

Committee Opinion
November 13, 1987

LEGAL ETHICS OPINION 997

LAW FIRM—ADVANCING COSTS OF
LITIGATION

You ask whether a court-appointed or pro bono counsel may advance the costs of an expert witness whose services are necessary to establish claims of constitutional error brought by a death row inmate, where there is no probability that the client will ultimately reimburse counsel for those costs.

Earlier Legal Ethics Opinions address the subject of advancing costs of litigation on behalf of a client. Generally, these opinions state that costs may be advanced if the client remains "ultimately responsible". (See LE Op. 317, LE Op. 820 and LE Op. 941). These opinions were all based upon DR:5-103(A) of the Code, which provides that an attorney may advance costs of litigation provided the client remains ultimately liable for such expenses. Ethical Consideration 5-8 provides that a lawyer may provide or guarantee costs but the liability for such costs must be that of the client.

LE Op. 485 states that "it is improper for a private law firm to advance the costs and expenses of litigation where the client will not be ultimately liable for these costs and expenses. This is so even in a class action--where there is not a readily identifiable 'client'--and even though the class members are indigent".

LE Op. 485 was based also on the possibility that the advancement of funds by a private attorney in a civil rights litigation could affect independence of judgment as to settlement and appeals. There is no danger of that occurring in the instant situation since there is only one avenue of relief in death penalty cases.

The Committee finds it extremely unfair for a client, particularly in a death penalty case, to be denied effective representation because he is indigent and unable to ultimately pay his attorney for costs advanced.

The Committee, therefore, opines that it is not improper for a lawyer to advance the costs of litigation for an indigent client in a death penalty case, when there is no reasonable expectation that the client will be able to repay the lawyer for the costs advanced.

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Legal Ethics Committee Notes. – Rule 1.8(e)(2) allows a lawyer to pay litigation costs and expenses on behalf of an indigent client.