

Committee Opinion
July 13, 1989
Committee Op Withdrawn
November 18, 2021

LEGAL ETHICS OPINION 1237

ADVANCING COSTS OF LITIGATION-
CONTINGENT FEE AGREEMENT-
FILING SUIT AGAINST CLIENT:
RECOVERY OF LITIGATION COSTS
ADVANCED BY ATTORNEY.

You have advised that Lawyer was retained by Widow to make a claim for medical negligence as the cause of her husband's death. The Widow signed Lawyer's standard engagement contract agreeing that Lawyer would advance funds for investigation, medical reports and other expenses. Widow further agreed that, if there was no recovery, she would make reasonable arrangements to reimburse her attorney for expenses advanced. Widow advanced initial monies and an additional sum when expenses of reproducing and distributing a large presentation for the malpractice review panel exceeded her available balance. On the day before the panel hearing, Widow and children insisted on discontinuing the proceeding. The attorney retained the balance in his trust account for several months, and, assuming that printer would not seek payment for the balance of the bill, remitted the trust account balance to the client. Approximately one year later, the attorney received a bill from printer for balance due which the printer will not address to the ex-client. To protect his own credit, the attorney paid the printer and billed Widow for the amount paid. Widow originally agreed to pay the balance in installments to the attorney; however, she subsequently refused to make any payments although she is able to do so.

You wish to know whether Lawyer is obligated to undertake collection efforts knowing that the client is solvent and is responsible for those costs associated with the litigation.

The Committee continues to be of the opinion that, in matters involving litigation, or where a contingency fee agreement has been entered into between an attorney and his client, advancement of court costs, expense of litigation, expenses of medical examination, and costs of obtaining and presenting evidence is permissible only if the client remains ultimately liable for the actual costs incurred. (See DR:5-103(B) and LE Op. 1056)

The Committee opined in LE Op. 1060 that whether the attorney was obligated to pay the medical provider for photocopies of medical records was a legal question; but, should the attorney advance the costs for the records, the client must still remain ultimately responsible for such expenses.

The Committee is of the view that since the client is responsible for the actual costs and expenses associated with the litigation, an attorney who has advanced or guaranteed such expense may properly take appropriate collection actions to recover any amount which he advanced on behalf of his client for which he has not been reimbursed by the client pursuant to DR:5-103(B). The Code of Professional Responsibility is silent regarding

Committee Opinion
July 13, 1989
Committee Op Withdrawn
November 18, 2021

a specific course of action an attorney should follow under the circumstances, but all legal means are presumed available. It is the opinion of the Committee that you are not required to undertake collection efforts against your client if you have reason to believe that such efforts would be fruitless or involve so much expense that it would not be worthwhile. A consistent policy of not proceeding against clients for the collection of expenses advanced would be improper. (See also LE Op. 485)

Committee Opinion
July 13, 1989

Legal Ethics Committee Notes. – Rule 1.8(e)(2) allows a lawyer to pay litigation costs and expenses on behalf of an indigent client.

WITHDRAWN