NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS
NO. 13-01

WHETHER OR NOT A NEBRASKA ATTORNEY MAY WITHHOLD A PORTION OF WORKERS COMPENSATION PROCEEDS IN ORDER TO HONOR A "LIEN" ON BEHALF OF A THIRD-PARTY WHO HAS ADVANCED FUNDS TO THE CLIENT IS DEPENDENT ON AN INTERPRETATION OF NEB. REV. STAT. §48-149. HOWEVER, IF THE WITHHOLDING OF PROCEEDS DOES VIOLATE §48-149, A LAWYER MAY NOT ETHICALLY HONOR THE "LIEN."

STATEMENT OF FACTS

A Nebraska attorney who represents an injured worker in a pending workers compensation proceeding has requested an opinion regarding whether honoring a potential agreement between the client and a third-party "lawsuit funding company" would violate the Nebraska Rules of Professional Conduct. Specifically, the attorney has indicated that the client was severely injured during the course of his employment and has been unable to return to work. As a result, the client has suffered significant financial hardship and has sought the assistance of a third-party "lawsuit funding company" who would provide advance funding to the client in anticipation of receiving a portion of the client's forthcoming workers compensation benefits.

A representative of the potential lender approached the attorney and inquired whether the attorney would agree to withhold from the client a portion of potential proceeds payable to the client if the client and lender were able to reach an agreement as to the amount. The attorney expressed concern that such an agreement would violate the general prohibition on the assignment, attachment, or garnishment of workers compensation benefits

found in Neb. Rev. Stat. §48-149 and sought assistance from the advisory committee as to whether agreeing to withhold the funds would constitute an ethical violation.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

The following rules of professional conduct are instructive with respect to the question presented:

Preamble to Nebraska Rules of Professional Conduct, Paragraph 5:

> A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Preamble to Nebraska Rules of Professional Conduct, Paragraph 6:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that

knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Preamble to Nebraska Rules of Professional Conduct, Paragraph 9:

The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the

lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

§3-501.2: Scope of representation and allocation of authority between client and lawyer.

(a) Subject to paragraphs (b), (c), (d), (e), and (f), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4 shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Comment 1: Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations.

DISCUSSION

At the outset of this discussion, it must first be noted that the nature of this request primarily turns on an interpretation of Neb. Rev. Stat. §48-149—specifically, whether the statute prohibits an attorney from withholding workers compensation benefits from the client as part of a contract between the client and a third-party lender. The committee is of the opinion that this question essentially calls for a legal interpretation which is outside of the scope of the committee's stated function. While the inability to provide guidance as to the applicability of the statute may not result in a thoroughly satisfactory opinion to the requesting attorney, this opinion will nevertheless attempt to provide guidance to the requesting attorney by assuming *arguendo* that §48-149 does prohibit an attorney from withholding workers compensation proceeds from the client under the circumstances provided and discussing what the attorney's ethical responsibilities would therefore entail.

The committee is of the opinion that, <u>if</u> §48-149 does prohibit an attorney from withholding workers compensation proceeds from a client in order to ensure payment to a third-party lender, then the lawyer must refrain from doing so even if the client desires the lawyer to do so and even if the lawyer believes the arrangement to be in the client's best interests. That is, a fundamental underpinning of the Nebraska Rules of Professional Conduct is that a lawyer must at all times conduct himself, and his representation of the client, within the confines of the law. For example, Paragraph five (5) of the

Preamble to the Nebraska Rules of Professional Conduct states that, "[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs." Similarly, in Paragraph nine (9), the Preamble discusses the fundamental ethical principle that a lawyer's representation must, "zealously . . . protect and pursue a client's legitimate interests, within the bounds of the law . . . ." (Emphasis added). Finally, Rule 3-501.2, and its associated Comment 1, specifies that a lawyer's duty to the client is restrained by "the limits imposed by law and the lawyer's professional obligations."

