LEGAL ETHICS OPINION 1830

MAY CRIMINAL DEFENSE ATTORNEY MAKE DE MINIMUS GIFT TO CLIENT OF MONEY FOR JAIL COMMISSARY PURCHASES?

You have presented a hypothetical involving a public defender's office, which provides criminal defense representation exclusively to indigent clients. Many of these clients also have no relatives to provide them with funds needed to buy items from the jail commissary while the client is incarcerated. Clients frequently request attorneys and/or support staff to give the clients nominal amounts of money for that purpose. The money is used primarily to buy personal items or food beyond that regularly provided to inmates. At times, staff is simultaneously trying to persuade some of these clients to accept plea agreements to which the clients are initially resistant. Your request asks whether it is improper for the attorneys and/or their support staff to provide this money to the clients.

Rule 1.8(e) establishes a prohibition against a lawyer providing certain financial assistance to his clients. Specifically, that provision directs as follows:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
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> (1) a lawyer may advance court costs and expenses of litigation, provided the client remains ultimately liable for such costs and expenses; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

In applying this rule to a particular situation, three questions need to be answered: is the attorney providing financial assistance to a client; is that assistance "in connection with" litigation; and (if so) does the assistance come within either of the two exceptions. Clearly, in the present scenario, an attorney is providing financial assistance to the client in each instance where he provides money for the client's commissary account. The critical question then is whether that assistance is "in connection with" the client's litigation, which would bring the assistance within the prohibition.

Former DR 5-103(B), while similar, did not contain this key phrasing of "assistance in connection with pending or contemplated litigation."[1] Therefore, this Committee's prior opinions do not provide an interpretation of this phrase. In the present instance, the attorney represents the client in the defense of a criminal case; thus, the representation does involve litigation. Does that mean any financial assistance provided to a client is "in connection with" that litigation? The Committee thinks not. The rule does not on its face prohibit providing *all* types of financial assistance to clients who are involved in litigation; rather, the prohibition is narrower, precluding only the assistance that is rendered *in connection with the client's litigation*. In making the distinction between those expenses that come within this prohibition and those that do not, it is useful to

[1] DR 5-103(B)'s phrasing established a broader prohibition, precluding assistance whenever "representing a client in connection with contemplated or pending litigation." Thus, on the face of these rules, the prohibited litigation connection referred to in the original language was with regard to the client's matter, while in the present Rule 1.8, the prohibited litigation connection refers to the expenses themselves.

consider the purpose of the prohibition. The Virginia Supreme Court, in considering the earlier, but similar, DR 5-103(B)[2], described that purpose as follows:

> [T]he rule in question is intended and designed to maintain the independent judgment of counsel in the representation of clients. If a client owes his attorney money, the attorney may have his own pocket book in mind as he handles litigation. That attorney might settle for an amount sufficient to cover the loan to his client, while foregoing the risk of a trial where his client could recover a larger amount *or lose everything*. The policy embodied in DR 5-103(B) is that a lawyer simply should not face this risk to independent judgment.

Shea v. Virginia State Bar, 236 Va. 442, 327 S.E.2d 63 (1988). Thus, the spirit of the prohibition is that financial assistance is problematic when it over-involves the attorney in the client's case to such a degree that the attorney's professional judgment is compromised.

In the *Shea* opinion, the Virginia Supreme Court interpreted DR 5-103(B) and rejected all forms of financial assistance to litigation clients. *See Shea v. Virginia State Bar*, 236 Va. 442, 327 S.E.2d 63 (1988). This Committee respectfully notes that the current language of Rule1.8(e) was not before the Court in that case. Thus, the Committee is looking at the phrasing of the Rule 1.8(e) prohibition for the first time. While the provision of this commissary money appears to have nothing to do directly with the litigation that is the subject of the representation, the attorney must be mindful of the considerations of maintaining independence in judgment. For example, a very nominal amount placed in a commissary account for gum or toothpaste is a de minimus gift that may be permissible. The lawyer must be mindful, however, of the duty to maintain independent judgment. If ever the de minimus gift occasions the lawyer to reexamine either his/her relationship with the client or his/her own personal interests of settling or handling the case, then the gift is improper. However, if the nominal funds are given on an occasional basis to assist an indigent client for small and assorted commissary purchases that have nothing to do with the litigation, Rule 1.8 does not create a *per se* prohibition against those gifts to clients, nor does any other provision of the Rules of Professional Conduct.

The Committee recognizes that this interpretation seems to be a departure from prior opinions and places the Virginia position in line with only a minority of jurisdictions. In prior LEOs, interpreting former DR 5-103(B), the Committee prohibited various forms of assistance, but a majority of those opinions do not interpret the prohibition itself but rather one of the exceptions to that prohibition. *See e.g* LEOs ##1256, 1237, 1182, 1133, 1060, 997, 941, 892, 820, 582, 485, 317, 297. However, in LEO 1269, this Committee prohibited an advancement to a client for living expenses as the loan was a business transaction which could affect the personal judgment of the lawyer. Also, in LEO 1441, the Committee opined that a lawyer may not loan money to a litigation client, with no distinction made regarding how the client would spend the money (i.e., on personal versus litigation expenses).

