come by way of an amendment to Rule 1.8(e).

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.