

1 **PROFESSIONAL ETHICS OF THE FLORIDA BAR**

2 **PROPOSED ADVISORY OPINION 18-2**
3 **(October 19, 2018)**

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5 The inquirer advances costs in personal injury cases. The inquirer’s contract provides
6 that repayment of the costs is contingent upon obtaining a recovery in a client’s cases. The
7 inquirer proposes to secure a non-recourse loan from an outside funding company to cover costs
8 in personal injury cases. Interest on the loan would be owed to the funding company only if
9 there is a recovery. The inquirer asks whether it is ethical to charge the client for the interest on
10 the loan if there is a recovery and whether the interest may exceed 18.5% with the client’s
11 written consent.

12 Rule 4-1.8(e), Rules Regulating The Florida Bar, states that:

13 A lawyer shall not provide financial assistance to a client in connection
14 with pending or contemplated litigation, except that:

15 (1) a lawyer may advance court costs and expenses of litigation, the
16 repayment of which may be contingent on the outcome of the matter;

17 This rule permits an attorney to loan a client the costs and expenses connected to
18 litigation and condition repayment of the costs on obtaining a recovery in a case.

19 Under Florida Ethics Opinion 86-2, the committee opined that lawyers may charge a
20 lawful rate of interest on *liquidated* fees and costs either by prior written agreement or with
21 reasonable notice. Florida Opinion 86-2 states:

22 The Committee finds no basis for distinguishing between fees and costs
23 advances for the purpose of charging interest. Accordingly, the Committee
24 concludes that the Code of Professional Responsibility [Rules Regulating The
25 Florida Bar] does not prohibit an attorney from charging a lawful rate of interest
26 on liquidated fees and costs, either as provided in advance by written agreement
27 or, in the absence of a written agreement, upon reasonable notice. It is the
28 committee's view that 60 days would constitute reasonable notice.

29 In determining the appropriate and lawful rate of interest to be charged,
30 attorneys must adhere to the guidelines provided in *The Florida Bar v. Fields*, 482
31 So.2d 1354 (Fla. 1986).

32 In Ethics Opinion 86-2, the committee concluded that a lawyer may charge interest on
33 costs only if they are liquidated, but did not define “liquidated.” The committee is of the opinion
34 that costs are liquidated when the cost is incurred and therefore known. Because a cost is
35 liquidated when incurred, a lawyer may, but is not required to, charge interest on costs advanced
36 to the client from the time the cost is incurred by the lawyer.

37 Ethics committees in other states have considered the issue of charging interest on costs
38 advanced on behalf of a client concluding that a lawyer may charge interest on advanced costs if
39 the client agrees in advance to the accruing of interest. *See* Georgia Ethics Opinion 05-5
40 (2/13/07)(attorney may obtain loan from bank to advance costs for client and may charge lawful
41 interest to client for advancing costs, but fee contract must indicate whether client is liable for
42 costs even if no recovery and the maximum rate of interest that will be charged, and the closing
43 statement must indicate the interest paid by the client); Illinois Ethics Opinion 87-10
44 (1988)(lawyer may charge interest on overdue fees and on advanced costs, but must give client
45 advance notice before interest accrues); Los Angeles County Bar Formal Ethics Opinion 497
46 (California 1999) (attorneys may charge interest on advanced costs if the clients agree in writing
47 in the initial fee contract and the interest rate is lawful); New Jersey Ethics Opinion 603
48 (1987)(lawyer may obtain loan from bank to advance litigation costs to client in contingent fee
49 case and may charge the client the interest on the loan if the client agrees in advance); Ohio
50 Ethics Opinion 2001-3 (6/7/01)(attorney may obtain loan from bank to advance litigation costs to
51 client and may charge client the fees/costs of loan if the loan is not secured with client's
52 settlement or judgement; terms of loan, including interest rate, are reasonable; and the client is
53 informed and consents at the outset in the fee agreement); West Virginia Ethics Opinion LEO
54 2016-01 (2016)(a lawyer may obtain a third party loan to advance cost and expenses in a
55 contingent fee case and may be deducted from the client's recovery with informed consent by
56 written agreement if the actual costs and interest are reasonable; however, the loan cannot be
57 secured with the client's settlement or judgement).

58 The committee agrees with these opinions and concludes that the inquirer may charge a
59 reasonable, lawful rate of interest on contingent costs with the client's informed consent in
60 writing. The preamble to chapter 4 of the Rules Regulating The Florida Bar states:

61 "Informed consent" denotes the agreement by a person to a proposed
62 course of conduct after the lawyer has communicated adequate information and
63 explanation about the material risks of and reasonably available alternatives to the
64 proposed course of conduct."

65 The inquirer may charge interest on contingent costs only if the inquirer discloses
66 the rate of interest to the client at the earliest opportunity, usually at the execution of a
67 written fee agreement, and obtains the client's informed consent in writing. *See* Rule 4-
68 1.8(a), Rules Regulating The Florida Bar; Kentucky Op E-420 (once the advancement
69 takes the form of a loan with interest, it takes on the characteristics of a business
70 transaction and is subject to the mandates of Rule 1.8(a) which include that the charges to
71 the client are reasonable in amount, that they do not exceed those paid by the lawyer, and
72 that the lawyer does not have an interest in the financial institution that would violate
73 conflicts rules); Illinois State Bar Association Opinion 87-10 (agreement providing for
74 the charging of interest on expenses should be placed in writing prior to the accrual of
75 any such interest and at the earliest opportunity, usually being the execution of a written
76 fee agreement/contract); Ohio Board of Commissioners on Grievances and Discipline
77 Opinion 2001-3 (2001)(the client must have a "reasonable opportunity to seek the advice
78 of independent counsel" and must "consent in writing").

79 The committee is of the opinion that a lawyer can charge a client interest whether
80 the costs are advanced from a funding company or other financial institution specific to a
81 client's case, a general line of credit available to the lawyer's firm from a financial
82 institution, or from the firm's own operating account. If taking out a loan, the lawyer can
83 only recover the interest actually charged to the lawyer by the lender, subject to the
84 limitations below.

85 Regarding the inquirer's second question, the lawyer can only charge a lawful rate of
86 interest and the amount must be reasonable. *See*, Rules 4-1.5(a) and 4-1.8(a), Rules Regulating
87 the Florida Bar. Although the question of whether an interest rate in excess of 18.5% is lawful is
88 outside the committee's purview, the committee is of the opinion that it is an unreasonable rate
89 of interest because the inquirer should be able to find a lower rate of interest. It is therefore
90 impermissible for the inquirer to charge the client the proposed rate.

91 Finally, a lawyer must always act in a client's interests and must not allow the lawyer's
92 personal interest to interfere with the lawyer's representation of the client. Rule 4-1.7(a)(2),
93 Rules Regulating The Florida Bar. Therefore, the inquirer must consider whether the inquirer's
94 use of a particular funding company is in the client's interest. If the company charges a higher
95 rate of interest than the inquirer may be able to obtain at another institution, such as a bank, it
96 may not be in the client's interest for the inquirer to use that funding company even if the
97 company is charging a lawful rate of interest. The inquirer must not allow the inquirer's
98 convenience to interfere with what is best for the client. Additionally, any disclosure by the
99 inquirer of information about a specific client's matter must comply with Rule Regulating The
100 Florida Bar 4-1.6.

101 In summary, a lawyer may charge a lawful rate of interest on an advance of
102 contingent costs from the time the costs are incurred by the lawyer provided the rate of
103 interest is lawful, reasonable, in the best interest of the client, is disclosed to the client in
104 writing at the earliest opportunity, and the client gives informed consent in writing.