

Nebraska Ethics Advisory Opinion for Lawyers  
No. 00-2

AN OPINION OF THE ADVISORY COMMITTEE HAS BEEN REQUESTED AS TO WHETHER IT IS ETHICAL FOR A LAWYER TO REFER A CLIENT TO A BUSINESS WHICH ADVANCES MONEY TO THE CLIENT FOR LITIGATION OR LIVING EXPENSE PURPOSES IN EXCHANGE FOR AN EQUITY POSITION IN THE CLIENT'S CASE. THE LENDER WILL EXPECT A LIEN ON THE PROCEEDS OF THE LAWSUIT OR THE SETTLED CLAIM AND ABOVE-MARKET INTEREST PLUS SERVICE FEES.

RESTATEMENT OF FACTS

The Advisory Committee has been provided with advertising materials and a brochure which outline the nature of the lender's business and the relationship which the lender expects to have with the client and with the lawyer. It is anticipated that the lender will primarily acquire customers by lawyer referral, but it is not anticipated that the lawyer receive a fee or compensation of any sort for making the referral.

The lender is expected to evaluate the matter to determine whether or not the case or claim qualifies for funding. The lawyer is not expected to provide any assurances as to the outcome of the litigation, and if the client does not prevail, the lender's loan is not paid. Because the lender will be risking its advances on the success of the claim or the lawsuit, the lender represents that it is not subject to state usury laws.

According to one of the printed items provided the Advisory Committee, the lawyer is expected to "issue" the lender "a lien" which will "guarantee" payment upon settlement from the lawyer's trust account.

STATEMENT OF APPLICABLE CANONS, ETHICAL  
CONSIDERATIONS  
AND DISCIPLINARY RULES RELIED ON

Canon 2. Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.

EC 2-16. The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

Canon 4. A Lawyer Should Preserve the Confidences and Secrets of a Client.

EC 4-2. The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when the lawyer's client consents after full disclosure, when necessary to perform his or her professional employment, when permitted by a Disciplinary Rule, or when required by law.

DR 4-101. Preservation of Confidences and Secrets of a Client

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

Canon 5. A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.

EC 5-8. A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his or her client. Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his or her cause of action, but the ultimate liability for such costs and expenses must

be that of the client.

DR 5-103. Avoiding Acquisition of Interest in Litigation.

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that he or she may:

(1) Acquire a lien granted by law to secure the lawyer's fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall 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 remain ultimately liable for such expenses.

## DISCUSSION

Clearly, a lawyer's ability to advance funds is sharply circumscribed by DR 5-103(B). The prohibitions against a lawyer "providing financial assistance to a client have their origins in the common law doctrines of champerty and maintenance." ABA/BNA Lawyers' Manual on Professional Conduct, "Financial Assistance to Client," § 51:803. Several commendable objectives are intended to be served by the ban on lawyers advancing money to clients. Some of these objectives are the prevention of lawyers enticing clients by promises of financial help; the avoidance of conflicts created by the lawyer becoming both lender and advocate; and the protection of lawyers from client requests for financial assistance. Id.

It could certainly be fairly debated that at times there exists at least some tension between this absolute ban on lawyers advancing funds for a client's living expenses

and Canon 2 which encourages lawyers to find ways for those of moderate means to have access to the courts. The argument is essentially that if a client is unable provide his or her family with basic necessities during the course of claim negotiation or litigation, the client is less able to achieve a settlement or verdict which might otherwise have been realized had personal finances not become a concern. See *In re Minor Child K.A.H.*, 967 P.2d 91 (Alaska 1998) (analyzing the issue under Model Rule 1.8(e) which is the counterpart to DR 5-103(B)); *Mississippi Bar v. Attorney HH*, 671 So.2d 1293 (Miss. 1996) (also analyzing the issue under Model Rule 1.8(e)); and *Louisiana State Bar Ass'n v. Edwins*, 329 So.2d 437 (La. 1976)(DR 5-103(B) analysis).

