

Paying Litigation Expenses For Litigation Service Providers

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Every lawyer knows the basic rule, embodied in DR 5103, that the expenses of litigation must be paid by the client. DR 5103(B)(1) permits a lawyer to advance or guarantee the expenses, “including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence,” but requires that the client remain ultimately liable for the expenses.

DR 5103(B)(2) provides the only exception to the basic rule:

Unless prohibited by law or rule of court, a lawyer representing an indigent client on a pro bono basis may pay court costs and reasonable expenses of litigation on behalf of the client.

In Opinion 786 (4/28/05), the NYSBA Committee on Professional Ethics considered the application of these provisions when the client is not an individual but, instead, a provider of legal services to the indigent. The Committee asked, in effect: may a provider of legal services itself be considered an indigent for purposes of the Rule, so as to permit the pro bono lawyer to pay the expenses of litigation without requiring that the provider remain ultimately responsible for them?

To answer this question, we need a definition of “indigent.” The New York courts have applied the term only to individuals, as in: “destitute of property or means of comfortable subsistence”; “too poor to hire a lawyer”; “financially unable to retain counsel.”

Can the term “indigent” be extended to the corporations, associations and other entities which act as providers of legal services? As Opinion 786 states:

The question is of some practical importance, as the expenses of litigation can be substantial and the resources of the organization are often fully committed to the service of its mission. Moreover, even if a lawyer has no intention of enforcing the legal right to collect expenses from the organization, the board of the organization may be reluctant to expose the organization to even a theoretical legal obligation in those amounts.

In *Rowland v. California Men’s Colony, Unit II Men’s Advisory Counsel*, 506 U.S. 194, (1993) the U.S. Supreme Court found that corporations and associations were not “persons” entitled to proceed in forma pauperis. The Court said, “[w]hatever the state of its treasury, an association or corporation cannot be said to ‘[ac]k the comforts of life,’ any more than one can sensibly ask whether it can provide itself, let alone its dependents, with life’s ‘necessities.’”

But the decision in *Rowland* was based on a number of ‘contextual features’ of the federal statute at issue. These are not shared by DR 5103(B)(2). Thus, Opinion 786 says:

We detect no like basis in the Code to conclude that the term “indigent client” is limited to natural persons. While we recognize that determining the meaning of the term “indigent” in the context of organizations is difficult, we do not believe it is impossible.

However, an organization does not qualify as “indigent” merely because it depends on charity or governmental assistance. Many nonprofit organizations providing legal services to the poor have very substantial resources.

Opinion 786 refused to offer any monetary guidelines as to what constitutes “indigence.”

In the end, the test must be the good judgment of the lawyer. But the test should apply equally to all organizations, regardless of “the perceived societal value of the organization’s purposes. It must, in short, depend only on the financial wherewithal of the organization.”

Opinion 786 offers this advice to pro bono lawyers who wish to help these indigent organizations:

We are mindful that many lawyers offering pro bono services to nonprofit providers of legal services to the poor are ready as well to bear the expenses of the suit. That is a choice that a lawyer can exercise by declining to seek recovery of expenses that the lawyer has paid on the client’s behalf, just as any lawyer can decline to collect a fee that is owed. But the lawyer may not, “[w]hile representing a client in connection with contemplated or pending litigation,” DR 5 103(B) — that is, during the pendency of the suit — relieve a nonindigent organization of ultimate responsibility for the expenses.