

Advisory Opinion 1986-2

An attorney has requested an opinion from the Advisory Opinions Committee regarding the possible improprieties of guaranteeing a bank loan made to a client who is anticipating a workman's compensation settlement.

FACTUAL SITUATION

The attorney represents the client in a workman's compensation case which has been filed, but has not been tried or settled. The client owns a home which has some equity in it. The client is unemployed and is behind on his mortgage payments. The attorney took the client to the attorney's banker and co-signed with the client a six month promissory note. The attorney anticipates the client recovering sufficient funds in the pending case to repay the note.

QUESTION PRESENTED

Is it improper for the attorney to guarantee a client's payment of a promissory note when repayment is anticipated from an unliquidated claim being handled by the attorney?

DISCUSSION

Rule 5-103 of the Code of Professional Responsibility is on point.

Although, in some states, it is quite common and permissible for plaintiffs' attorneys to advance living expenses to clients, this is not the situation in New Mexico.

Rule 5-103 of the New Mexico Code appears to prohibit exactly this type of conduct:

(B) While representing a client in connection with contemplation or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client . . . Rule 5-103(B) [emphasis added].

While an attorney may advance or guarantee costs of litigation, it is generally forbidden for the attorney to advance general living expenses which are to be repaid from an anticipated recovery.

The purpose of this rule is obviously to prevent the attorney from resolving a case in a manner most favorable to the attorney at the client's detriment.

The prohibition can work a hardship on clients, and situations can tug at the heart strings of the attorney who sees an unemployed client faced with the possibility of losing his home, but in our present situation, the attorney will be under pressure to resolve the case within six months to pay off this promissory note even if waiting for trial could bring a larger settlement.

An attorney is simply forbidden to act as his client's banker and this conduct is expressly prohibited, regardless of the altruistic motives. See also *Matter of Horton*, 100 N.M. 13 (1983), in which the Supreme Court disbarred a New Mexico attorney on nine charges, of which three included making loans to his clients for purposes unrelated to litigation.

There are some arguments that could be made that the attorney's guarantee of the loans was permissible. These arguments, based upon the authorities cited in the attached document, do not appear to overcome the authorities cited above. Therefore, the opinion of the Advisory opinions Committee is that it is improper for the attorney to guarantee a client's payment of a promissory note when repayment is anticipated from an unliquidated claim being handled by the attorney.