Payment of Indigent Client's Litigation-Related Expenses

NOVEMBER 18, 2020

The question presented is whether an attorney who works for the State of Connecticut's Division of Public Defender Services may, consistent with our Rule of Professional Conduct 1.8(e), pay for certain litigation-related expenses of an indigent client "including, but not limited to, providing the…client a bus pass, train ticket, hotel room, meal, or clothing to wear for a court trial."

The answer, in short, is yes, because the financial assistance listed by the inquirer—new clothes for a court appearance, a train or bus ticket to get to court, and a hotel room when the client must stay overnight near the court[1]—relate to the litigation and pertain to an indigent client, and hence are expressly permitted by Rule 1.8(e)(2).

Rule 1.8 is entitled "**Conflict of Interest: Prohibited Transactions**." Subsection (e) 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 pay court costs and expenses of litigation on behalf of a client, the repayment of which may be contingent on the outcome of the matter;
>
> (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

In the situation presented in the inquiry before us, there is no expectation of repayment; hence, the first exception to the general prohibition on financial assistance to a client is not applicable. The second exception expressly permits attorneys to pay both "court costs" and "expenses of litigation" on behalf of an indigent client. Both exceptions apply to all attorneys and are not limited to those undertaking a pro bono representation or working for a non-profit organization. Thus, they apply to attorneys working for a government agency such as the State of Connecticut Division of Public Defender Service. We understand that all clients of a public defender in Connecticut are indigent, and it appears that virtually all of the payments the inquiry asks about are payments for expenses related to litigation.[2] Hence, we conclude that such payments would be permissible under the second exception in Rule 1.8(e).

This Committee has previously determined that the term "expenses of litigation" should be narrowly construed to encompass only those expenses that are integral to the lawsuit itself, such as sheriff's fees, an appeal bond, or an MRI in a personal injury action performed for the purposes of establishing causation. *See* Informal Opinion 93-12 (1993) (Attorney Advancing Cost of Client's Medical Test). Likewise, travel and hotel expenses to enable the indigent client to attend a court hearing may be paid by the attorney. *See* Informal Opinion 00-21 (2000) (Right of Lawyer to Pay Client's Transportation and Lodging to Attend Deposition). On the other hand, transportation expenses not directly related to the litigation, such as to allow the client in a personal injury case to obtain medical treatment, are not within the exceptions of Rule 1.8(e). *See* Informal Opinion 00-21 (citing *Attorney Grievance Commission of Maryland v. Kandel*, 563 A.2d 387, 389 (1989)), which held that living expenses, including transportation for medical treatment, were not "litigation expenses"). We have also opined that payment of a DMV license restoration fee is not an expense of litigation and therefore is not permissible under Rule 1.8(e). *See* Informal Opinion 04-02 (2004) (Payment of License Restoration Fee by Lawyer). Although there is no prior ethics opinion on point in Connecticut about clothes, it is reasonable to conclude that the clothes worn by an indigent client may have an impact on the judge, witnesses, other attorneys, and a jury. Hence, we conclude that an attorney may pay for the clothing a client wears to a court or other litigation appearance.

As this Committee has previously noted, Connecticut's Rule 1.8(e) does not currently have a general "humanitarian ex-

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The Rules of Professional Conduct have the force of law on attorneys. The Formal and Informal Opinions are advisory opinions. Although the Connecticut Supreme Court has on occasion referred to them as well reasoned, the advisory opinions are not authoritative and are not binding on the Statewide Grievance Committee or the courts.

ception" to the prohibition on providing financial assistance to a client. *See* Informal Opinion 90-03 (1990) (Financial Assistance to a Client) (concluding that a $300 loan to a client to avoid a home foreclosure is not a litigation expense); Informal Opinion 00-21, *supra* (citing Informal Opinion 90-03 approvingly); Informal Opinion 11-10 (2011) (Humanitarian Financial Assistance to Client) (again noting the absence of a "humanitarian exception" in Rule 1.8(e) and concluding that such a payment "made through the medium of a church or done anonymously would not change the essential character of the payment").

