

Utah Ethics Opinion

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11-02. UTAH STATE BAR ETHICS ADVISORY
OPINION COMMITTEE Opinion Number 11-02

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Issued November 8, 2011

1. ISSUE: If an indigent litigation client asks his attorney for a financial gift, is the attorney permitted to provide that charitable gift or do the Utah Rules of Professional Conduct prohibit doing so?

2. OPINION: Utah Rule 1.8(e) prohibits "financial assistance" in connection with litigation, which includes paying living expenses for a client. However, a lawyer representing an indigent client may pay court costs, expenses of litigation and "minor expenses reasonably connected to the litigation." The rule does not prohibit occasional small charitable gifts.

3. BACKGROUND: The attorney represents, by appointment, a death row inmate in a state habeas corpus matter. The client has asked the attorney to contribute a regular sum each month to the client's prison account for his personal use (e.g. purchase of items from the commissary such as snacks, items of clothing, entertainment such as a television, radio or CD player.) The attorney suggests that many such clients suffer from mental illness and that CLE events have suggested making such charitable donations to elicit trust from difficult clients. Death row inmates have their basic needs provided for (food, clothing, necessary toiletries, paper) and are permitted to spend up to a certain amount each month in the commissary for items beyond this. They may earn some small amount of money doing prison work and may receive gifts.

4. ANALYSIS: This situation is addressed by Rule 1.8(e) of the Utah Rules of Professional Conduct. It is useful to understand the common law history leading up to this rule, to consider cases and opinions from other jurisdictions, and lastly to be aware of the differences between Utah's version of this rule and the Model Rules of Professional Conduct and other states' rules.

5. Utah's Rule 1.8, like the Model Rule, is entitled "Conflict of Interest: Current Clients: Specific Rules." Utah Rule 1.8(e) reads in relevant part: (e)A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (e)(fn1) a lawyer may advance court costs and expenses in litigation .

. . and (e)(fn2) a lawyer representing an indigent client may pay courts costs and expenses of litigation and minor expenses reasonably connected to the litigation, on behalf of the client. (emphasis added)

6. Hazard and Hodes' THE LAW OF LAWYERING explains that Rule 1.8 "presents a series of specific applications of the basic conflicts of interest principles . . . [where] most . . . involve situations in which the lawyer's own interests threaten to adversely affect the representation. . . ." Regarding the specific prohibition of providing financial assistance to a client in connection with litigation addressed in Model Rule 1.8(e), Hazard et al. note that this rule derived from the common law prohibition of champerty and maintenance.

Champerty(fn3) consisted of 'investing' in the cause of action of another by buying a certain percentage of the hoped-for recovery. . . .Maintenance was a similar offense, where the form of investment was providing living or other expenses to a client so that the litigation could be carried on. The prohibition applied to lawyers and nonlawyers alike and was generally enforced via the criminal law. The main harm . . . was said to be 'stirring up litigation.' It was feared that plaintiffs would be encouraged to bring suits they would otherwise forgo, thus adding to the public cost of administering justice, imposing unjust burdens on defendants, and enriching lawyers.(fn4)

7. The ban against "maintenance" under the Code of Professional Responsibility (DR 5-103(B)) contained a compromise, permitting advancement of litigation expenses so long as they were loans that must be repaid(fn5) . This change was made, "lest indigent or even middle class plaintiffs forgo meritorious claims . . ."(fn6) When the Model Rules were first drafted, it was proposed that an attorney be permitted to advance living expenses as well(fn7). However, the ABA House of Delegate rejected that proposal, but liberalized the rule to permit the litigation costs be advanced without guarantee of repayment.(fn8) Model Rule 1.8(e) currently provides:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of the litigation on behalf of the client.

8. The Comment to the Model Rules explains the current provision as follows:

Financial Assistance

[10] 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. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

9. Since the initial adoption of the Model Rules, Rule 1.8(e), a handful of proposals to liberalize this rule (fn9) have been made or adopted. Note that while the Model Rule permits only "expenses of litigation" be advanced, Utah Rule 1.8(e) further permits the lawyer of an indigent client to also pay "minor expenses reasonably connected to the litigation." (fn10) The Utah Comments, including but augmenting the Model Rule Comments, explain:

[10] . . . Similarly, an exception allowing lawyers representing indigent clients to pay . . . minor sums reasonably connected to the litigation, such as the cost of maintaining nominal basic local telephone service or providing bus passes to enable the indigent client to have means of contact with the lawyer during litigation, regardless of whether these funds will be repaid, is warranted.

