

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS**

FORMAL OPINION 2019-6: Provision of financial assistance to indigent clients in administrative proceedings

TOPIC: Provision of financial assistance to indigent clients.

DIGEST: Subject to exception, Rule 1.8(e) forbids a lawyer from providing financial assistance to a client when the lawyer is representing the client “in connection with contemplated or pending litigation.” Although a lawyer representing “an indigent or pro bono client” in connection with a litigation may “pay court costs and expenses of litigation” on behalf of the client, the lawyer may not provide financial assistance for living expenses or other expenses unrelated to the litigation. Nor may other lawyers or non-lawyers in the lawyer’s firm do so. However, when the lawyer serves in a legal services department within a not-for-profit social services agency, the rule does not forbid the lawyer from assisting the client in securing financial assistance and other assistance unrelated to the litigation from the social service agency itself, provided that the law office plays no role in directing the social services agency’s activities, and the social services agency makes an independent assessment of the client’s eligibility and need for assistance. In addition, a lawyer may refer a client to outside agencies that provide such assistance.

RULES: 1.8(e).

OPINION:

I. INTRODUCTION

Rule 1.8(e) of the New York Rules of Professional Conduct (the “Rules”) provides, subject to exception, that: “While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client.” Among the exceptions are that “a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client.” However, the lawyer representing a party in a contemplated or pending litigation may not advance or otherwise provide financial assistance with regard to expenses that are unrelated to the litigation.¹

The accompanying Comment explains the rationale for this restriction as follows: “Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.”²

¹ See NYCBA Formal Op. 2010-3 (2010) (opining that the lawyer may not indemnify client for “potential liabilities arising out of the performance of a settlement agreement after the litigation has been concluded”, because these are not “costs and expenses of litigation”).

² Rule 1.8, Cmt. [10]. The restrictions in Rule 1.8(e) have their origin in the common law prohibition of champerty and maintenance. See Utah State Bar Ethics Advisory Opinion Comm. Op. No. 11-02 (2011) (citing Geoffrey Hazard and W. William Hodes, *THE LAW OF LAWYERING* §12.2 (3rd ed. 2011)).

In addition to these concerns, Rule 1.8(e) relates to the more general principle underlying all conflict of interest provisions that a lawyer must be able to provide independent professional judgment for each client. This concern is most obvious where the lawyer has advanced funds with an expectation that they will be repaid. As one court explained in the context of the predecessor to Rule 1.8(e),

[T]he rule in question is intended and designed to maintain the independent judgment of counsel in the representation of clients. If a client owes his attorney money, the attorney may have his own pocketbook in mind as he handles the litigation. That attorney might settle for an amount sufficient to cover the loan to his client, while foregoing the risk of a trial where his client could recover a larger amount *or lose everything*.³

The ABA has cautioned against paying bail on behalf of indigent clients, noting that whether an attorney may pay a client's bail depends on the extent to which the attorney's ability to exercise independent judgment will be limited:

A lawyer who advances substantial funds or puts substantial assets at risk to secure a client's release on bail has a personal interest in avoiding financial loss. . . . [U]nless the amount at risk is inconsequential to the lawyer, there will be a significant risk that this personal interest will materially limit her ability to exercise her independent professional judgment on the client's behalf.⁴

However, this concern may apply as well to situations where an attorney has given funds to an indigent client without any expectation of repayment. As one ethics opinion has noted in the context of payments to an incarcerated client's commissary account,

a client continually asking for monetary gifts from a lawyer could interfere with the independent professional judgment of the lawyer. . . . [A lawyer who makes such gifts to the incarcerated client] should do so in such a way that avoids any impression on the part of the client that the gift is a "reward" or inducement for accepting the plea agreement encouraged by the attorney. The attorney's advice on that point should in no way be linked to the offer of the financial gift.⁵

³ *Shea v. Virginia State Bar*, 374 S.E.2d 63, 64-65 (Va. 1988) (interpreting Virginia's version of DR 5-103(B), the predecessor to Rule 1.8(e)) (emphasis in original).

⁴ ABA Formal Op. 04-432 (2004); *cf.* Md. State Bar Ass'n, Comm. on Ethics, Ethics Docket 2001-10 (2001) (finding that payment of bail is not a permissible "advance of court costs, or expenses of litigation" within the meaning of Rule 1.8(e)").

