DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1994- 3

December 16, 1994

This opinion is merely advisory and is not binding on the inquiring attorney, the courts or any other tribunal.

A member of the Delaware Bar has asked whether an attorney who has litigated a claim for a client may loan his client money for living expenses after the claim has been settled, but before the settlement consideration has been paid.

FACTS

The inquiring attorney filed a petition with the Industrial Accident Board of the State of Delaware ("IAB") in which he asserted his client's claim for total disability benefits. The claim was settled prior to hearing. After settlement, but prior to payment, the client asked the attorney to loan him some money so he could pay his rent.

Noting that Rule 1.8(e) of the Delaware Lawyers' Rules of Professional Conduct ("DIRPC") prohibits a lawyer from providing financial assistance to a client in connection with pending litigation, the inquiring attorney asks whether the rule applies after the claim has been settled, but before the payment contemplated by the settlement has been made.

CONCLUSION

Subject to certain exceptions not here relevant,[1] Rule 1.8(e) prohibits a lawyer from providing financial assistance to a client "in connection with pending or contemplated

[1] Rule 1.8(e) allows lawyers to advance court costs and litigation expenses.

litigation." The applicability of this rule to the situation presented by the inquiring attorney will be determined by: (a) whether the proposed loan is "in connection with" the litigation and (b) whether litigation is "pending" after settlement but before the payment of the settlement consideration.

A. Although the jurisprudence construing the phrase "in connection with" is sparse and conflicting, the Committee believes a loan by an attorney to a litigation client would be deemed to be "in connection with" the litigation where the attorney has no connection with the client apart from the litigation and the repayment of the loan is expected to come from the proceeds of the litigation.

B. Although the Committee has found no authorities dealing with the meaning of the word "pending" in the context of Rule 1.8(e), the Committee believes a settled litigation will not be deemed to be "pending" once it has been terminated under the rules of the tribunal. The fact that a settlement may require a party to do something in the future would not alter this conclusion, provided a default in the performance of the future obligation would not disturb the resolution of the claim or the termination of the litigation. On the other hand, where a settlement is contingent on the performance of an act in the future, the litigation would continue to be "pending" for purposes of Rule 1.8(e) until all conditions precedent to a final resolution of the claim had been satisfied and the case had been closed under the rules of the tribunal. The application of these general principles will turn on the particular facts and circumstances of the settlement and the rules and practices of the tribunal.

DISCUSSION

The prohibition imposed by Rule 1.8(e) on the provision of financial assistance to clients responds to special concerns that arise uniquely in the context of litigation. The prohibition has no application in other areas of practice.[2]

The prohibition is rooted in the common law bar against maintenance. At common law, maintenance was defined as the advancement of living or other expenses to a litigant so that the litigant would be financially able to continue the litigation. Maintenance and the related offense of champerty[3] were viewed as evils because they were believed to "stir up" baseless litigation.

Hazard & Hodes, The Law of Lawyering, §1.8:601 (1985) (hereinafter "Hazard"). Maintenance and champerty were forbidden to lawyers and nonlawyers alike. Hazard at §1.8:601.

The modern rule against the advancement of living expenses by lawyers to their clients in connection with litigation is motivated by another, perhaps more pragmatic, concern -- the risk that a lawyer's interest in recouping such advancements might compromise the independence of his or her professional judgment. Hazard at §1.8:601; C. Wolfram, Modern Legal Ethics at §9.2.3 (1986); ABA Code on Professional Conduct, Ethical Considerations 5-7 and 5-8. For example, a loan by a lawyer to a litigation client might invite a question as to

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[2] The provision of financial assistance to clients in other areas of practice is governed by Rule 1.8(a) which applies to all business dealings between lawyers and their clients.

[3] Champerty was the prosecution by one person of another person's claim in exchange for a portion of the recovery. The common law prohibition against champerty finds contemporary application in Rule 1.8(h) which, subject to certain exceptions, bars an attorney from acquiring "a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client." See DIRPC, Comment, Rule 1.8.

whether the lawyer's recommendation to accept a particular settlement offer is motivated by the lawyer's personal desire to be repaid or his professional assessment of his client's case.

