

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-216
Issued: May 1979

Question 1: May an attorney with full consent and disclosure charge a service and interest charge on advancements in litigation?

Answer 1: Yes.

Question 2: May an attorney “co-sign” notes for a client in pending litigation for the purpose of advancing funds to cover the cost of litigation?

Answer 2: Qualified Yes.

Question 3: May an attorney charge interest and a service charge on unpaid fees with full disclosure and consent of the client?

Answer 3: Yes.

Question 4: May an attorney on a contingency fee charge long distance phone calls, postage, stationery and photocopying to the client as “cost” of litigation on a contingent fee arrangement?

Answer 4: Qualified Yes.

References: Opinion KBA E-51; Canon 10, 13, 42; DR 2-106, 5-103(A)(B); EC 2-20; ABA Formal Opinion 246, 320 (Feb 1968), 338 (Nov 1974); ABA Informal Opinion 337, C-741

OPINION

Question 1

As stated in ABA Formal Opinion 338, “a necessary corollary to the use of credit cards is the charging of interest on delinquent accounts. It is the Committee’s opinion that it is proper to use a credit card system which involves charging of interest on delinquent accounts.” Furthermore the opinion extends to the lawyer the right to charge his client interest on delinquent accounts provided that the client is advised and agrees to a charging of interest.

It should be emphasized that the client must be told that there is going to be an interest charge on the delinquent accounts.

Opinion KBA E-51, which refers to DR 5-103(B), states that when representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation. An

interest charge on advancements would seem to be only a further expense of the litigation and as such could be charged against the client.

Question 2

This is an area that lately has received much consideration by the American Bar Association.

ABA Disciplinary Rule 5-103 as well as ABA Canon 10, forbids a lawyer from purchasing any interest in the subject matter of the litigation which he is conducting. DR 5-103 prohibits a lawyer from advancing or guaranteeing financial assistance to his client except that a lawyer can advance or guarantee the expenses of litigation provided the client remains ultimately liable for such expenses. Opinion KBA E-51 prevents an attorney from subsidizing a client during the course of litigation.

ABA Formal Opinion 320 considered whether a bar association could approve a plan which allowed attorneys to participate in a plan for financing legal fees. This plan called for any member of the association, after executing an agreement with the bank, to co-sign a note for a client in pending litigation for the purpose of advancing funds to cover the cost of litigation. ABA Formal Opinion 320 said that it was not unethical *per se* for a local or state bar association to approve a plan as set out above. The opinion did make a distinction though of a note co-signed by the attorney which was *with recourse* against the attorney and a note executed *without recourse* by the bank against the attorney. The opinion stated that possible conflicts of interest would be avoided if recourse against the bank is limited to the client (as it is by endorsement by the attorney without recourse).

Therefore, an attorney can co-sign notes for a client in pending litigation for the purpose of advancing funds to cover the costs of litigation as long as the note is not without recourse as to the attorney.

Question 3

In ABA Formal Opinion 338, it was stated that a lawyer can charge his client interest on accounts that are delinquent for more than a stated period of time. The client, though, must be advised that the lawyer intends to charge interest and agrees to the payment of interest on the delinquent accounts.

Considering ABA Formal Opinion 338, which was addressed to the use of credit cards with an interest charge, there would appear to be no ethical problem for the Kentucky Bar to permit the charging of interest on unpaid fees, provided that the client is told and agrees.

Question 4

ABA Canon 13 permits a contract for a reasonable contingency fee where sanctioned by law but the client must remain responsible to the lawyer for expenses advanced by the latter (ABA Formal Opinion 246). This is reinforced by ABA Canon 42, which allows a lawyer in good faith to advance expenses as a matter of convenience but subject to reimbursement.

Considering that a lawyer is allowed to make various agreements as to how he will set his contingency fee (See ABA Informal Opinion 337, which says that a contingency fee must be responsible,

irrespective of agreements) and that a lawyer does not have to advance expenses, it would appear that a provision on a contingent fee contract which would specify that long distance phone calls, postage, stationery and photocopying be deducted from the client's share would be proper. Of course, it would be improper if it would make the lawyer's fee unreasonably high.

Other states have considered this issue and have permitted deductions from client's share of expenses incurred by the lawyer (Missouri Bar Administration 15).

As well, Opinion KBA E-51, citing DR 5-103, states that a lawyer cannot give financial assistance to his client "except that a lawyer may advance or guarantee the expenses of litigation", provided the client remains ultimately liable. The wording clearly suggests that a lawyer need not advance funds for the cost of litigation. There is no mention in the KBA Opinion that under a contingency basis, this would not be true also.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides: "Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act on his part performed in compliance with an opinion furnished to him on his petition, provided his petition clearly, fairly, accurately and completely states his contemplated professional act."