In light of the foregoing, the requesting attorney in this instance must at all times conduct himself within the confines of the law even if the client requests him to do otherwise and even if the lawyer reasonably believes that client would benefit from the potential contractual arrangement. To the extent that Neb. Rev. Stat. §48-149 prohibits an attorney from withholding workers compensation benefits from her client, then the attorney must not do so irrespective of any agreement that may have been contemplated between the client and a third-party lender. Again, however, this opinion is not to be construed as an interpretation of §48-149 and its effect on the particular factual scenario at issue.

CONCLUSION

Much of this request turns on the question of whether Neb. Rev. Stat. §48-149 prohibits an attorney from withholding workers compensation

proceeds from the client as part of a contractual obligation entered into between the client and a third-party "lawsuit funding company." While the Committee cannot take a position on the applicability of the statute to the circumstances at hand, it is clear that the lawyer must at all times conduct his representation within the confines of the law. Accordingly, if §48-149 prohibits the lawyer from withholding workers compensation benefits from the client under the particular scenario at hand, then the lawyer must not do so even if the client desires the lawyer to do so and even if the lawyer believes that the proposed contractual agreement would be in the best interests of the client.

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 barretry. The court observed that the decline of champerty, maintenance and barretry 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.

Nebraska Ethics Advisory Opinion for Lawyers
No. 94-3

LAWYERS MAY NOT ETHICALLY PARTICIPATE IN A FINANCE PROGRAM WHICH PURCHASES INSTALLMENT ACCOUNTS AND CREDIT AGREEMENTS FROM PARTICIPATING LAWYERS IF THE PROGRAM IS DESIGNED TO BE PROMOTED TO THE CLIENT BY THE LAWYER; DOES NOT PROVIDE FOR SCRUPULOUS OBSERVANCE OF THE LAWYER'S OBLIGATION TO PRESERVE CONFIDENCES AND SECRETS; AND PROVIDES AN INCENTIVE TO INCREASE CHARGES TO COVER THE PLAN'S 10% AND 20% DISCOUNTS. THE ADVANCE DISCOUNTING OF UNEARNED FEES FOR LEGAL SERVICES CONSTITUTES FEE SPLITTING. ADVISORY OPINION 81-2 IS HEREBY MODIFIED.

FACTS

This Committee has been provided with certain information from a corporation which will purchase installment accounts and credit agreements from participating lawyers or law firms and will assist participating lawyers in collecting other accounts receivable which do not qualify for immediate purchase.

The lawyer or a law firm enters into a written participation agreement enabling the lawyer or the law firm to participate in a financing program on the accounts payable of certain of the lawyer's clients. Under this arrangement, there is an initial "set-up" charge of $500 for one lawyer, with an additional charge of $50 for each additional lawyer.

The finance company provides the law office with forms that are used by the lawyer to gather information from the clients which will enable the finance company to conduct its underwriting review and assign the proposed creditor to a classification of A, B, or C, depending upon the client's creditworthiness. Classification A would include approximately 10% to 15% of the general public and involve persons with excellent credit. Classification

B would include clients with a lesser degree of creditworthiness and include approximately 60% of the general public. Classification C would involve clients with poor or unverifiable credit or poor employment histories.

Interest at the rate of 18% would be charged on each account, regardless of whether it is classified A, B, or C. The lawyer may immediately discount Class A accounts at 10%, receiving 90% in cash from the finance company. Class B accounts are discounted at 20%. Class C accounts are not discounted, but the finance company will undertake collection and remit 80% of all collections, including interest, to the lawyer. The discounted 10% or 20 % on the A and B accounts and the remaining 20% of principal and interest on the C accounts would be retained by the finance company.

The participation agreement between the lawyer and the finance company states, in very small print:

> Except for rights and remedies of the finance company in connection with any breach of warranties, representations and covenants made by Participant herein, or in any voucher, the finance company is purchasing the accounts without recourse to Participant. . . .

However, on the reverse side of the agreement (in smaller print), the Participant (lawyer) indemnifies the finance company for any claims made by clients against the Participant or finance company relating to the quality and/or quantity of any service provided by the Participant and agrees to accept a tender of the defense of any such proceeding. Any controversy arising out of the agreement is subject to mandatory arbitration.

