

**ALASKA BAR ASSOCIATION
ETHICS OPINION 2015-1**

May a Lawyer Post Bail for a Client?

Question Presented:

Under what circumstances, if any, may a lawyer post bail for a client?

Conclusion:

Under rare circumstances a lawyer may post bail for a client, though the practice is discouraged.

Discussion:

An attorney asks whether it is ethically permissible to post bail for a client¹ who is in custody.

Posting bail for a client raises several issues under the Alaska Rules of Professional Conduct, which help ensure that a lawyer can zealously represent a client without conflicting interests that could affect the quality of the representation. The Rules provide, for example, that a lawyer may not provide financial assistance to a client in connection with litigation² or acquire a proprietary interest in the subject matter of litigation.³ Neither may a lawyer represent a client if the representation is adverse to a personal interest of the lawyer.⁴

Each of these prohibitions, however, has exceptions. So, while a lawyer is generally prohibited from providing financial assistance to a client in connection with pending or contemplated litigation, a lawyer may advance court costs and expenses.⁵ And if a lawyer believes that he or she will be able to provide competent and diligent representation to a client despite their adverse interests, the lawyer may proceed with that representation after obtaining informed consent from the client.⁶

Posting bail for a client imposes on the lawyer both contractual and financial constraints which could give rise to a situation in which the lawyer's interests are materially

¹ This opinion does not address the ethical obligations of an attorney who is asked to post bail in a personal capacity unrelated to any existing or prospective client-lawyer relationship.

² Rule 1.8(e) (“A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation . . .”)

³ Rule 1.8(a) (“A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client . . .”)

⁴ Rule 1.7(a)(2).

⁵ Rule 1.8(e)(1)-(2).

⁶ Rule 1.7 (b).

adverse to the client's, particularly if the client fails to comply with his or her conditions of release. Despite these ethical implications, posting bail does not fit squarely within the "costs of litigation" exception contemplated by Rule 1.8(e) nor the concurrent conflict of interest analysis contemplated by Rule 1.7(a)(2). Some jurisdictions interpret bail as akin to a cost of litigation,⁷ while the American Bar Association applies a concurrent conflict of interest analysis.⁸ While the Rules do not expressly address bail, they do provide analytical guidance.

Rule 1.7(b) contemplates limited exceptions to a concurrent conflict of interest where a lawyer's ability to zealously represent the client's interest is not compromised and the client consents. Rule 1.8(e) anticipates that a lawyer may pay for certain, limited expenses on a client's behalf within the scope of the representation. Drawing from these exceptions, a lawyer may post bail for a client where the amount of bail is insignificant enough to not create a material limitation on the lawyer's ability to represent the client. To ensure that a client understands the unique relationship that is created when the lawyer posts bail, a lawyer must obtain written informed consent from the client, specifying the surety provided and the scope of the liability the bail agreement imposes on the lawyer.⁹

These considerations allow lawyers to facilitate the occasional client's return to the community, which may assist with the representation. By limiting the acceptable circumstances to rare events, lawyers will avoid facing any significant risk that their ability to provide legal representation will be materially limited by the financial obligations posting bail requires. Similarly, by limiting the amount of bail to sums unlikely to materially limit a lawyer's ability to represent a client, a lawyer diminishes the risk that the client's noncompliance with the conditions of release would affect his or her ability to provide competent and diligent ongoing representation.

Approved by the Alaska Bar Association Ethics Committee on May 7, 2015.

Adopted by the Board of Governors on May 12, 2015.

⁷ See Oregon State Bar Op. 1991-4, 1991 WL 279145 (July 1991).

⁸ ABA Formal Opinion 04-432, citing Model Rule of Professional Conduct 1.7(a)(2)).

⁹ Rule 1.7(b)(4).