



Loans to Clients

In previous columns, we examined the ethical issues involved when a lawyer assists a client in getting financing in order to prosecute a case, and when the lawyer advances costs that his client couldn't otherwise afford.¹ But what if the client has no litigation contemplated or pending? Does ER 1.8(e),² the rule that prohibits a lawyer from providing financial assistance to a client "in connection with pending or contemplated litigation," apply?

No, by the rule's own terms, but ER 1.8(a), the rule regulating business transactions with clients, probably will. And, even if permitted, such loans will be examined closely to make sure the conditions provided for in ER 1.8(a)(1)-(3) have been met.


Some cases will be close to the line that divides a prohibited ER 1.8(e) situation from one conditionally allowed under ER 1.8(a). A recent case from Ohio³ indicates that it might be wise to err on the side of caution when contemplating a loan to a client.

In that matter, the lawyer was representing a client in pending litigation but wasn't clear whether the loan being requested by the client was "in connection" with it. Sensing that there might be a problem, the lawyer decided he could resolve it by having his wife make the loan. The client was not advised to get independent counsel, nor were any of the ordinary precautions about the conflicting interests involved given or put in writing. The client was awarded \$20,000, which was appealed, after which the client asked the lawyer for more money, acknowledging that he was having financial difficulties while awaiting the conclusion of the matter. The lawyer, as his wife's de facto attorney, drew up a promissory note, marked the original loan as paid, and had the client assign his rights to the recovery in the pending case to the lawyer's wife as security for the new loan. Relations soured between the lawyer and the client while the appeal was pending. When the client hired new counsel, the lawyer, representing his wife, filed suit on the note against his former client, who eventually paid the debt when his case settled.

There are several ethical problems involved in what the lawyer did in this matter. While there might have been a question as to whether the first loan was "in connection with pending or contemplated litigation" and therefore prohibited by ER 1.8(e), there certainly was a violation of ER 1.8(a). And when the first loan was paid off or consolidated with the second loan, which in turn was secured by the proceeds of (and thereby connected with) the litigation, the lawyer had clearly crossed the

ER 1.8(e) line and was guilty of an ethical infraction.

The lawyer initially tried to avoid responsibility by claiming that it was his wife, not he, who loaned the money to the client. Pointing out that the lawyer had a conflict of interest as the lawyer for both the wife (the lender) and the client (the borrower) that neither had waived in accordance with ER 1.7(b), the court properly pointed out that a lawyer cannot do through another what he is not allowed to do himself. This, of course, is the notion specified in ER 8.4(a), which prohibits violations of, or attempts to violate, the Rules of Professional Conduct done, among other things, "through the acts of another."

The court noted that even if the lawyer's sole intention was to benefit his client, it still did not excuse the lawyer's conduct. The court held that the prohibition against providing financial assistance to a client is absolute and that a court would not look into the lawyer's motivations. Loaning money to a client is a problem in and of itself, the court stated, because it gives the lawyer a financial stake in the litigation,⁴ and it might thereby impair the lawyer's obligation of independent objective advice. 

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Ethics Opinions are on p. 57. Opinions and the Rules of Professional Conduct are available at www.azbar.org/Ethics





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endnotes

1. *Borrowing To Finance a Lawsuit*, ARIZ. ATT'Y, Oct. 2007, at 10; *Paying To Help Your Client's Lawsuit*, ARIZ. ATT'Y, Feb. 2007, at 6.
2. Rule 42, ARIZ.R.S.CT.
3. *Toledo Bar Ass'n v. Pheils*, 129 Ohio St. 3d 279 (2011).
4. See Comment [10] to ER 1.8.