Perhaps at least in part due to the attorney's inability to finance a client's living expenses and likely in part due to the high cost of litigation, there appear to be some movements nationwide toward reexamining the value of the ancient doctrines of champerty and maintenance and to developing appropriate and ethical means of providing meaningful access to the courts. See Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity*, 30 *Am. Bus.L.J.* 485 (1992). Recently, in *Osprey, Inc. v. Cabana Limited Partnership*, 532 S.E.2d 269 (S.C. 2000), champerty was abolished as a defense in contract actions in South Carolina. According to the South Carolina Supreme Court, well-developed principles of law can more effectively accomplish goals of preventing speculation in groundless lawsuits than the doctrine of champerty. In *Saladini v. Righellis*, 426 Mass. 231, 687 N.E.2d 1224 (1997), the Massachusetts Supreme Judicial Court abolished champerty, maintenance and barrety. The court observed that the decline of champerty, maintenance and barrety are symptomatic of a change in a view of litigation as a social ill to a view that litigation is a useful way to resolve disputes.

One development in the reconsideration of conventional thought regarding the financing of cases is certainly the appearance of the type of lender described in the request for an opinion received by this Committee. The appropriateness of referring a client to this type of

lender has been discussed by other bar associations. In Advisory Ethics Opinion 99-A-666, the Board of Professional Responsibility of the Supreme Court of Tennessee responded to the issue of whether it was ethical for an attorney to refer clients to a venture capital company investing in select cases. The Board concluded that DR 5-103(A) prohibits a lawyer from acquiring an interest in the litigation, but that the lawyer could make the referral provided the lawyer (1) does not evaluate the merits of the case for the company; (2) does not guarantee the financial assistance to the client; and (3) gets no benefit from the client for the client using the company.

The Ethics Committee of the Los Angeles County Bar Association, in Opinion 500 (5/10/99), affirmatively answered the question of whether a lawyer could establish a business which would finance litigation in exchange for an assignment of a portion of the recovery. According to the Committee, the lawyer could be involved in such a business if (1) the assignors brought the lawsuit in their own name by their own lawyer; (2) the lending lawyer exercised no control over the assignors' lawsuit; (3) the lawyer for the assignors preserves client confidences; and (4) the lending lawyer signs a confidentiality agreement.

## CONCLUSIONS

We conclude that it is not a violation of the Code of Professional Responsibility for a lawyer to refer a client to a lender which the lawyer knows will expect a lien on the client's recovery. We believe the lawyer considering such a referral should be guided by the following:

1. The lawyer should receive no fee or commission from the client or the lender for making the referral. Receiving consideration from either could effect the independent judgment of the lawyer.
2. The lawyer should provide no assurances to the third party as to the conduct or likely outcome of the litigation. The Advisory Committee believes that such representations could be detrimental to the exercise of

independent judgment by the lawyer.

3. The lawyer must conform to Canon 4 relating to the preservation of client confidences. The lawyer must be attentive to what can or should be revealed to the lender as part of the client's efforts to get the loan.

4. Prior to making the referral, the lawyer must disclose to the client what advances the lawyer would make consistent with DR 5-103(B) in the absence of the lender making a loan. In the context of the lender advancing funds to the client for purposes of litigation expenses, it is possible that the lawyer would directly benefit by referring the client to a third party lender. The Advisory Committee believes that the client should be fully informed as to what the lawyer would be willing to do with respect to making proper advances under DR 5-103(B) before being referred to a lender who will likely expect significant profit on the money advanced in the event of recovery.

5. Prior to making the referral, the lawyer must inform the client as to the cost of the loan. Prior to the client borrowing money from a lender who will likely require an assignment of settlement or lawsuit proceeds and a high rate of return, the lawyer must instruct the client as to the cost of the loan. The client must understand that the interest rate in such a scenario is likely much higher than a more conventional loan arrangement.

This Committee does not give legal advice. Consequently, we specifically do not give any opinion here relative to the enforceability of a loan agreement between the lender and the client, the validity of the lender's lien, or the viability of the doctrines of champerty and maintenance in the State of Nebraska.

November 30, 2000.