LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

FORMAL OPINION NO. 495
NOVEMBER 16, 1998

SUMMARY OF OPINION

ATTORNEY PAYMENT OF REASONABLY INCURRED LITIGATION EXPENSES FOR WHICH CLIENT REFUSES TO PAY

Pursuant to Rule of Professional Conduct 4-210, an attorney may advance the reasonable expenses of prosecuting or defending an action notwithstanding the client's refusal to pay such costs, after they were incurred, and even though the expenses might not be repaid. This is true even if such repayment is not contingent on the outcome of the action. Attorneys are reminded that Business and Professions Code sections 6147 and 6148 state that when written fee agreements for contingent and non-contingent fees are required, they must set forth how costs/charges will be paid and allocated.

AUTHORITIES CITED

California Rule of Professional Conduct 4-210

DeBlase v. Superior Court (1996) 41 Cal.App.4th 1279

Ojeda v. Sharp Cabrillo Hospital (1992) 8 Cal.App.4th 1

Ripley v. Pappadopoulous (1994) 23 Cal.App.4th 1616

COPRAC Formal Opinion No. 1976-38

LACBA Opinion No. 379 (May 8, 1979)

Business and Professions Code section 6147

Business and Professions Code section 6148

Code of Civil Procedure section 1032

Code of Civil Procedure section 1033.5, subdivision (a)(3)

FACTS AND ISSUES PRESENTED

Attorney was retained by Client to represent it in a lawsuit. During the course of the litigation, Attorney noticed several depositions and arranged for a court reporter to record and transcribe those depositions. Attorney appeared at the depositions to represent Client, who also attended the depositions. In accordance with the arrangements made by Attorney, the court reporter provided transcripts to Attorney, along with

invoices for the costs of those transcripts and the recording of testimony during the depositions. Attorney then submitted the reporter's bills to Client for payment, but Client refused to pay the invoices. Client, however, did not instruct Attorney not to pay the invoices.

May Attorney pay the reporters' invoices without violating California Rule of Professional Conduct 4-210? [1]

DISCUSSION

Although once the subject of great debate and controversy, it is now generally accepted that an attorney may advance the reasonable costs of litigation, even if the repayment of such costs is uncertain. (See, e.g., DeBlase v. Superior Court (1996) 41 Cal.App.4th 1279, 1284-85 (an arrangement whereby counsel advances a litigants' litigation expenses "is commonplace in public-interest litigation . . . and contingent fee litigation . . . .); Ripley v. Pappadopoulous (1994) 23 Cal.App.4th 1616, 1626 n.17 (noting that while the advancement of litigation expenses used to be considered unethical, Rule 4-210 now expressly permits such advancement); Ojeda, 8 Cal.App.4th at 21(citing Rule 4-210); COPRAC Formal Opinion No. 1976-38 (concluding that it is not ethically improper for an attorney to advance litigation costs even where there is a substantial likelihood that the client cannot repay the advances absent recovery of damages, so long as the client is informed of his responsibility to reimburse his attorney); LACBA Opinion No. 379 (May 8, 1979) (same).)

Here, of course, the question is not so much whether an attorney may advance reasonable litigation costs, but whether an attorney may advance such costs in the face of a client's statement that it refuses to pay the costs?[2] Because Attorney reasonably could anticipate that the reporter's fees would be awarded as recoverable costs of litigation if Client were the prevailing party (Code of Civil Procedure §§ 1032, 1033.5, subd. (a)(3); cf. DeBlase, 41 Cal.App.4th at 1285), the reporter's fees still would be considered litigation expenses "the repayment of which may be contingent on the outcome of the matter." Thus, Rule 4-210 would not be violated if Attorney paid the reporter's fees after Client refused to pay such costs itself.

Moreover, because Rule 4-210 does not condition the advancement (or payment) of litigation costs on the fact of repayment - but rather states in a subordinate clause that the repayment of litigation costs "may be contingent on the outcome of the matter" - an attorney should be able to advance the reasonable costs of litigation even if (i) a client states it will not pay for such costs and (ii) there is no good faith belief that the costs may be repaid through some other means, and still fall within the safe harbor provided by subparagraph (3) of Rule 4-210. Indeed, in Ojeda, supra, the court of appeal found that an attorney was liable to a medical-legal consulting firm under a contract signed by the attorney (as well as the clients) wherein the attorney promised to pay the consultant in accordance with the terms of the contract. This liability was independent of the clients' responsibility for payment, and to the extent that the fees due the consultant were not considered "usual" litigation costs, the court held - fully cognizant of the dictates of Rule 4-210 - that such costs should be deducted from amounts that otherwise would have been paid to the attorney as contingent fees. (8 Cal.App.4th at 20.)

Finally, left unstated in the inquiry is whether Attorney and Client previously had agreed who would pay "reasonable costs of litigation" or otherwise how such costs would be treated as between them. If applicable, Business and Professions Code section 6147, subdivision (a)(2), or section 6148, subdivision (a)(1), would have required Attorney to enter into a written fee agreement with Client that set forth the responsibilities of Client and Attorney with regard to the payment of litigation costs. Even if those sections were not applicable, had a written fee agreement been executed by Client that required Client to pay all litigation costs when incurred or from the proceeds of the litigation, Attorney might have convinced Client to pay the invoices and would not have found himself wondering whether he could pay them in light of Client's refusal.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinions are based on such facts as are set forth in the inquiry submitted to it.

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[1] Rule 4-210 provides, in relevant part, that

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member:
(3) From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

According to the court in Ojeda v. Sharp Cabrillo Hospital (1992) 8 Cal.App.4th 1, 8, "[t]raditionally the costs associated with a lawsuit have included items such as transcript, filing, service and jury fees and hourly compensation paid to experts who serve as witnesses or consultants." Hence, the reporting transcript costs at issue herein should be considered "costs of prosecuting or defending a claim or action" or "expenses of litigation."
Subparagraph (1) of Rule 4-210, which outlines the circumstances under which an attorney may pay a client's personal or business expenses, is not applicable here, as the court reporter fees are not "personal or business expenses" of Client. Subparagraph (2) solely concerns some of the conditions under which an attorney can enter an agreement to loan money to a former client, and thus also is inapplicable here.

[2] The Committee assumes that Client's statement that it "refused" to pay the reporter's fees was a categorical refusal to pay those costs, not just that it would not pay the costs at the time the invoices first were presented. The latter situation falls within the usual understanding of the term "advancing costs" (cf., Webster's College Dictionary (Random House, 1995) - Advance "7. to furnish or supply (money or goods) on credit" and "19a. a furnishing of something before an equivalent is received") and thus is permitted by Rule 4-210(A)(3) and existing authority. The Committee further assumes that (i) Attorney was authorized to incur the expenses of the depositions, as evidenced by the Client's knowledge of and attendance at the depositions, (ii) the Client did not direct Attorney not to pay the costs at all (i.e., personally) and (iii) the Client did not refuse to pay the fees due to some dissatisfaction with the work performed by the court reporter. Further, in the face of Client's refusal, Attorney should clarify whether Client will oppose the repayment of the cost from any recovery that may be had in the litigation.