The Committee recognizes that this interpretation is a minority position. The current Rule 1.8(e) mirrors that provision in the ABA's Model Rules of Professional Conduct. The Committee notes that neither the Comments to Virginia's rules nor those of the

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[2] As noted in Footnote 1, the old rule and the new rule are not identical. Nevertheless, the Committee sees nothing in the rephrasing that changes the basic purpose of this prohibition, only its scope. Thus, the Committee looks to the *Shea* discussion on this point as relevant.

Model Rules squarely address this issue of which, if any, expenses would not fall within this prohibition. A majority of jurisdictions with rules containing the language at issue interpret the "in connection with" prohibition as including any and all expenses of a litigation client.[3] However, the Committee does not agree with this majority position as applied to occasional de minimus humanitarian gifts as long as the independent professional judgment of the attorney is and can be maintained.

The Committee finds persuasive the approach of those minority jurisdictions, which find that neither the language nor the spirit of this prohibition create a *per se* ban on all financial assistance, regardless of the purpose or size of the assistance.[4] In *Florida Bar v. Taylor*, 648 So. 2d 1190 (Fla. 1994), the lawyer's gift of second-hand clothing to a litigation client was deemed permissible under Rule 1.8(e) as humanitarian in nature, not made in attempt to maintain employment and not made with any expectation of repayment, from the litigation proceeds or otherwise. The Committee concurs with the Florida court's reasoning that there can be gifts to clients, unrelated to the litigation itself and not involving a loan giving the lawyer an improper stake in the matter, that do not violate Rule 1.8(e). A total prohibition on all such giving paints with an unnecessarily broad brush.

Nevertheless, the Committee acknowledges, for example, in the situation you describe, a *substantial* gift could violate ethical requirements by compromising the representation of a client if the lawyer is also at the time trying, with some difficulty, to persuade the client to accept a plea agreement unappealing to the client. It would be too sweeping to suggest that all gifts, of all sizes, in all circumstances would be permissible. Such a scenario is better addressed by the application of other ethics rules, instead of an overly broad interpretation of Rule 1.8(e).

For example, Rule 1.7 governs conflicts of interest. In particular, Rule 1.7(a) prohibits conflicts of interest where an attorney's personal interest poses significant risk of materially limiting the representation. Could the making of a gift to a client create such a conflict? The Committee acknowledges that a client continually asking for monetary gifts from a lawyer could interfere with the independent professional judgment of the lawyer. Nevertheless, the Committee does caution that an attorney in the present scenario, if he is to make these gifts, should do so in such a way that avoids any impression on the part of the client that the gift is a "reward" or inducement for accepting the plea agreement encouraged by the attorney. The attorney's advice on that point should in no way be linked to the offer of the financial gift.

Rule 1.8 governs various prohibited transactions. As discussed above, the Committee does not consider these gifts to come within the prohibition established in Rule 1.8(e). Moreover, as these are gifts and not loans, Rule 1.8(a) regarding business transactions with a client is not triggered. The Committee opines that these gifts do not constitute any of the other forms of prohibited transactions under Rule 1.8. The gifts contemplated in this hypothetical are presumably of appropriately small amounts.

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[3] *See e.g., Attorney Greivance Comm'n v. Pennington,* 733 A.2d 1029 (Md. 1999); *In re Pajerowski*, 721 A.2d 992 (N.J. 1998); *Cleveland Bar Ass'n v. Nusbaum*, 753 N.E.2d 183 (Ohio 2001); *State ex rel. Oklahoma Bar Ass'n v. Smolen*, 17 P.3d 456 (Okla. 2000); *In re Strait*, 540 S.E.2d 460 (S.C. 2000); *In re Mines*, 612 N.W.2d 619 (S.D.2000); Md. Ethics Op. 2001-10(prohibiting most assistance); S.D. Ethics Op. 2000-3.

[4] *See e.g., Florida Bar v. Taylor,* 648 So.2d 1190 (Fla. 1994); *In re G.M.,* 797 So.2d 931 (Miss. 2001); *Attorney AAA v. Missisppi Bar,* 735 So.2d 294(Miss. 1999) (note that Miss. rule contains unique language); Conn. Ethics Op. 99-42 (1999); Pa. Ethics Op. 99-8, Md. Ethics Op. 00-42(opinion limited to outright gift of small sum of money).

The second part of the question in this request was whether gifts of this small type may be made by nonattorney staff. The Rules of Professional Conduct regulate members of the Virginia State Bar and do not directly regulate nonattorneys.[5] However, to the extent that the Committee has opined that gifts of the sort described pose no ethical problem for the attorneys, the Committee sees no problem in the attorneys allowing their staff to make these occasional, de minimus gifts as well. The attorney must be mindful of the prohibition in Rule 8.4(a) that an attorney cannot do indirectly though another, in this case a staff person, what they cannot do directly.

This opinion is advisory only, and not binding on any court or tribunal.

Committee Opinion
September 7, 2006

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[5] Rule 5.3 does establish supervisory accountability for support staff's operation in a manner consistent with the Rules of Professional Conduct:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
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> (a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
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> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
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> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
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> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.