We understand that some states do permit payments to indigent clients beyond those currently permitted by Connecticut. *See*, *e.g.*, *Louisiana State Bar Association v. Edwins*, 329 So. 2d 437, 446 (La. 1976); *The Florida Bar v. Taylor*, 648 So. 2d 1190 (Fla. 1994). On June 18, 2020, New York amended its counterpart to Rule 1.8(e) to allow lawyers undertaking a pro bono representation or working for a non-profit legal services organization to provide financial assistance to indigent clients. *See* 2020 Amendments to Rule 1.8(e) of the New York Rules of Professional Conduct. ABA Model Rule 1.8(e) also was recently amended to permit limited humanitarian assistance to indigent clients. The task of this Committee, however, is to interpret the Rules of Professional Conduct as adopted in Connecticut.

NOTES

1. We address "meal" payment *infra* note 2.
2. The one payment inquired about that may not be a litigation expense is for the client's "meal." We understand the question to be whether it is permissible to buy the client lunch now and then when the attorney and client are meeting. In these circumstances, we do not think the provision of or payment for the client's meal amounts to "financial assistance" because it is de minimis and an ordinary part of civil discourse. *See* Informal Opinion 18-05 (Nominal Value Gift for Client Referrals) (stating that "a gift of such nominal value does not violate" Rule 7.2(c)); *see also* Commentary to Rule 1.8 (explaining that the Rule likewise does not prohibit clients from giving lawyers "a simple gift such as a present given at a holiday or as a token of appreciation").

Maintaining Client Files and Original Wills When a Partner Departs

JANUARY 20, 2021

The Committee received an inquiry from an attorney, as partner in a law firm ("Requesting Partner") regarding the ethical obligations owed to clients and former clients about the client's files and original executed Wills when a partner leaves the firm ("Departing Partner"). The Requesting Partner provided the following facts: (1) the Departing Partner left the law firm to practice elsewhere; (2) at the time of departure, the Departing Partner sent "ballot" letters to clients soliciting consent to transfer the active clients' files to the Departing Partner's new firm; (3) some clients did not return the "ballot" or otherwise consent to transfer their active files to the Departing Attorney; and (4) the firm maintains clients' files and former clients' original executed Wills.

The Requesting Partner asked whether:

1. The Departing Partner is entitled to take the active clients' files from the firm at the time of departure where the clients did not return the "ballot" or otherwise consent?
2. The Departing Partner is entitled to take former clients' original executed Wills and estate planning documents from the firm at the time of departure without notice to the former clients or client consent?

Rule 5.1(a) of the Rules of Professional Conduct (the "Rules") requires attorneys with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all attorneys in the firm will conform to the Rules.

Rule 1.15 of the Rules imposes the affirmative duty upon an attorney to safeguard client property in the attorney's possession. While this duty is most frequently applied in the context of an attorney's handling of client funds or tangible

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property, the Rule extends to *all* forms of client property, including a client's file and/or original executed Will. *See* CBA Informal Opinion 98-23 (concerning reasonable steps to safeguard file documents and original Wills).

The questions presented here underscore the importance of attorneys in a firm creating a file and record retention policy. Implementing and enforcing such a policy helps every attorney safeguard client confidences and organize information to permit effective representation and compliance with the Rules. Properly maintaining client files during representation and for an established time-period thereafter benefits the attorney, the law firm, and client. Ideally, attorneys inform their clients of the retention policy in the retainer agreement or file closing letter. *See* CBA Informal Opinion 10-07.

Rule 1.4(a)(3) of the Rules provides, in pertinent part, that "a lawyer shall . . . keep the client reasonably informed about the status of the matter," which includes the attorney's status and the location of the client's file. See CBA Informal Opinions 88-23, 97-14, 97-15 and 00-25 (confirming that an attorney's departure from a law firm is sufficiently noteworthy to warrant notice to the client).

In the Committee's view, the size of the firm, the sophistication of the client, and the nature of the client matter are relevant to the client's reasonable expectation with respect to who will act on the client's behalf when an attorney leaves the firm. For example, the reasonable expectation of a corporate client retaining a mid-size firm for representation in multiple contract matters may differ significantly from that of an individual client retaining an attorney in a two-attorney firm for representation in a custody dispute. In every situation the client's reasonable expectation under the circumstances is an important consideration in determining the timing, content, and method of notification.