The lawyer's duties in the event the client asserts any claim or right not to pay an account in full require the Participant to:

> . . . promptly advise the finance company in writing of the particulars of such claim and cooperate with the finance company on

> whatever investigation of such claim the finance company determines to make. If such claim is based upon an event or circumstance which constitutes a breach of any warranty or representation by Participant herein, then Participant shall promptly commence and diligently pursue completion of all actions reasonable and necessary to obtain full payment on the account in question. In the event Participant's breach is not cured to the finance company's satisfaction within ten (10) days from notice thereof, then the finance company shall have the right to take any or all of the following actions in its sole and absolute discretion:
>
> (1) Offset the remaining balance of the account affected by such breach, together with any and all reasonable and incidental costs and expenses incurred by the finance company in connection with the nonpayment of such account (collectively the "balance"), against any new or future transactions between the finance company and Participant or
>
> (2) Offset the balance against any funds, accounts or other property of Participant in the finance company's control or possession or
>
> (3) Require Participant to repurchase such account at a price equal to the balance minus applicable discounts within ten (10) days of such election.
>
> [Emphasis supplied.]

Thus, the terms and conditions of the proposed agreement require the lawyer to participate and presumably disclose to the finance confidences and secrets of the client, to pursue active and diligent collection efforts against the client, regardless of circumstances, when requested by the finance company, and do in fact give the finance company the right of recourse against the lawyer, contrary to the language on the first page of the agreement. Collection of the

accounts rests in the sole discretion of the finance company.

Even though the name of the program implies otherwise, there does not appear to be in existence any credit card that enables the holder thereof to obtain immediate credit for services. In each instance, the lawyer is to fax the finance company the underwriting information; and within a day or two, the finance company will respond with its classification of the credit, classifying the credit request entirely in its own discretion in accordance with its own underwriting criteria.

DISCUSSION

This Committee does not involve itself with questions of law; hence, issues involving state licensing requirements and usury laws will not be part of this opinion. However, if the program violates usury or installment loan laws, it could subject a participating lawyer to misdemeanor penalties and disciplinary sanctions.

Similarly, this Committee declines to provide specific opinions about specific plans that may currently be available or be proposed from time to time in the future. However, we will provide an opinion on certain aspects of the program and point out certain considerations that need to be reviewed in connection with the propriety of any program involving the use of credit cards or the financing of a lawyer's accounts receivable.

The primary issues involved concern lawyer misconduct, sharing fees with non-lawyers, secrets and confidences of a client, excessive fees, and conflict of interest.

A. Misconduct

Disciplinary Rule 1-102(A)(4) provides, inter alia, that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. " Use of the program name in this instance, in and of itself would appear to be misleading because there does not appear

to be any card that is similar to a conventional credit card in that it authorizes the holder to obtain immediate credit.

Descriptive material provided to potential participants by the finance company describes how you can convince a client to provide you with a $2,500 advance deposit by accepting $1,500 in cash and persuading the client to finance the remaining $1,000 through the use of the finance program. Financing a $1,000 portion of an advance retainer, where the finance company retains up to 20% of the financed amount, unless this situation is made abundantly clear to the client or potential new client, could involve elements of dishonesty, deceit, or misrepresentation, particularly when there is an 18% interest charge tacked on top of the principal sum.

B. Reasonable Fees

Canon 2 requires a lawyer to assist the legal profession in making legal counsel available. Certain ethical considerations under Canon 2 require review.

Ethical Consideration 2-17 provides that a lawyer should not charge more than a reasonable fee because excessive costs of legal service will deter laymen from utilizing the legal system in protection of their rights. In addition, an excessive charge abuses the professional relationship between lawyer and client. The range of discounts for traditional credit cards issued by financial institutions that are subject to regulation in this area ranges from one and one-half percent to five percent. This is considerably less than what the client would have to pay if the client enters into this program with its 18% interest factor and the 10% and 20% discounts.