⁵ Va. Opinions of the Standing Comm. on Legal Ethics, Legal Ethics Op. No. 1830 (2006) (interpreting Rules 1.8(e) and 1.7(a))

II. ANALYSIS

Against this background, this opinion considers whether the restriction of 1.8(e) applies to a lawyer in the following scenario:

A lawyer works in the legal services department of a not-for-profit social services agency which provides various assistance to its clients, including financial assistance, medical and mental health services, educational assistance, and legal assistance. The legal services department does not take direction from the non-lawyer directors of the agency with regard to the practice of law, and unless clients give informed consent, the legal services department does not share client confidences with non-lawyers in other departments of the agency.⁶ The lawyer provides legal assistance to clients seeking to secure Social Security benefits and other government benefits. Among them are clients whom the lawyer represents in adversarial proceedings regarding their eligibility for benefits. While the proceedings are pending, insofar as ethically permissible, the lawyer seeks to assist clients in securing financial assistance with respect to living expenses and other non-litigation assistance from other departments of the social service agency.

The Rules do not define “litigation” for purposes of Rule 1.10(e) and other purposes, but the accompanying Comment takes the view that “[l]awyers may not subsidize lawsuits *or administrative proceedings*.” Rule 1.8, Cmt. [10] (emphasis added). Based on the Comment, we assume that adversarial proceedings in an administrative setting constitute “litigation” for purposes of Rule 1.8(e).

Nor do the rules define “expenses of litigation.” Authorities recognize that litigation expenses are not limited to conventional costs such as payments to experts, translators and court reporters, payments for mailing and photocopying, or payments for medical examinations necessary to ascertain damages in a personal injury case. Litigation expenses may include the expense of travel to meet with the lawyer or to attend court.⁷ Likewise, they may include medical treatment “if the client otherwise cannot afford to travel to treatment and if failure to obtain treatment may be used by the insurer to minimize the extent of the client’s injuries.”⁸ However, routine medical care and living expenses do *not* qualify as expenses of litigation even if, in the absence of assistance, the client may be pressured to accept an unfavorable settlement.⁹

⁶ In general, in representing clients, lawyers serving in social service agencies may not take direction from non-lawyers who direct the agency or share client confidences with them. See Rule 1.8(f); *see generally* NYCBA Formal Op. 1997-2 (1997); NYSBA Formal Op. 957 (2013).

⁷ *See, e.g.*, R.I. Sup. Ct., Ethics Advisory Panel Op. 2012-08 (2012) (expenses for travel to court); Conn.Bar Ass’n Comm. on Prof.Ethics, Formal Op. 00-21(2000) (travel and lodging for client attending deposition). In addition, one New York ethics opinion concluded that the purchase of video surveillance equipment for use in a lawsuit was an acceptable expense of litigation, which the lawyer was permitted to pay. N.Y. State Op. 997 (2014)

⁸ N.Y. State Op. 1044 (2015);

⁹ N.Y. State Op. 1044 (2015); *see also* State Bar of S.D., Ethics Op. 2000-3 (2000).

An additional important distinction is between non-litigation related “financial assistance” and other types of assistance. One treatise explains that “financial assistance” includes not only cash but also other forms of financial help for the client:

[T]he phrase “financial assistance” means assistance that either (a) adds to the client’s financial resources (such as a cash gift or loan), or (b) spares the client from an expense the client would otherwise have to bear (such as a lawyer’s payment of the client’s rent, medical expenses, living expenses or car payments).

[T]he lawyer may not assist a client by (a) giving the client cash, (b) lending money to the client, or (c) paying or guaranteeing payment for something that the client would otherwise have to pay for personally. . . .¹⁰

But not all “assistance” unrelated to the litigation constitutes “financial assistance” forbidden by the Rule:

Rule 1.8(e) prohibits only “financial” assistance, not other types of assistance. A lawyer may give the client things that have *de minimis* monetary value, such as a ride to the court house, a fruit basket at the holidays, or an occasional lunch, and the lawyer may certainly assist the client in purely non-monetary ways, such as by writing a favorable employment recommendation for the client.¹¹

Applying this distinction, a lawyer may not pay a client’s car payments, office rent, costs of full-time nursing care, or free food and lodging at a motel in which the lawyer owns a controlling interest. However, a lawyer may “help the client find resources to help get the client back on his feet again.”¹²

Therefore, except for *de minimis* contributions, such as occasional payments into prison commissary accounts, Rule 1.8(e) does not authorize a lawyer to provide living expenses, even as a gift, to an indigent or pro bono client in connection with a litigation. Nonetheless, as discussed below, we conclude that when a lawyer serves in the legal services department of a social service agency, the restriction of Rule 1.8(e) does not apply to individuals outside the social service agency’s legal services department unless those individuals are acting as agents of the lawyer.

