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**COMMITTEE ON PROFESSIONAL ETHICS  
OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION  
REPORT ON  
JUDICIARY LAW §488 AS AMENDED AND PROPOSED CONFORMING  
CHANGES TO THE CODE OF PROFESSIONAL RESPONSIBILITY  
September 21, 2006**

At its meeting of September 12, 2006, the Committee on Professional Ethics (the "Committee") of the New York County Lawyers' Association ("NYCLA") adopted the following comments:

New York Judiciary Law Section 488 ("Section 488") was recently amended to bring New York law into conformity with the vast majority of other U.S. jurisdictions with regard to the attorney-client relationship in payment of legal costs and expenses. Section 488 was amended with the intent to bring New York State in line with the American Bar Association's Model Rule of Professional Conduct 1.8(e), which has been adopted by 39 other U.S. jurisdictions, including all bordering states.

Specifically, Subsection 2 of Section 488 was amended to add the following exceptions to the prohibition on attorneys against the advancing of litigation costs to clients:

- (b) *pro bono* and indigent clients;
- (c) costs and expenses of litigation advanced contingent on outcome; and
- (d) costs and expenses of litigation advanced contingent on outcome when payment is to be based on a percentage of recovery.

Section 488 as amended, however, appears to conflict with current New York Code of Professional Responsibility Disciplinary Rules. Specifically, DR 5-103(B) [22 NYCRR §1200.22] provides that in connection with contemplated or pending litigation, a lawyer may not advance or guarantee financial assistance to the client, except that:

A lawyer may advance or guarantee the expenses of litigation, including court

costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

Because DR 5-103(B) permits a lawyer to advance litigation expenses only where the client remains ultimately liable for such expenses, it is in conflict with Section 488, which permits a lawyer to advance litigation expenses from his or her own account without any expectation or obligation of repayment from the client. Likewise, DR 2-101(L) [22 NYCRR §1200.6] currently requires that a lawyer publishing contingency fee rates also disclose that “in the event there is no recovery, the client shall remain liable for the expenses of litigation, including court costs and disbursements.”

### **CONCLUSION**

Accordingly, we recommend to the presiding justices of the four appellate divisions that DR 5-103(B) and DR 2-101(L) be amended to conform to and be consistent with the intent and purpose of the New York State Legislature’s amendment to Section 488.

Wally Larson Jr.  
Co-Chair, Committee on Professional Ethics