Another danger against which the prohibition protects is the possibility that lawyers might engage in "unseemly competition" and try to "outbid" one another for clients. Wolfram at §9.2.3; See In re Reaves, S.C. Supr. , 250 S.E. 2d 329 (1978). Such bidding contests are thought to threaten the quality of the legal justice system by encouraging clients to select lawyers based on financial inducements rather than professional competency.

CONSTRUCTION OF RULE 1.8(e)

Rule 1.8(e) is the means by which Delaware has implemented these policy considerations. In pertinent part, the rule prohibits lawyers from advancing living expenses to clients (a) "in connection with" (b) "pending" litigation.

A. "In Connection With"

The prohibition against the provision of financial assistance to clients "in connection with" litigation has generally been given a broad interpretation, no matter how needy the client might be. See, e.g., Toledo Bar Assn v. Mcgill, Ohio Supr., 597 N.E.2d 1104 (1992); Florida Bar v Wooten, Fla. Supr., 452 So.2d 547, 548 (1984); In re Carroll, Ariz. Supr., 206 P.2d 461 (1979).[4] However, these cases may not express the current state of the law. They were

[4] Some jurisdictions have balked at the strictness of the Code and the harsh results it sometimes achieved. The leading case expressing this view is Louisiana State Bar Assn v. Edwins, La. Supr., 329 So.2d 437 (1979) in which the court held that financial assistance to a needy client would not violate DR 5-103 (D) where (1) the client has already retained the lawyer, (2) there has been no promise of financial assistance made to the client to induce the client to retain the lawyer, (3) the expenses are limited to minimal living expenses and minor sums necessary to prevent foreclosure or to provide necessary medical treatment, (4) the client remains

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decided under former DR 5-103 (B) , the predecessor of the present Rule 1.8(e). The language of current Rule 1.8(e) differs slightly from that of former DR 5-103 (B). A comparison of the two rules suggests that the new rule has changed the circumstances in which the prohibition applies.

1. The Language of Former DR 5-103(B)

Former DR 5-103 (B) stated in pertinent part: "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client." This language defined the rule's application with a bright temporal line. It applied "while" the lawyer represented the client. The phrase "in connection with pending or contemplated litigation" def ined the nature of the representation during which the prohibition applied.

Thus, former DR 5-103 (B) imposed a blanket prohibition against the provision of financial assistance by lawyers to clients during the time when the lawyer represented the client in connection with pending or contemplated litigation. Under the language of former DR 5-103 (B) the prohibition applied even though the financial assistance might have had nothing to do with the litigation.

2. The Language of Rule 1.8(e)

The Rule 1.8(e) states in pertinent part: "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation." The present rule uses much of the language of the former rule, but it omits the phrase "while representing" and rearranges the phrasing.

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liable to repay the advances, and (5) the lawyer does not encourage public knowledge of his

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The Committee believes both changes are potentially significant. The phrase "while representing" had been the basis for the bright temporal line drawn by former DR 5-103(B). Its omission removes the link between the prohibition on financial assistance to clients and the period of time during which the lawyer represents the client. The rephrasing of the rule changes the referent of the phrase "in connection with." In former DR 5-103 (B) the phrase "in connection with pending or contemplated litigation" referred to the type of representation during which the rule's prohibition would apply. In Rule 1.8(e) the phrase refers to the nature of the financial assistance to which the prohibition applies.

These changes, taken together, suggest that under Rule 1.8(e), a lawyer is not prohibited from providing financial assistance to a client while representing the client in connection with pending or contemplated litigation, unless the financial assistance is connected in some way to the litigation. That connection would be established where the provision of financial assistance would offend the public policy the rule was adopted to implement.

3. The Case Law

The foregoing conclusion cannot be expressed with great assurance because the jurisprudence on this issue is sparse and conflicting.

