

Paying To Help Your Client's Lawsuit

Prohibitions against champerty (investing in another person's lawsuit for part of the recovery) and maintenance (supporting a litigant directly) have existed at common law for centuries. The idea here is that lawyers cannot be objective representatives of their clients if the lawyers have a financial interest or stake in their client's litigation matters.

We do not use the terms champerty and maintenance much nowadays, but the concepts and the proscriptions against them are found at ER 1.8(e) in Arizona's Rules of Professional Conduct.¹ This is the ER stating specific instances of lawyer-client conflicts of interest, including where a lawyer attempts to provide financial assistance to a litigation client.

Under "old" 1.8(e) as it existed prior to Dec. 1, 2003, a lawyer could not provide financial assistance to a client in connection with pending or contemplated litigation except that the lawyer could advance "court costs and expenses of litigation." The client had to remain ultimately liable for such costs and expenses advanced, however. There was another exception for pro bono "indigent" clients: In those cases, lawyers who were not charging fees could advance the same court costs and expenses of litigation without having the client being ultimately responsible for their repayment.²

Under "new" 1.8(e), lawyers are still limited to advancing only court costs and expenses of litigation on behalf of their clients, but now the repayment of those narrowly construed categories can be made contingent on the outcome of the case: "If you do not recover anything, you do not have to pay me back." This is a major difference from the old rule, but it comports more with the reality of contingent fee litigation in which the losing plaintiff could not pay for the costs and expenses advanced by the lawyer, resulting in the lawyer having to "pay" them anyway. The rule on pro bono indigent client representation remains the same as before.

So what can you do, and what can't you do? We know that "court costs and expenses of litigation" are allowed and that, in general, expenses unrelated to the litigation are not.³ Specifically, you can:

- pay for filing fees, fees for service of process and other costs that are generally taxed and included in judgments under A.R.S. § 12331, *et seq.*;⁴
- advance fees for investigators and expert witnesses⁵;
- make payments to witnesses for reasonable compensation for lost time at work, for time preparing to testify and for travel expenses;⁶
- pay the expenses of medical examination for purposes of securing evidence at trial;⁷
- assist a client, under certain conditions, in securing a line of credit for litigation expenses;⁸
- secure, under specified conditions, a line of credit for

advancing costs and expenses and pass on to the client any interest charges you actually have to pay;⁹ and

- advance the cost of a security bond ordered to be posed under Rule 67(d), ARIZ.R.CIV.P.¹⁰

You cannot:

- make payments to your client's creditors, including medical expenses¹¹; advance rental car expenses, vehicle repair expenses or collision insurance deductibles¹²;
- agree to indemnify settling parties from any lien claims against your client's settlement proceeds¹³;
- advance funds for your client's child support obligations¹⁴;
- pay for a client's food and household expenses¹⁵; or
- agree to guarantee a third-party loan to a client.¹⁶

What if you just make a "gift" to your client, and make sure that it is clearly understood by all concerned that you do not ever expect repayment, regardless of the litigation's outcome? Wouldn't this be an easy way out of all the problems concerning payments to or on behalf of clients?

Watch out for this one: Arizona's Committee on the Rules of Professional Conduct (the Ethics Committee) has conditionally authorized this practice,¹⁷ but the best choice here is to play by the rules set forth in ER 1.8(e) and not try to circumvent this by calling payments to clients "gifts."

The specific categories of cash advances you can or cannot make have not changed over the years, and the cases, ethics opinions and secondary authorities have generally drawn the line at court costs and actual litigation expenses, finding generally that anything beyond these types of advances is improper. This subject has


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endnotes

drawn a lot of attention from the Ethics Committee, and the committee opinions set forth in the endnotes should be consulted if you are not sure what you want to pay in a “court cost” or “an expense of litigation.”¹⁸ 

1. ER 1.8 (Conflict of Interest: Current Clients: Specific Rules) is found at Rule 42, ARIZ.R.S.CT..
2. ER 1.8(c)(2).
3. Lawyers can lend money to clients in a nonlitigation context, but only after complying with ER 1.8(a) (business transactions with clients).
4. Comment 10, ER 1.8.
5. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36, at comment c.
6. Comment 3, ER 3.4.
7. Comment 10, ER 1.8.
8. Ariz. Ethics Op. No. 91-22 (Sept. 1991).
9. Ariz. Ethics Op. No. 01-07 (Sept. 2001).
10. Ariz. Ethics Op. No. 06-05 (Sept. 2006).
11. *In re Bowen*, 695 P.2d 1130 (Ariz. 1985) (lawyer censured for paying clients’ mortgage, which lawyer had apparently allowed to be foreclosed); Ariz. Ethics Op. No. 91-14 (May 8, 1991).
12. Ariz. Ethics Op. No. 95-01 (Jan. 1995).
13. Ariz. Ethics Op. No. 03-05 (Aug. 2003).
14. *Mississippi Bar v. Attorney HH*, 1996 WL 125767 (Miss. 1996) (lawyer privately reprimanded for advancing funds to indigent client for prosthesis, child support and other personal living expenses pending outcome of personal injury claim).
15. *Attorney Grievance Commission v. Engerman*, 424 A.2d 362 (Md. 1981) (lawyer improperly advanced funds to client for food and household expenses).
16. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36(2).
17. Ariz. Ethics Op. No. 89-03 (April 1989); Ariz. Ethics Op. No. 91-14 (May 1991).
18. For an excellent discussion on this topic, with a review of all the relevant Arizona Ethics Committee opinions, see DANIEL J. MCAULIFFE, ARIZONA LEGAL ETHICS HANDBOOK (2d ed. 2005), at ¶ 1.8.600.