[10a] Relative to the ABA Model Rule, Utah Rule 1.8(e)(2) broadens the scope of direct support that a lawyer may provide to indigent clients to cover minor expenses reasonably connected to the litigation. This would include, for example, financial assistance in providing transportation, communications or lodging that would be required or desirable to assist the indigent client in the course of the litigation.

Accordingly, when considering decisions or ethics opinions from other states, it is important to note any differences that exist between that state's rule and Utah's rule.

10. States that have adopted the Model Rule limitations, permitting only the payment of court costs, have found violations in these circumstances: *Matter of Minor Child K.A.H.*, 967 P.2d 91 (Alaska, 1985) (in wrongful death action attorney advanced over \$6000 in living expenses and

sought reimbursement, which the court denied); *Attorney Grievance Commission of Maryland v. Pennington*, 733 A.2d 1029 (Maryland, 1997) (attorney loaned money to employment discrimination client and was reprimanded); *Cleveland Bar Association v. Nusbaum*, 753 N.E.2d 183 (Ohio, 2001) (attorney advanced \$26,000 in living expenses to motorcycle accident victim for living expenses and was publically reprimanded); *State of Oklahoma Bar Association v. Smolen*, 17 P.3d 456 (Okla., 2000) (attorney loaned workers compensation client (s) money for living expenses and was suspended for 60 days given prior disciplinary proceedings). More serious discipline was meted out when advancing funds to clients was only one of multiple ethical violations in *In the Matter of Discipline of Mines*, 612 N.W.2d 619 (SD., 2000) and *In the Matter of Strait*, 540 S.E. 2d 460 (S.C. 2000). It is worth noting that all of these cases involved a client who sought to recover money damages and an attorney who expected to be reimbursed out of the funds ultimately received.

11. A handful of cases and ethics opinions based on the Model Rule version of the prohibition nevertheless permit charity to a client when there is no expectation of repayment and there is no promise of "financial assistance in order to establish and maintain employment." *Florida Bar v. Taylor*, 648 So.2d 1190, 1192 (Fla., 1995) (attorney persuaded partner to give a poor client \$200 and gave used clothing to the client's child held to not violate the rule). See also *Louisiana State Bar Association v. Edwins*, 329 So. 437 (La., 1976) (attorney advanced over \$2000 in medical and living expenses after having been retained, but court found no violation as these payments were "akin" to litigation expenses). The Maryland State Bar Committee on Ethics opined that "a gift of a small sum of money, without conditions of repayment" is not prohibited, *Maryland Ethics Docket 00-42*, but later clarified that it is a violation to provide housing or other financial assistance in connection with litigation, distinguishing the prior case as permitting a "de minimus gift." *Maryland Ethics Docket 2001-10*. Finally, most closely related to the facts of this inquiry, the Virginia Bar issued *Legal Ethics Opinion 1830* which addressed whether a public defender was permitted to provide "nominal amounts of money" to incarcerated clients to "buy personal items or food beyond that regularly provided to inmates." Even though dealing with the Model Rule total prohibition, this Opinion approved providing "nominal funds . . . on an occasional basis to assist an indigent client for small and assorted commissary purchases that have nothing to do with the litigation." This Opinion reasoned that such nominal gifts to defense clients were not "in connection with" that litigation.

12. The commentators, cases and opinions appear to be uniform in recognizing the purposes behind the current prophylactic prohibition. The original goal of not stirring up litigation is no longer a justification for this rule. The

United State Supreme Court has made clear, in finding lawyer's advertising to be protected commercial speech, that there is no state interest in suppressing litigation in general as an individual has a right to seek judicial redress for wrongs he has suffered(fn11). Indeed, many of the cases recognize that an injustice is done to an impoverished client who is forced to settle because he cannot support himself throughout the litigation.(fn12) However, some limits are justified in order to prevent a conflict of interest between attorney and client and to prevent a "bidding war"(fn13) between lawyers that could negatively affect the client's ability to retain the best counsel.

13. Most courts believe the conflict of interest is heightened when the lawyer become a creditor as well as counsel.(fn14) "If large sums of money are advanced to maintain the client's lifestyle, settlement may be frustrated."(fn15) On the other hand, the Mississippi Court, adopting a variation allowing for some limited payment of living expenses to impoverished clients, argued that it was inconsistent to assert "that a lawyer's interest in recovering moneys lent to a client for living and medical expenses would affect his judgment while the prospect of losing possibly vast sums advanced in the form of litigation expenses would not."(fn16) These conflict of interest concerns are most relevant in cases in which the lawyer stands to recover his fees through the case, and less germane when the lawyer is appointed or pro bono.