Where a client engages the law firm and the firm advises the client that its professional staff will provide representation in the client's matter, the client may understand that no particular lawyer in the firm will handle every aspect of the client's matter. However, where a client reasonably expects that a particular lawyer will handle the client's matter, the departure of that attorney is a significant development that triggers the duty to inform the client. Timely notification to the client regarding the departure of an attorney involved in the client's matter is critical to assist the client to decide who will represent him. *See* CBA Informal Opinion 00-25 (quoting ABA Formal Opinion 414 (1999)).

When fulfilling this duty to inform the client, partners at the law firm or the Departing Attorney may solicit the client's consent (in the form of a "ballot" letter) for transfer of representation and delivery of the former client's original Will and file to the Departing Attorney. If a client responds to a "ballot" that directs the transfer of the client's file, then the client's direction controls. Both the Requesting Attorney and the Departing Attorney must comply with the client's instruction. *See* ABA Formal Opinion 489 (12/4/19).

In response to Question #1 presented about the Departing Attorney's "ballot" sent to active clients about their files, if a client fails to return the "ballot" or otherwise respond with consent to transfer the client's file in an active or pending matter, neither the Requesting Attorney nor the Departing Attorney can assume consent to the transfer representation of the client (and the client's file) to the Departing Attorney. The client's silence cannot be construed as acquiescence under these circumstances.

If no "ballot" is received, it's equally important for the Requesting Partner who has managerial and/or supervisory authority, to ensure that the law firm's remaining attorneys are capable and sufficiently competent to continue representation in the client's active or pending matter. *See* Rule 1.1. Without a reasonable means to competently handle the client's active matter, the Requesting Partner may consider an arrangement with the Departing Partner to provide or assist in the provision of legal services to the firm's client in the active, pending matter.

In response to Question #2 presented about the former client's executed Will in the possession of the law firm, the Will is the property of the client. Under Rule 1.15, the law firm must safeguard it until the firm's client gives different instructions. If a Departing Attorney takes the client's Will from the law firm without notice to the client or the client's consent, then in most instances, the Departing Attorney would be frustrating a material purpose of Rule 1.15.

When an attorney leaves a law firm, the original Will and estate planning documents in the client's file should remain with the law firm, unless the client's reasonable expectation under the circumstances manifestly warrant transfer. For example, if the Departing Partner exclusively represented the client in preparation and execution of the Will, and was specifically entrusted with possession of the client's original Will, the Requesting Partner may transfer the Will to the Departing Partner provided the Requesting Partner is satisfied that the Departing Partner will preserve and safeguard the original Will, and Requesting Partner notifies the former client of the transfer, and the client does not object to the arrangement.

While the Rules do not precisely answer the questions presented, the Committee concludes that the Departing Partner is not automatically entitled to take the active clients' files from the firm at the time of departure where the client does not return the "ballot" or otherwise consent. The Departing Partner is not entitled to take a former client's original executed Will from the firm at the time of departure without notice to the former client or client consent. The Requesting Partner may transfer to the Departing Partner a former client's original executed Will and estate planning documents where the arrangement conforms to the reasonable expectations of a particular client, and the firm advises the client of the transfer to the Departing Partner, and the client does not object to the arrangement.

Use of a Vendor in Connection with Filing a Patent Application

MARCH 17, 2021

A Connecticut patent lawyer asks two questions: (1) whether it is permissible to use a service in which the vendor, using its knowledge and experience, provides guidance on writing a patent application so the application may be "classified" more favorably by the United States Patent and Trademark Office ("USPTO") when the vendor separately provides the USPTO with government contractor services by classifying incoming patent applications; and (2) if it is permissible, whether a lawyer is obliged to use such services for the benefit of a client.

