



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in May 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.8(e) with its Comment [10]. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 95-6
October, 1995

Topic: Advances of medical expenses to client.

Digest: An attorney may not advance money to a hospital on behalf of a client for medical expenses of the client.

Ref.: Illinois Rules of Professional Conduct, Rule 1.8(d)

In re The Illinois Trial Lawyers Association, M.R. 6852 (5/27/1993), Supreme Court den'd petition to amend Supreme Court Rule 1.8

Topps v. Pratt & Callis, P.C., 206 Ill.App.3d 298, 564 N.E.2d 196, 151 Ill.Dec. 219 (4th Dist. 1990), app.den., 136 Ill.2d 555, 567 N.E.2d 343, 153 Ill.Dec. 385 (1991), app. granted, 137 Ill.2d 672, 571 N.E.2d 156, 156 Ill.Dec. 569 (1991), cause dism'd, 579 N.E.2d 890, 162 Ill.Dec. 76 (1991).

ISBA Advisory Opinions on Professional Conduct, Nos. 151, 87-10, and 92-9.

FACTS

A client who suffered injuries in an automobile accident is being treated by an orthopedic surgeon who has prescribed back surgery for injuries related to the accident. The client does not have health insurance. The hospital will not accept the client as a patient unless it receives a \$2000 deposit. The client has asked the attorney handling his case if the attorney could advance the money to the hospital so that the client can undergo the surgery.

QUESTION

May an attorney advance money to a hospital on behalf of a client to secure medical treatment to the client?

OPINION

At common law, there is a long-standing rule against advancing financial assistance to a client in connection with pending or anticipated litigation. It has long been felt that such assistance could encourage attorneys to use the advancement of funds to solicit clients. There is also concern that an attorney with a large financial stake in a case would sacrifice the client's interests in order to recover the amounts advanced. The rule has further been viewed as a form of protection for attorneys from clients who would seek to "market" their case to the highest bidder.

The modern embodiment of the rule against financial assistance to clients is contained in Illinois Rules of Professional Conduct, Rule 1.8(d). Rule 1.8(d) states, "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client...." An exception within Rule 1.8(d) is that an attorney may "advance or guarantee the expenses of litigation..." under certain defined circumstances. While Rule 1.8(d) allows an attorney to advance the cost of a medical examination necessary for litigation, it does not allow for the payment of medical expenses on behalf of a client. The exceptions within Rule 1.8(d) are meant to allow litigation to proceed when a client would otherwise be unable to bear the costs of litigation. However, living expenses and medical expenses are not "expenses of litigation" and therefore cannot be advanced on behalf of a client.

While there has been a movement to revise Rule 1.8 to repeal the prohibition against loans by attorneys to clients, the Illinois Supreme Court recently denied a petition to revise the rule, or hold hearings on the matter (*In re The Illinois Trial Lawyers Association*, M.R. 6852 (1993)).

The Fourth District has held that advancing living expenses to a client during litigation violated the Code of Professional Responsibility in *Topps v. Pratt & Callis, P.C.*, 206 Ill.App.3d 298, 564 N.E.2d 196, 151 Ill.Dec. 219 (4th Dist. 1990), app.den., 136 Ill.2d 555, 567 N.E.2d 343, 153 Ill.Dec. 385 (1991), app. granted, 137 Ill.2d 672, 571 N.E.2d 156, 156 Ill.Dec. 569 (1991), cause dismissed, 579 N.E.2d 890, 162 Ill.Dec. 76 (1991). The Illinois Supreme Court had agreed to hear an appeal of the Topps ruling, but thereafter ruled that leave to appeal had been "improvidently granted" without explanation.

Previous ISBA Opinion No. 151 interpreted Canon 42 (prohibiting an attorney from bearing the costs of litigation) as prohibiting an attorney from advancing living expenses to a client, and stated that such expenses were not within the scope of the exception for "expenses of litigation." ISBA

Opinion No. 87-10, stated that Rule 5-103 of the Code of Professional Responsibility, similarly prohibited financial assistance to clients, other than for expenses of litigation. The Opinion also stated that, "[t]he ISBA does not encourage loaning money to clients."

ISBA Opinion 92-9 further clarified that while an attorney may assist clients in obtaining loans for the payment of attorney fees, the "type of financial assistance prohibited by the Rule is the guaranteeing of financial assistance or direct assistance by the attorney to the client with the exception that the attorney is allowed to advance the 'expenses of litigation'". The language of Rule 1.8(d) does allow an attorney to advance or guarantee the cost of "medical examinations", but in the context of the rule as a whole, those examinations are limited to examinations necessary for litigation, such as those necessary for expert testimony or the presentation of medical evidence. Clearly, expenses of ordinary medical care are not included in Rule 1.8.

As Rule 1.8(d) clearly prohibits financial assistance to a client, except for the advancing of the expenses of litigation, an attorney may not advance money to a hospital to secure medical care for his client.

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