

Some Financial Aspects *of the* Lawyer-Client Relationship



Robert Valdez, Nathaniel Chakares and James Reist are members of the **Ethics Advisory Committee of the State Bar of New Mexico**. This collection of short articles does not necessarily represent the opinion of the Committee as a whole and represent short overviews of ethical issues that can arise in the areas of financial assistance to a client, certain financing arrangements that are appearing, and charging liens. If you have a specific question or issue for which an advisory opinion from the Committee would be helpful, please submit your request in writing to ethics@nmba.org.

Some Ethical Limits on Financing a Client's Costs and Expenses in New Mexico

By Robert E. Valdez

New Mexico's rules regarding provision of financial assistance to clients are more limited compared to certain other jurisdictions, including Texas. Rule 16-108(E) of the New Mexico Rules of Professional Conduct provides:

E. Financial assistance. 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 litigation on behalf of the client.

Rule 16-108(E), NMRA (emphasis added).¹ This rule prohibits a lawyer from paying "reasonable and necessary medical and living expenses." See *Rubio v. BNSF Railway Co.*, 548 F. Supp. 1220, 1224 (D.N.M. 2008) ("Rule 16-108 prohibits lawyers from subsidizing lawsuits by directly giving or lending money to a client or by guaranteeing third-party loans to the client"). This is in stark contrast to the Texas rule that allows lawyers to pay for such expenses.²

New Mexico's prohibition is based upon the ABA Model Rule³ and is the majority rule. See *id.* at 1225, citing, *State ex rel. Oklahoma Bar Ass'n v. Smolen*, 17 P.3d 456, 459-60 (Okla. 2000) (noting that only eight states "explicitly allow lawyers to advance or guarantee loans to clients for living expenses"). Under New Mexico's rule, a lawyer may only advance:

- Court costs; and
- Expenses of litigation including "the expenses of medical examination and the costs of obtaining and presenting evidence." See Rule 16-108 NMRA, cmt. 10.

The consequence of violating the rule is significant. In *Rubio*, Texas lawyers, admitted to practice in New Mexico federal court *pro hac vice* co-signed their client's bank loan for some \$86,000 for "client expenses." Consequently, the court revoked the Texas attorneys' permission to appear *pro hac vice* in New Mexico, resulting in the attorneys being disqualified from the case. See *id.* at 1226-27. Even though the Texas lawyers argued that the New Mexico prohibition on financial assistance, "is quite frankly, surprising to a Texas lawyer," the court had no difficulty observing, "[t]here is no doubt that [the Texas lawyers] have violated [the New Mexico] rule. They admit that they co-signed for the loan and that the money was sent directly to [the plaintiff]." *Id.* at 1223-24. ■

Endnotes

¹ New Mexico allows lawyers to issue a "letter of protection" to a health care provider in order to obtain medical services for the client. See *In re Moore*, 2000-NMSC-019.

² The Texas rule provides, in pertinent part: (d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that: (1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, 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 litigation on behalf of the client. Tex. Disciplinary Rules of Prof'l Conduct 1.08(d)(1)(emphasis added).

³ See Model Rules of Prof'l Conduct 1.8(e)(2002).

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