As a general matter, Rule 1.8(e) applies equally to uncompensated representations of indigent clients as to other representations. In this respect, New York’s version of the rule differs from that of more than ten other states and the District of Columbia which have adopted a “humanitarian exception” or have recognized other limitations “that allow lawyers to make loans

¹⁰ Roy D. Simon & Nicole Hyland, *Simon's New York Rules of Professional Conduct Annotated* 547 (2017 ed.)

¹¹ *Id.*

¹² *Id.* at 546-47. Similarly, ethics opinions from other states have concluded that a lawyer may not pay expenses for the client’s housing, Md. State Bar Ass’n, Comm. on Ethics, Ethics Docket 2001-10 (2001); or the cost of a rental car while the client is awaiting settlement of a lawsuit. S.C. Bar Advisory Op. 91-31 (1991).

or gifts to relieve necessitous circumstances.”¹³ The Professional Responsibility Committee recently recommended that the New York judiciary adopt a comparable exception.¹⁴

Rule 1.8(e) applies both to the lawyer who represents a litigant and to other lawyers and non-lawyers in the lawyer’s firm. This is one among a series of “specific conflict of interest rules” included in Rule 1.8 relating to the representation of current clients. As a general matter, the restrictions apply not only to the personally-affected lawyers but to other lawyers of a firm. *See* Rule 1.10(a) (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as provided therein.”). With regard to Rule 1.10(e), there is no exception to the principle that the restriction is imputed to all the lawyers of the firm. Further, lawyers must take reasonable measures to ensure that non-lawyers in the firm do not circumvent the restriction of Rule 1.8(e). *See* Rule 5.3. Therefore, a litigant’s lawyer may not do indirectly through the acts of another what the lawyer is not permitted to do directly. Thus, the lawyer may not ask, or permit, others in the firm to provide financial assistance to an indigent or pro bono litigant in connection with the litigation other than with regard to court costs and expenses of the litigation. *See* Rule 8.4(a).

Therefore, if a lawyer in the legal services department represents a client in connection with a litigation, the lawyer may not provide financial assistance to the client other than with respect to court costs and expenses. Nor may others in the legal services department provide financial assistance to the client that is unrelated to the litigation.¹⁵

A lawyer may, however, assist the litigant in obtaining financial support from an individual or entity outside the firm who is not acting at the lawyer’s direction.¹⁶ Therefore, a lawyer may assist a litigant in obtaining financial support regarding non-litigation expenses from an individual or entity, including a social service agency, which is entirely independent of the lawyer. Helping the client to secure outside financial support does not implicate either the terms of Rule 1.8(e) or its underlying purposes.

The question we address here is whether a lawyer in a social service agency’s legal services department may help a client obtain non-litigation financial support from an independent department of the agency. Doing so, in many cases, will be consistent with the agency’s objective

¹³ New York City Bar, Report by the Professional Responsibility Committee, “Proposed Amendment to Rule 1.8(e), NY Rules of Professional Conduct” (March 2018); *see generally* Philip G. Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 GEO. J. LEGAL ETHICS 39 (2015).

¹⁴ Report by the Professional Responsibility Committee, *supra*, n. 13.

¹⁵ As discussed above, this restriction does not apply to *de minimis* expenses, such as occasional contributions to a jail commissary account.

¹⁶ *See, e.g.*, NYCBA Formal Op. 2011-2 (2011) (discussing rules applicable to lawyer’s assistance to client seeking litigation financing); NYSBA Formal Op. 1066 (2015) (stating that a lawyer may help a litigation client secure a loan from a lender, subject to ethical restrictions); and ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 484 (2018) (stating that a lawyer may refer a client to fee financing companies or brokers in which the lawyer has no ownership or other financial interests, provided the lawyer complies with the relevant rules).

of providing multiple kinds of services or assistance (e.g., medical, educational, financial and legal) to its clientele in light of individuals' multiple, often inter-related, needs.

