Committee Opinion
November 16, 1992

LEGAL ETHICS OPINION 1489

BUSINESS TRANSACTIONS WITH CLIENT: CLIENT LOANING MONEY TO ATTORNEY.

You have presented a hypothetical situation in which an attorney's client (who had no connection with her father's litigation) has been billed by another attorney for services rendered to/on her father's behalf prior to her father's death earlier this year, indigent and intestate and leaving four surviving children.

You state that during the attorney's most recent meeting with his client, he was given certain letters from the billing attorney regarding the decedent's litigation (dismissed subsequent to decedent's death for lack of legal standing to proceed) and the attorney's bill. While discussing her father's indigence, the client mentioned to the attorney that the billing attorney, in order to pay his rent, had borrowed money from her father on several occasions. The client advised that all sums borrowed had either been repaid according to the terms of the loan or, without any known prior notice to the decedent, had merely been credited against his bill to the attorney. The client (who is not aware of the existence of any formal retainer agreement) believes that the billing attorney was not working on a contingent fee basis or on a "contingency plus" basis but rather was charging her father a flat fee of $45 per hour.

You have asked the Committee to opine whether, under the facts of the inquiry, it is improper for an attorney to borrow funds from his client, during the pendency of contested litigation.

The appropriate and controlling Disciplinary Rule related to your inquiry is DR:5-104(A), which states that a lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full and adequate disclosure under the circumstances and provided that the transaction was not unconscionable, unfair or inequitable when made.

The Committee has previously considered the propriety of a loan made to a client for assistance with living expenses during the course of litigation. LE Op. 1269 was, however, predicated in part on the improper adverse relationship between the lawyer as creditor and the client as debtor, as prohibited by DR:5-104(A) and in part on DR:5-103(A) which prohibits a lawyer from acquiring a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client.

The Committee is of the opinion that since the attorney does not acquire a proprietary interest in the pending litigation, DR:5-103(A) is inapposite to the facts you have presented. The Committee further opines that it is not per se improper for an attorney to obtain a loan from his client during the pendency of contested litigation, provided that there is compliance with the mandates of DR:5-104(A) before entering into such a

transaction. Specifically, there must be full and adequate disclosure as to all possible consequences of such a transaction and the transaction must not be unconscionable, unfair or inequitable when made. See, e.g. Giovanazzi v. State Bar, 619 P.2d 1005 (Cal. 1980) (lawyer suspended for three years for having borrowed large sums of money from client and agreeing to pay high rate of interest; lawyer failed to inform client as to consequences of lender charging usurious rates of interest); In re Johnson, Wash. Sup. Ct. Bar No. 8824, 3/19/92 (lawyer who twice borrowed substantial sum of money without providing clients with full written disclosure of his precarious financial condition is suspended for 60 days, placed on probation for two years, and required to make restitution).

As to what constitutes "full and adequate disclosure," the Committee directs your attention to prior LE Op. 187, LE Op. 1097, LE Op. 1198, and LE Op. 1254, which conclude that disclosure is adequate if it is such that the attorney's client is able to make an informed decision as to whether or not to give consent. The Committee has consistently opined that all doubts regarding the sufficiency of the disclosure must be resolved in favor of the client.

Assuming that there was not full and adequate disclosure, the Committee also opines that it was improper for the billing attorney to borrow money from his client during the pending litigation, since the attorney would not have complied with the requirements of DR:5-104(A).

Finally, assuming there was similarly no disclosure as to payments on the loan being applied to the client's bill, the Committee is concerned by the indications that the billing attorney merely credited the loan against the client's bill without any notice to, or agreement of, the client. See LE Op. 734. In so crediting without notice or agreement, the billing attorney may also have violated DRs 9-102(B)(1) and (3) [DR:9-102] which, in pertinent part, require a lawyer to promptly notify a client of the receipt of his funds, maintain complete records of all funds of the client coming into the possession of the lawyer, and render appropriate accounts to the client regarding those funds and records.

Legal Ethics Committee Notes. – Under Rule 1.8(a), a lawyer may not enter into a “business transaction” with a client unless the client is given an opportunity to seek independent advice, and there has been full disclosure and consent in writing.