Enduring Ethics Opinions: Opinion #153. Contingent Fee Agreement Providing Client Will Not Be Responsible for Any Disbursements - By C. Donald Briggs, III, Esquire - Professional Ethics Commission

On September 9, 1996, the Professional Ethics Commission issued Opinion #153 which provided guidance concerning former Maine Bar Rule 3.7(d) and discussed a lawyer's ethical obligation when entering into a Contingent Fee Agreement with a client where the lawyer wishes to provide that the client will not be responsible for any of the disbursements, regardless of the outcome of the case. The Opinion contained a discussion of whether or not the arrangement would violate the Maine Bar Rules against advancing or guaranteeing financial assistance to the client and ultimately concluded that the arrangement would not violate the Maine Bar Rules.

Opinion #153 endures today. Former Maine Bar Rule 3.7(d) provided:

(d) Financial Assistance. While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and expenses of obtaining and presenting evidence.

Rule 1.8(e) of the Maine Rules of Professional Conduct provides:

(e) 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.

The language in Rule 1.8(e) of the Maine Rules of Professional Conduct is substantially the same as former Maine Bar Rule 3.7(d) and is identical to Rule 1.8(e) of the ABA Model Rules of Professional Conduct. It should also be noted that the proviso at the end of old Disciplinary Rule 5-103(b) of the ABA Model Code of Professional Responsibility specifying that the advance or guarantee of litigation expenses may only occur if "the client remains ultimately liable for such expenses" has been omitted from the ABA Model Rules.

The Reporter’s Notes for Rule 1.8(e) of the Maine Rules of Professional Conduct further clarify that a lawyer may provide financial assistance by advancing certain out of pocket expenses and that repayment may not be forthcoming.

Accordingly, the conclusions in Ethics Opinion #153 remain intact under M. R. Prof. Conduct 1.8(e).