14. The second consideration is that "in choosing an attorney, a client's judgment should always be based on his confidence in the character and capability of the attorney" rather than on which attorney can best support the client.(fn17) "Clients should not be influenced to seek representation based on the ease with which monies can be obtained, in the form of advancements, from certain law firms or attorneys."(fn18) Hazard and Hodes opine that "a bright line drawn between expenses of litigation and living expenses is a sensible one. One concern voiced by the critics . . . was that lawyers might 'purchase' clients with lucrative cases. . . ." (fn19)

15. With this background, it is now appropriate to turn to the Utah Rule, which is more permissive than the Model Rules or than any of the rules relied upon above. Utah's Rule 1.8(e) provides:

(e)A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (e)(1) a lawyer may advance court costs and expenses in litigation . . . and (e)(2) a lawyer representing an indigent client may pay courts costs and expenses of litigation and minor expenses reasonably connected to the litigation, on behalf of the client. (emphasis added)

There are three questions that should be addressed: 1) are sums paid to a prisoner's personal account "financial assistance . . . in connection with . . . litigation," 2) and if so, are they "reasonably connected to the litigation," and if so, what is a "minor expense"?

16. There is an argument that a "gift" is not "financial assistance" which carried the day with the Florida court and the Virginia and Maryland Ethics committees. Indeed, law firms sending holiday fruit baskets or providing valuable tickets to sporting events for litigation clients have never been condemned in a disciplinary case or ethics opinion to our knowledge, perhaps because they are not seen as "financial assistance." Thus, gratuities appear to be permitted provided they do not create a conflict of interest or provide a significant economic incentive for a litigation client to retain one firm rather than another. Small contributions to an inmate's account might be permitted on this basis. Indeed, it would seem anomalous and ungenerous that a law firm might give small gifts to wealthy clients but not to impoverished clients who might actually be in need.

17. However, all courts and ethics committees except the Florida Court and Virginia and Maryland Ethics committees have concluded that ANY money paid to a litigation client is "financial assistance in connection with litigation." All courts and committees have concluded that paying "living expenses" is "in connection with litigation." This is the only sensible conclusion when a payment or gift would reasonably be expected to induce the client to continue with the case in order to obtain the gift rather than obtain a favorable outcome in litigation. In this case, while the attorney may well be under-paid by the state and there may be few attorneys bidding for death penalty habeas cases, nevertheless, where the attorney has any financial incentive, the Committee concludes that financial assistance to a client should be seen as "in connection with litigation." While there may be a case in which charity to a client has no effect on the client's selection of a lawyer - say a pro bono attorney pursuing a default divorce without expectation of payment providing Christmas presents for the client's impoverished and unsupported child - this is not such a case. Here the requester informs the Committee that he would make a gift in order to "elicit trust from a very difficult client." Thus, we will analyze this situation as if the gift was "financial assistance in connection with litigation."

18. The second question is whether payments to a prisoner's personal account are "minor expenses reasonably connected to the litigation." This requires both determining what a "minor expense" is and what expense is "connected to the litigation." With respect to the second point, it would seem anomalous to conclude that the same words "in connection with litigation" and "connected to the litigation" sweep broadly to cover any and all expenditure, but then

must be read narrowly to permit "minor expenses." Accordingly, we conclude that the words mean the same thing in Rule 1.8(e) and 1.8(e)(2).

19. Having reached that conclusion, it follows that the Utah Rules permit "minor expenses" or "financial assistance . . . that would be required or desirable." Comment [10a]. Here the client is asking for regular monthly payments and in an amount equal to the maximum he is permitted to spend in the commissary. Conceding to this request would be akin to paying all his "living expenses" as it would eliminate any need for the client to engage in prison work, and thus would be forbidden. We also note that no opinion approved of an agreement in which the attorney is obligated to pay a regular fee to retain the client. Indeed, that would violate both the principle of having the client have free choice as to whether to litigate and the principle of avoiding conflicts of interest.

20. However, an occasional "minor" gift to the inmate would seem to be within both the letter and the spirit of Utah's rule. The Utah comments suggest payment for telephone service and for bus passes (which would be valuable beyond the case) is permitted. One would imagine payment for a meal during an attorney-client meeting would also be permitted. Payment to an inmate's personal account to permit the inmate to buy a snack or toiletry item seems similarly permissible. Accordingly, small and occasional charitable gifts by attorneys who are not seeking reimbursement and which would not influence the client to retain or remain with that attorney, should be permitted under Utah's Rule 1.8(e).

