

## The Arizona Litigation Guide

6th Edition

Produced by the Maricopa County Bar Association Litigation Section, this 447-page book, newly updated through 2020, is a soup-to-nuts guide on litigation in Arizona. It provides an overview of litigation procedure and practice tips (including forms) from experienced attorneys.



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## Q&A



### LAWYER LIABILITY AND ETHICS

## Dispute Over Payment of Sanctions Reveals Ambiguity in ER 1.8



Joseph Brophy

A recent case in federal court highlighted a difference of opinion between a federal court and the state bar in the jurisdiction where the court sits regarding whether it is ethical for an attorney to pay a discovery sanction levied against the attorney's client.

In *Pletcher v. Giant Eagle, Inc.*, the plaintiffs brought suit in a Pennsylvania federal court against a grocery store chain alleging that the chain's policy requiring customers to wear a mask while inside its stores during the Covid-19 pandemic violated the Americans With Disabilities Act. The defendant moved for sanctions against the plaintiffs for discovery violations, including the failure to produce videos of plaintiffs' trips to the grocery store in question and the failure to perform reasonable searches for text messages and emails. The court awarded the defendant \$8,085 in attorneys' fees incurred as a result of the discovery dispute.

After the court made its ruling, counsel for the plaintiffs asked the court's permission to allow the plaintiffs' law firm to pay or advance the cost of the sanctions on behalf of their clients. The defendant argued that allowing the lawyers to advance the cost of sanctions would violate the Pennsylvania Rules of Professional Responsibility. The court, after recognizing that this issue is an "unsettled" area of the law, ruled in favor of the defendants because the plaintiffs' contingent fee agreement did not allow for the lawyers to advance those costs.

ER 1.5 requires that a contingent fee agreement be in writing and state the method by which the fee is to be determined, and whether and when expenses will be deducted (before or after the contingent fee is calculated). ER 1.8 prohibits a lawyer from providing "financial assistance" to a client, except for the advancement of "court costs and expenses of litigation." Whether sanctions from an attorney fee award is a "court cost" or "expense of litigation" is unsettled in most jurisdictions, including Arizona.

The *Pletcher* court noted that not only did the contingent fee agreement not specify whether attorney's fees and costs ordered as a discovery sanction could be advanced by the lawyers, but the fee agreement specifically stated that "attorneys fees are not included in the costs and expenses incident to the litigation that are the sole obligation of the client to pay and are to be reimbursed upon the advancement of counsel." Since the contingent fee did not obligate the clients to reimburse the lawyers for the attorneys' fee sanction that would be paid by the lawyers, the court concluded there was no guarantee that the clients would remain responsible for the sanctions. The court also felt that ER 1.8 did not clearly

allow an attorney to advance the cost of a discovery sanction on behalf of the client.

The plaintiffs were not done. After the court issued its sanction in December 2021, the plaintiffs sought and obtained an opinion from the Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee on the sanction issue. On February 2, 2022, the Committee reached a different conclusion than the federal court. First, the Committee reasoned that payment of the sanctions was directly related to the litigation for which the plaintiffs' lawyers were hired. Second, the Committee considered the purpose of the sanctions, which was to both deter parties who commit discovery violations and to reimburse opposing counsel and their client for the time obtaining the sanction order. While the Committee acknowledged that allowing the attorneys to pay the sanction would defeat the deterrent effect of the sanctions, it also noted that the plaintiffs lived solely off Social Security Disability payments, which the Pletcher defendants could not attach anyway. Since the deterrent effect was unlikely to be served, the Committee felt that policy of reimbursement could still likely be served by allowing counsel to pay the sanctions.

The Honorable Nora Fischer of the Western District of Pennsylvania was not moved by the Committee's opinion when it was brought to her attention via a motion to reconsider. Judge Fisher denied the motion because: (1) there had not been any change in the controlling law since the original ruling; (2) there was no new evidence that would change the ruling; and (3) there was not a clear error of law or fact. The Committee's opinion was merely "advisory." Moreover, Judge Fisher disputed the Committee's opinion on the merits to the extent it relied on an exception to ER 1.8 that allows an attorney to pay the court costs and litigation expenses of indigent clients. Judge Fisher noted that the plaintiff and her husband recently purchased a \$625,000 retirement home, had a boat docked near their residence, paid \$400 a week in groceries, and had taken expensive vacations with friends. This is obviously a notable discrepancy between the evidence in the court case and the assumptions that the plaintiffs fed to the Committee.

Both the *Pletcher* decision and the Committee's response to Inquiry No. 2022-005 summarized the ethics opinions from different states that have addressed this issue, which is one over which there is a genuine split of opinion. For those of you who take clients on a contingent fee basis, it may be worth addressing this issue in your fee agreement to avoid the problem the *Pletcher* plaintiffs encountered. ■

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