

## FORMAL OPINION NO 2005-4

[REVISED 2024]

### **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. Maybe.
2. Yes, qualified.
3. Yes.

#### **Discussion:**

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

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

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(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client through a nonprofit legal services or public interest organization, and a lawyer representing an indigent client through a court appointment, or through a law school clinical or pro bono program, may provide modest gifts to the client for food, rent, transportation, medicine, and other basic living expenses. The lawyer:

(i) may not promise, assure, or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

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 may be unethical if Lawyer *A* would acquire an interest in the litigation by advancing the monies. *See In re Brown*, 298 Or 285, 692 P2d 107 (1984).

The analysis changes if Client *A* is indigent and Lawyer *A*’s representation is a type described in Oregon RPC 1.8(e)(3). In those circumstances, Oregon RPC 1.8(e)(3) would allow Lawyer *A* to provide modest gifts for basic living expenses.<sup>1</sup> However, Lawyer *A*

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<sup>1</sup> ABA Model RPC 1.8 comment [11] may provide guidance in determining the scope of “modest gifts . . . [for] other basic living expenses”

may not contravene any of the conduct described in Oregon RPC 1.8(e)(3)(i)–(iii).

Client *B*'s advance of 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 themselves that the requirements of Oregon RPC 1.7(b) could be met and obtaining the necessary conflicts waiver. *See* ABA Formal Ethics 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, June 2024.**

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under Oregon RPC 1.8(e)(3). Comment [11] defines gifts as “modest contributions for . . . basic necessities of life.” “If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client” so they may make an informed decision. ABA Model RPC 1.8, cmt [11]. *See* Oregon RPC 1.4. ABA Model RPC 1.8, cmt [12] notes the “modest gift” exception under (e)(3) should be narrowly construed and only allowed in “specific circumstances where it is unlikely to create conflicts of interest or invite abuse.”

COMMENT: For additional information on this general topic and other related topics, see *The Ethical Oregon Lawyer* § 3.5-7(a) to § 3.5-7(c) (payments on behalf of client), and chapter 9 (economic and personal conflicts) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 36 (2000); ABA Model RPC 1.7(b); and ABA Model RPC 1.8(e).