

FORMAL OPINION NO. 2005-4
Conflicts of Interest, Current Clients:
Advancement of Living Expenses, Bail,
and Travel Expenses to Client

Facts:

Lawyer *A* proposes to advance or guarantee Client *A*'s living expenses pending the outcome of litigation that Lawyer *A* is handling for Client *A*.

Lawyer *B* proposes to advance bail money to Client *B*, along with court-related costs, on the express understanding that Client *B* will remain liable to Lawyer therefor.

Lawyer *C* proposes to pay for Lawyer *C*'s own travel and investigation expenses incurred on Client *C*'s behalf from Lawyer *C*'s own funds.

Questions:

1. Is the proposed conduct of Lawyer *A* ethical?
2. Is the proposed conduct of Lawyer *B* ethical?
3. Is the proposed conduct of Lawyer *C* ethical?

Conclusions:

1. No.
2. Yes, qualified.
3. Yes.

Discussion:

All of the foregoing questions are governed by Oregon RPC 1.8(e):

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the lawyer's client, except that a lawyer may advance or guarantee the expenses of litigation, provided the client remains ultimately liable for such expenses to the extent of the client's ability to pay.

This rule must be read in concert with Oregon RPC 1.7(a)(2), which states that a lawyer “shall not” represent a client if

there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Under Oregon RPC 1.7(a)(2), Lawyer A’s proposed conduct is unethical. *See In re Brown*, 298 Or 285, 692 P2d 107 (1984). By advancing these expenses, Lawyer A would be acquiring an interest in the litigation.

On the other hand, bail appears to be close enough to court-related costs to constitute “expenses of litigation,” which a lawyer may properly advance as long as the client remains liable therefor. Consequently, Lawyer B’s proposed conduct does not per se violate Oregon RPC 1.7(a)(2). Nevertheless, advancing significant bail funds, especially in the absence of a strong personal or familial relationship, could result in a personal conflict of interest between lawyer and client pursuant to Oregon RPC 1.7(a)(2). If so, Lawyer B could not advance bail funds without, at a minimum, satisfying himself or herself that the requirements of Oregon RPC 1.7(b) could be met and obtaining the necessary conflicts waiver. *See* ABA Formal Op No 04-432.

Lawyer C’s conduct is permissible. Indeed, such an assumption of investigative expenses is commonplace in contingent fee litigation.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related topics, see THE ETHICAL OREGON LAWYER §§3.42–3.44 and chapter 8 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §36 (2003); and ABA Model Rules 1.7(b), 1.8(e).