In general, for purposes of Rule 1.8(e), the "firm" of a lawyer employed by a social service agency is the "legal services department" of the social service agency, not the entire agency. Rule 1.0(h) defines a "firm" or "law firm" for purposes of the Rules to include "lawyers in . . . the legal department of a corporation or other organization." The "firm" does not extend to individuals or departments outside the department that is providing legal services to clients.¹⁷ Therefore, a lawyer in a social service agency's legal department is not *per se* precluded from assisting a litigation client in obtaining non-litigation services from other departments of the agency.

However, a lawyer may not circumvent the restriction through other agency employees who function as agents of the lawyer even if they are outside the social service agency's legal services department. Cf. Rule 8.4(a) ("A lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."). If there is an explicit or tacit understanding that the other employees or departments will invariably provide financial assistance or other non-litigation services at the lawyer's request, rather than making an independent determination of whether the client should receive assistance, then the other departments are functioning essentially as an arm of the law department for this purpose, even if they are formally outside the law department.

The lawyer may assist the litigation client in obtaining non-litigation financial assistance from the non-legal departments of the agency only if individuals outside the agency's legal department are not subject to the lawyer's direction and supervision and are therefore operating independently of the legal department in deciding whom to assist. This will ensure that the lawyers are not providing non-litigation related financial assistance to clients directly or indirectly in violation of Rule 1.8(e). As discussed above, the agency's provision of such financial assistance to the legal services department's clients must not interfere with the lawyer's exercise of independent professional judgment on behalf of the client.

To ensure that there is sufficient independence between the agency's legal and non-legal departments to comply with Rule 1.8(e), the agency could set up a restricted account to hold charitable donations from private donors for use in meeting client emergency needs, as well as other types of necessary expenses such as tuition for GED or vocational programs, licensing fees, etc., the decisions for which would be made by a person or committee operating with complete independence. The understanding would be that if the client demonstrated need according to a set of fixed criteria, and funds were available, a grant would be made. This would be equivalent to a referral to a private charity, which is clearly permissible.

¹⁷ In many cases, when a lawyer serves in the legal department of an entity, such as a corporation, representatives of the entity outside the legal department function as constituents of the organizational client, see Rule 1.13, cmt. [1], not as agents of the lawyer or the legal department. In the context of this Opinion, in contrast, the legal department of the not-for-profit agency does not represent the entity but represents individuals who are clients of the agency. For another recent opinion addressing ethical questions facing lawyers serving clients in not-for-profit settings, see NYCBA Formal Op. 2017-4 (2017) ("**Error! Main Document Only.**Ethical Considerations for Legal Services Lawyers Working with Outside Non-Lawyer Professionals").

We distinguish the situation described above, in which the agency's legal services department is referring a client to the non-legal department for assistance, from the reverse situation where the person is already receiving financial assistance from the non-legal department when the person comes to the legal services department for assistance. For example, an agency may already be providing the person with services such as meals, education, counseling, medical care, clothing, and transportation before a legal problem arises that sends the person to the agency's legal services department. In such a situation, one can presume for the purpose of Rule 1.8(e) that any financial assistance the person was receiving from the non-legal departments was being provided independently of the legal services department. And as discussed above¹⁸, if the assistance provided in this example by the non-legal departments was non-financial, Rule 1.8(e) would not be implicated.

III. CONCLUSION

Subject to exception, Rule 1.8(e) forbids a lawyer who is representing a client "in connection with contemplated or pending litigation" from providing financial assistance to the client. Although a lawyer representing "an indigent or pro bono client" in connection with a litigation may "pay court costs and expenses of litigation" on behalf of the client, the lawyer may not provide financial assistance for living expenses or other expenses unrelated to the litigation. Nor may other lawyers or non-lawyers in the lawyer's firm do so. However, when the lawyer serves in a law office within a social service agency, the rule does not forbid the lawyer from assisting the client in securing financial assistance unrelated to the litigation from the social service agency itself, provided that the decision to provide financial assistance is made by individuals who are not under the control or direction of the lawyer and are acting with independence and autonomy. Rule 1.8(e) does not preclude the agency from providing other types of non-financial assistance to clients or referring clients to outside charitable organizations.

¹⁸ See nn.11 and 12, *supra*, and accompanying text. Rule 1.8(e) prohibits only "financial assistance" ("a lawyer shall not advance or guarantee financial assistance to the client. . .").