When a patent application is filed at the USPTO, the application is assigned to a patent examiner in an Art Unit[1] that has skill relevant to the invention technology. Based on law and an assessment of what is new and nonobvious, a patent examiner determines whether the application should be allowed, i.e., whether a patent will be granted. While the USPTO's proceedings are a mixture of public and non-public information, with few exceptions, when a patent is granted all information about the patenting process becomes electronically accessible public information. Datamining of such public information can ascertain the statistical likelihood for a favorable outcome—i.e., the allowance of a patent as a function of the examiner's Art Unit. The USPTO has a classification system that is a highly detailed organization of technology (or "art," e.g., chemistry, physics, human necessities, etc.), comprised of more than 150,000 possible codes. Art Units are aligned with this classification system and the USPTO uses a vendor to classify new patent applications.

Here, a vendor that provides classification services to the USPTO also supplies its classification expertise as a commercial service to patent lawyers. The vendor analyzes a prospective application and offers its opinion on how the application will be classified as drafted. In addition, the service makes suggestions about changing the wording and emphasis, so that when it is filed, the application will likely be classified in the Art Unit where the chance for obtaining a patent should be greater, as indicated by public data.

As an initial matter, patent lawyers in the State of Connecticut are not only subject to the Connecticut Rules of Professional Conduct (the "CT Rules"), they are also subject to the United States Patent and Trademark Office's Rules of Professional Conduct (the "USPTO Rules"). *See* CT Rule 8.5(a) (stating "[a] lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct"). Although the USPTO Rules are similar in many respects, this opinion only addresses whether the conduct in question is permissible under the CT Rules. Consistent with *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 383 (1963) (agreeing with the determination that the preparation and prosecution of patent applications constitutes the practice of law under Florida law), this Committee has previously concluded that an attorney practicing in Connecticut who seeks to secure letters patent from the USPTO is practicing law in Connecticut. Informal Opinion 12-02. Further, the USPTO Rules recognize the co-extensiveness of state professionalism standards with its regulations. *See* 37 C.F.R. § 10.1.[2] Under the doctrine of federal preemption, a state cannot set the rules by which a lawyer may practice before the USPTO, however "the State maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objectives." *Sperry*, 373 U.S. at 402. "That the PTO and the states may share jurisdiction over certain disciplinary matters, however, does not mean that the states' authority is preempted." *Kroll v. Finnerty*, 242 F.3d 1359, 1365 (Fed. Cir. 2001).

The consideration of this service requires us to consider Rule 8.4. Here, the vendor supplying its expertise for the service provided to a lawyer is also classifying applications into Art Units for review by patent examiners, however we are told that the vendor screens the employees providing the service from the employees tasked with classifying applications for the USPTO. It is also critical to note that while the vendor in its work for the USPTO is responsible for which Art Unit initially reviews a particular application, the substantive review of an application's merits rests with a USPTO patent examiner. Further, supervisors of patent examiners are able to negotiate among themselves a change of classification, and thus a change of Art Unit, when they deem it is appropriate. Thus, the value of the service in question is not that it is able to ensure an application will be passed on to a particular Art Unit, but rather it is providing expert opinion on: (1) what Art Unit the application will likely be assigned to in its current form; and (2) changes to the application that, if made, will increase the likelihood the application is assigned to an Art Unit that public data shows has a more favorable allowance rate and possibly a faster response time.[3]

The service described and represented appears to provide an objective assessment of how the application would be classified as written and how it might be

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classified differently if altered. It appears that the vendor is providing advice to a patent lawyer using its expertise with respect to how applications are classified at the USPTO, while at the same time it is providing classification services to the USPTO. As presented, there is no indication of a connection between the advice (which the lawyer may or may not follow) and how the patent application might be handled by the vendor if and when it is filed.[4] Thus, as presented, the lawyer's use of the service described above would not appear to violate any provision of Rule 8.4.

The question posed by the lawyer also requires consideration of Rule 5.3(3)(A) which provides that a lawyer who employs, retains, or associates with a non-lawyer is responsible for the conduct of the non-lawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer—provided that the lawyer "orders or, with the knowledge of the specific conduct, ratifies the conduct involved." We are told that the vendor represents its service does not violate any agreement with the USPTO and that the USPTO is aware of the service. Taking this representation at face value and considering the public promotion of the service by the vendor, it appears reasonable to conclude that the USPTO is aware of the service. The commentary to Rule 5.3 states that "a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations." The open and notorious nature of the service appears to be sufficient to allow the lawyer to conclude that use of the services would not be a violation of Rule 5.3(3)(A).