In Attorney Grievance Comm'n. v. Eisenstein, Md. Supr., 635 A.2d 1327, 1337 (1994), the Supreme Court of Maryland rejected the idea that Rule1.8(e) had changed the circumstances under which lawyers were prohibited from providing financial assistance to litigation clients. The issue in that case was presented by an attorney who had been sanctioned

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willingness to give financial assistance to his clients.

for, among other things, having made a personal loan to a longstanding friend while representing the friend in litigation. Such a loan would have clearly been on the wrong side of the temporal line drawn by former DR 5-103 (B) . However, this loan was governed by Rule 1. 8(e). The attorney argued Rule 1.8(e) had created a new standard under which he had done no wrong because the loan had been made to help a personal friend, and therefore, was not "in connection with" the litigation. The Maryland court, acknowledging that the language of Rule 1.8(e) differed from that of its predecessor, nonetheless concluded that the prohibition imposed by Rule 1.8(e) was "essentially the same" as that imposed under former DR 5-103(B).[5]

The Florida Supreme Court took the opposite view. In The Florida Bar v. Taylor, Fla. Supr., No. 82, 526, 1994 Fla. Lexis 1810 at *5 (November 17, 1994) (finality suspended, pending motion for reargument), a per curiam decision in which four justices concurred, three dissented, and two recused themselves, the court held that Rule 1.8(e) does not impose a blanket prohibition on all financial assistance given to a client during the pendency of litigation. Taylor, 1994 Lexis 1901, at *5.

In the Taylor case, the Florida Bar appealed a disciplinary hearing officer's decision not to discipline a lawyer for having made a $200 loan to a needy client during the course of litigation. Focusing on the phrase "in connection with," the hearing officer had concluded that the loan did not violate Rule 1.8(e) because the loan had not been made to induce the client to

[5] Although the point was not addressed in the court's discussion of Rule 1.8(e) , its findings of facts indicate the loan was repaid out of the proceeds of the litigation. If that was part of the agreement between Eisenstein and his client, the court could have concluded that the loan was "in connection with" the litigation and thus reached the same result.

retain the lawyer's firm or to cause the client to continue to use the firm and because the lawyer had not required the client to agree to its repayment out of the proceeds of the litigation.

Characterizing the issue as one of first impression, the four justice majority stated: "it is our opinion that the ethical concerns surrounding the prohibition against attorneys providing financial assistance to clients have consistently focused upon preventing attorneys from promising their clients financial assistance in order to establish or maintain employment." Id. Finding that the loan had been made for humanitarian purposes and further finding no facts to suggest that it had been made for an improper purpose, the majority affirmed the hearing officer's decision.

In his dissenting opinion (in which two justices joined), Chief Justice Grimes agreed with the majority's view of the public policy to be served by Rule 1.8(e) and expressed no disagreement with the majority's view that the rule only prohibits lawyers from advancing funds to clients "in connection with" litigation. Chief Justice Grimes did, however, take issue with the majority's assessment of the facts. In his view, the loan "was clearly in connection with the litigation," because the lawyer's only relationship with the client was through his firm's representation of the client in the litigation.[6] Taylor, 1994 Lexis at *7.

Chief Justice Grimes' dissent seems to suggest that a loan to a litigation client with whom a lawyer has no other relationship should be presumed to be "in connection with" the

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[6] Justice Grimes' reading of Rule 1.8(e) is different from that of the Maryland Supreme Court. Applying Justice Grimes' approach, the Maryland court might have concluded that Eisenstein's loan to his longstanding friend was not "in connection with" the litigation in which he represented his friend.

litigation. His opinion does not, however, suggest whether such a presumption would be conclusive or rebuttable.

4. The Committee's Construction of "In Connection With"

The Committee believes the construction of the phrase "in connection with" should follow from the language of the rule. The Committee also believes that the better construction of the phrase will allow the rule to reach the areas of professional conduct where its protections are needed and at the same time prevent the rule from intruding into areas where its prohibition on client loans has no place.

The blanket prohibition adopted by the Maryland Supreme Court in Eisenstein is derived from jurisprudence developed under former DR 5-103 (D), not a close analysis of Rule 1.8(e)'s language. Although Eisenstein's broad construction would allow the rule to fulfill its public policy purpose, it would also extend the rule's prohibition against client advances into areas where special concerns created by litigation are not involved.