21. Two final points are worth noting. While the Rules of Professional Conduct do not define "indigent client," a Utah attorney would be well advised to consult the definition of "indigent" under Utah's criminal law (below 150% of poverty),(fn20) Utah's statute regarding waiving fees for "impecunious" clients(fn21) (undefined), the qualifications for charitable legal assistance at Utah Legal Services, Inc. (125% of poverty)(fn22) and the Legal Aid Society of Salt Lake County (200% of poverty)(fn23) based on the federal poverty law guidelines and 24) in determining whether to pay "minor expenses reasonably connected to" litigation for a client..

22. Finally this rule prohibiting or limiting gifts to impoverished clients is only applicable in the litigation context. Thus, Rule 1.8(e) does not prohibit an attorney who is drafting a will for an impoverished senior from giving this client a gift. However, the concern regarding conflicts of interest under Rule 1.7 would remain. An attorney who undertakes to provide non-litigation clients with substantial gifts may create a conflict that would impair the attorney-client relationship. (For example the attorney may delay or postpone the legal work, fearing the client will ask

for more gifts at their next meeting.)

Footnotes:

1. GEOFFREY HAZARD and W. WILLIAM HODES, THE LAW OF LAWYERING §12.2 (3rd ed., 2011).

2. Id. at § 12.11.

3. Rule 1.8(i) of both the Utah and the Model Rules of Professional Conduct carries on the prohibition of investing in the client's case: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except . . . a lien authorized by law to secure the lawyer's fee or expenses; and . . . contract . . . for a reasonable contingent fee. . . ."

4. Id.

5. Id.

6. Id. at §12.12

7. Id.

8. Id.

9. The American Law Institute proposed permitting loans to clients, but ultimately dropped that idea. Hazard and Hodes, §12.12, note 1. The following states permit, in limited and strictly controlled circumstances, the advancement of living expenses: , Alabama, California, Louisiana, Mississippi, Minnesota, Montana, North Dakota, Texas, See Oklahoma Bar Ass'n v. Smolen, 17 P.3d 456, 459 (2000).

10. This change to the Utah Rule was made when Utah adopted the Ethics 2000 amendments in November, 2005.

11. Shapiro v. Kentucky Bar Assn., 486 U.S. 466 (1988).

12. "If an impoverished person is unable to secure subsistence from some source during disability, he may be deprived of the only effective means by which he can wait out the necessary delays that result from litigation to enforce his cause of action. He may, for reasons of economic necessity and physical need, be forced to settle his claim for an inadequate amount." Louisiana State Bar Ass'n v. Edwins, 329 So.2d 437, 446 (1976)

13. Mississippi Bar v. Attorney HH, 671 So.2d 1293, 1296 Miss. 1995) withdrawn, substitute opinion, reh'g denied, 1998 Miss. LEXIS 75 (Miss. 1996),

14. Oklahoma Bar Ass'n v. Smolen, 17 P.3d at 462.

15. In re: Application of G.M., 797 So.2d 931, 935 (Miss., 2001).

16. Attorney AAA v. Mississippi Bar, 735 So.2d 294, 299 (Miss., 1999), citing The Mississippi Bar v. Attorney HH, 671 So.2d 1293 (Miss. 1995).

17. In re: Application of G.M., 797 So.2d at 935.

18. Attorney Griev. Comm. v. Kandel, 341 Md. 113, 563 A.2d 387, 390 (1989). (public reprimand for advancing living expenses, including medical treatment).

19. Hazard and Hodes, supra note 1, at §12.12.

20. Utah Code Ann. § 77-32-202 (2010).

21. Utah Code Ann. § 78A-2-302 (2010). "The Board of District Court Judges has decided that if you have completed a financial statement to qualify for representation by Utah Legal Services or The Legal Aid Society of Salt Lake, you may use that financial statement with your Motion and Affidavit to Waive Fees, rather than completing the court form." <http://www.utcourts.gov/resources/forms/waiver/>

22. http://www.utahlegalservices.org/public/do_i_qualify

23. <http://www.legalaidsocietyofsaltlake.org/index.php?o=income-guidelines>

24. <https://www.cms.gov/MedicaidEligibility/downloads/POV10Combo.pdf>