Accordingly, it is the Committee's opinion that, consistent with Rules 5.3(3) and 8.4(3), the lawyer may use the service described above, provided the lawyer is not aware that the service constitutes a breach of the vendor's obligations to the USPTO.

Based upon the Committee's opinion as to the first question, the lawyer also asks for the Committee's opinion as to whether the lawyer is obligated to use such a service to satisfy Rules 1.1 and 1.3. Rule 1.1 states in relevant part that a "lawyer shall provide competent representation to a client." The commentary to Rule 1.1 provides that a relevant factor in determining whether a lawyer has employed the requisite knowledge and skill is the relative complexity and specialized nature of the matter. Here, arguably the practice of law regarding intellectual property, specifically patents, is inherently specialized based upon the additional academic credentials and examination required. Indeed, Rule 7.2(d) addresses instances in which a lawyer holds him/herself out as a specialist, and the commentary to this rule specifically notes that the "Patent and Trademark Office has a long established policy of designating lawyers practicing before the Office." Accordingly, the obligation of competent representation in the context of a patent application is subject to a different, if not higher, standard under the USPTO Rules. *See* USPTO Rule 11.101 ("A practitioner shall provide competent representation to a client. Competent representation requires the legal, scientific, and technical knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

Here, the value of the service is that it relies upon the experience obtained from classifying millions of patent applications to predict the likely Art Unit that a prospective application will be classified into. Although the criteria for classifying a patent application are publicly available,[5] a patent lawyer may not be able to appreciate how the USPTO is likely to classify a particular application given the detailed and complex taxonomy of the USPTO's system. Further, the client's objectives factor into whether the service's recommendations would be of value. For example, a client that seeks to obtain any patent might find this service appealing. In contrast a client seeking a patent that provides protection for specific technical aspects may believe that re-crafting the application solely for possible better classification requires unacceptable tradeoffs.

Further, it is worth noting that even if the lawyer implements the vendor's suggested changes and is successful in having the application classified to a more desirable Art Unit, that classification is not final. Indeed, where a supervisory patent examiner "believes an application, either new or amended, does not belong in their art unit, they may request transfer of the application from their art unit (the 'originating' art unit) to another art unit."[6] There can be substantial variation within an Art Unit amongst the examiners with respect to the likelihood of a favorable outcome.[7] So, the value of the vendor's service is that it might provide the client's application with some statistically better chance of having a patent issued. Whether an application altered for classification purposes would result in a diminished degree of desired patent protection is a determination for the patent lawyer to make, consulting with the client as appropriate.

Rule 1.3, states a "lawyer shall act with reasonable diligence and promptness in representing a client." The commentary to Rule 1.3 provides in relevant part, that a "lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client." Therefore, in accordance with the lawyer's communication obligations under Rule 1.4(a)(2) and 1.4(b), if the lawyer believes the client's chances of receiving a patent with the desired degree of protection would be materially improved by using the service, the lawyer is encouraged to inform the client of the option and abide by the client's decision. ■

NOTES

1. Patent examiners are organized into "Art Units," focused on different areas of technology (e.g., electronic systems, cooling systems with compressors, etc.).
2. "This part governs solely the practice of patent, trademark, and other law before the Patent and Trademark Office. Nothing in this part shall be construed to preempt the authority of each State to regulate the practice of law, except to the extent necessary for the Patent and Trademark Office to accomplish its federal objectives."
3. For example, an application may be presented as "data center (collection of detailed electronic devices) having a cooling system" which might be classified as "electronic system." It might be recrafted as "cooling system" with little emphasis on what are the electronic components, whereupon it would be classified as "cooling system with compressor/controls."
4. For reference, about 600–700,000 patent applications are filed with the USPTO each year.
5. *See generally* United States Patent and Trademark Office, MANUAL OF PATENT EXAMINING PROCEDURE, Chapter 900, www.uspto.gov/web/offices/pac/mpep/mpep-0900.html (last visited December 24, 2020).
6. *Id.* at Section 903.08(d)(II).
7. Data about chance for allowance as a function of named examiner is publicly available, www.patentbots.com/stats.