The Committee believes the construction adopted by the Florida Supreme Court in the Taylor case and the presumption suggested by Justice Grimes's dissenting opinion are more closely in tune with the rule's language. That language only prohibits financial assistance to clients "in connection with" pending or proposed litigation. The Taylor decision construes this language so that the rule's prohibition is limited to the areas where the special concerns created by litigation are present.[7]

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[7] An example illustrates the point. A business loan by a lawyer to a business client for business reasons would not violate Rule 1.8(e). The public policy behind the Rule 1.8(e)

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For these reasons, the Committee believes other courts will be more likely to follow the views expressed in Taylor than those expressed by in Eisenstein. Based on this assessment of an admittedly unsettled area of law, the Committee concludes that an offer of financial assistance made for the purpose of inducing a client to engage the lawyer's services or the provision of financial assistance made for the purpose of causing the client to continue to use the lawyer's services would be "in connection with" litigation for purposes of the rule. Similarly, an agreement or understanding that a litigation client would repay a loan from the proceeds of the claim, would "connect" the loan to the litigation.[8] These examples are not intended to be categorical. Other circumstance will arise in which financial assistance by a lawyer to a client would implicate the policy concerns behind the rule. Such circumstances would be sufficient to "connect" the f inancial assistance to the litigation for purposes of Rule 1. 8 (e) .

he Committee also believes that in cases where a lawyer has no relationship with a client other than through the litigation the courts will adopt the presumption suggested by Justice Grimes' dissent. The Committee does not, however, believe that the public policy concerns behind Rule 1.8(e) will require courts to make the presumption conclusive. The burden of persuading a disciplinary hearing panel that financial assistance to such a client was not connected to the litigation should be enough to deter a lawyer who might otherwise be tempted to

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suggests no apparent reason why this conclusion should change if it happened that the lawyer was also representing the client in unrelated litigation. Nonetheless, under Eisenstein's view of the rule, this additional fact would trigger the rule's bar against client loans. Taylor's reading of the rule would reach the opposite result because the loan was not "in connection with" the litigation.

test the line. On the other hand, where the facts allow a lawyer to overcome the presumption and convince a hearing panel that the transaction did not implicate the public policy concerns behind the rule, the hearing panel could reasonably conclude that the financial assistance was not "in connection with" the litigation and therefore did not offend Rule 1.8(e). In that event a mandatory sanction such as would be created by a conclusive presumption would serve no purpose.

5. The Committee's Conclusion

With respect to the question posed by the inquiring attorney, the Committee understands that the inquiring attorney has no connection with the client other than his representation of the client in connection with the IAB proceedings. The Committee also understands that the attorney and client expect the loan be repaid out of the settlement proceeds. Based on these understandings, the Committee believes the loan would be deemed to have been made "in connection with" the IAB proceedings.

B. "Pending"

Having determined that the proposed loan would be "in connection with" the IAB proceedings, the Committee must construe the word "pending" to determine whether Rule

[8] Moreover, an agreement that went even further and secured the client's repayment of a loan by imposing a lien on the proceeds of the litigation would also violate Rule 1.8(j). at rule prohibits a lawyer from acquiring a proprietary interest in the subject matter of the litigation.

1.8(e)’s prohibition would apply after the claim for disability benefits has been settled, but before the settlement consideration has been paid.

1. The Language of The Rule

The Committee's research has revealed no authorities addressing this question. Accordingly, the Committee turns to the language of the rule which it reads in light of the public policy considerations motivating the rule's adoption. The rule applies to "contemplated" and "pending" litigation. The reference to "contemplated" litigation protects the public against the harms occasioned by lawyers "bidding" for clients, and the reference to "pending" litigation preserves the independence of the lawyer's litigation judgment until the case is over. However, because the rule refers only to "contemplated" or "pending" litigation, its prohibition against loans to clients does not apply when the lawyer's engagement does not involve litigation.

As with the construction of the phrase "in connection with," the Committee believes the proper construction of the word "pending" would be broad enough to allow Rule 1.8(e) to reach the areas of professional conduct where its protections are needed, and at the same time, narrow enough to prevent its prohibition on client loans from intruding into areas where the special concerns created by litigation are not present. A balance between these competing considerations is struck by construing the word "pending" by reference to the rules of the tribunal governing the termination of the litigation. The termination of a litigation marks the point when there is no longer a reasonable possibility the lawyer will be required to advise the client concerning the litigation, and therefore, it also marks the point when there is no longer a need to preserve the independence of the lawyer's litigation judgment. Thus, the Committee

believes that a court would hold that a litigation is "pending" for purposes of Rule 1.8(e) until it is terminated under the rules of the tribunal.

2. Examples of "Pending" Judgments

The application of this general principle will turn on the particular facts and circumstances in which the issue is presented. For example, a litigation would not be "pending" within the meaning of Rule 1.8(e), if a judgment finally adjudicating the merits of all claims or defenses asserted by the client in the litigation had been entered by the tribunal and that judgment was no longer subject to appeal. But, a litigation would be "pending" for purposes of Rule 1.8(e) if the judgment resolved less than all of the claims or defenses asserted by the client, because in that circumstance there would remain a reasonable probability that the lawyer would be required to exercise independent professional judgment with respect to the unresolved claims or defenses.[9]

3. Examples of "Pending" Settlements

When a claim in litigation has been settled, the litigation would not be "pending" within the meaning of Rule 1.8(e), if the last act required by the tribunal to terminate the litigation had been completed.[10] Payment of the settlement may or may not be part of that process, depending on the terms of the settlement and the procedures of the tribunal.

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[9] Similarly, when a case is dismissed without prejudice, or terminated on some non-substantive, procedural ground, the client may "contemplate" a new litigation in which the defect would be cured. In that circumstance, Rule 1.8(e)'s prohibitions would remain in effect.

[10] There may be a delay between the settlement of a claim and the termination of the litigation under the tribunal's rules. The Committee has linked the definition of "pending" to the termination of the litigation under the rules of the tribunal, because, until a case is terminated in the eyes of the tribunal, there is a small, but reasonable, possibility that a judge may do something that will require the lawyer to advise the client about the case.

A settlement agreement that requires a party to do something in the future creates the possibility of a default in the performance of that future act. However, the Committee does not believe, unless the settlement agreement provides otherwise, that a litigation finally and completely terminated under the rules of the tribunal would be viewed as "pending" for purposes of Rule 1.8(e) merely because the agreement under which it was settled included terms to be satisfied in the future. An action to enforce such a settlement against the defaulting party would be a new litigation, not a continuation of the old one.

On the other hand, when the effectiveness of the settlement is contingent on the performance of an act in the future, the litigation would be viewed as "pending" for purposes of Rule 1.8(e) until all conditions precedent to the final resolution of the claim had been satisfied and all acts required by the tribunal to terminate the litigation had been completed. If a contingent settlement were to fall apart, the litigation would resume. Thus, so long as a settlement remains contingent, there is a reasonable possibility that the lawyer will be required to advise the client concerning the litigation.

4. <u>The Committee's Conclusion</u>

With respect to the question posed by the inquiring attorney, the Committee understands that the settlement of the client's total disability claim is final. The Committee also understands that the finality of the settlement is not contingent on the payment of the settlement amount.[11] The Committee assumes that the steps required by the IAB to terminate

[11] In other words, it is the Committee's understanding that the client's remedy in the event of a default would be an action for specific performance of the settlement agreement, not a resumption of the claim for total disability benefits.

the litigation have been completed. Based on these understandings and assumptions, the Committee does not believe the IAB proceedings are "pending" for purposes of Rule 1.8(e). Accordingly, the Committee does not believe that Rule 1.8(e) would prevent the inquiring attorney from loaning his client money for rent.[12]

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[12] Of course, the advancement of living expenses by the inquiring attorney to his client, like any transaction between a lawyer and a client, would have to comply with the general requirements of Rule 1.8(a).