Ethical Consideration 2-19 states:

> As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good

> relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

Since this financing program is designed to be promoted by, and originated between, the lawyer and client, this ethical consideration would require a lawyer to spend a great deal of time analyzing the financing program with the client, objectively explaining to the client the potential downside risks to the program, describing other credit programs that may be available, as well as the benefits to the lawyer that may in turn be detrimental to the client.

Ethical Consideration 2-21 provides that a lawyer should not accept compensation or anything of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure. By the same token, this ethical consideration would also require that a lawyer should not compensate a third party without the knowledge and consent of his client after full disclosure. This would require an explanation of the grading classification of A, B, and C; a disclosure of the 10% and 20% discount that is paid, based upon the classification; and the fact that if the client is classified as a C, the lawyer will be splitting 20% of amounts collected, including interest, with the finance company.

Ethical Consideration 2-23 requires a lawyer to be zealous in efforts to avoid controversies over fees and provides that he shall "not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." This would appear to be inconsistent with the provisions of the participation agreement quoted above requiring the lawyer to "promptly commence and diligently pursue to completion all acts reasonable or

necessary to obtain full payment on the account in question."

Ethical Consideration 2-25 calls to our attention the historic need to provide legal services for those unable to pay reasonable fees and the basic responsibility for providing legal services for those unable to pay and the admonition that every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.

It is the opinion of this Committee that aggressive promotion of this financing program has the potential of turning the eye of the lawyer away from the lawyer's obli

25-3302. Terms, defined.

For purposes of the Nonrecourse Civil Litigation Act:

(1) Civil litigation funding company means a person or entity that enters into a nonrecourse civil litigation funding transaction with a consumer;

(2) Consumer means a person residing or domiciled in Nebraska or who elects to enter into a transaction under the act, whether it be in person, over the Internet, by facsimile, or by any other electronic means, and who has a pending legal claim and is represented by an attorney at the time he or she receives the nonrecourse civil litigation funding;

(3) Legal claim means a civil claim or action; and

(4) Nonrecourse civil litigation funding means a transaction in which a civil litigation funding company purchases and a consumer assigns the contingent right to receive an amount of the potential proceeds of the consumer's legal claim to the civil litigation funding company out of the proceeds of any realized settlement, judgment, award, or verdict the consumer may receive in the legal claim.

25-3303. Contracts for nonrecourse civil litigation funding; right to cancel; notice; statements required.

(1) All contracts for nonrecourse civil litigation funding shall comply with the following requirements:

(a) The contract shall be completely filled in and contain on the front page, appropriately headed and in at least twelve-point bold type, the following disclosures:

(i) The total dollar amount to be funded to the consumer;

(ii) An itemization of one-time fees;

(iii) The total dollar amount to be repaid by the consumer, in six-month intervals for thirty-six months, and including all fees;

(iv) The total dollar amount in broker fees that are involved in the transaction; and

(v) The annual percentage rate of return, calculated as of the last day of each six-month interval, including frequency of compounding;

(b) The contract shall provide that the consumer may cancel the contract within five business days following the consumer's receipt of funds without penalty or further obligation. The contract shall contain the following notice written in a clear and conspicuous manner: "CONSUMER'S RIGHT TO CANCELLATION: YOU MAY CANCEL THIS CONTRACT WITHOUT PENALTY OR FURTHER OBLIGATION WITHIN FIVE BUSINESS DAYS FROM THE DATE YOU RECEIVE FUNDING FROM (insert name of civil litigation funding company)." The contract also shall specify that in order for the cancellation to be effective, the consumer shall either return the full amount of disbursed funds to the civil litigation funding company by delivering the civil litigation funding company's uncashed check to the civil litigation funding company's offices in person, within five business days after the disbursement of funds, or mail a notice of cancellation and include in that mailing a return of the full amount of disbursed funds in the form of the civil litigation funding company's uncashed check or a registered or certified check or money order, by insured, registered, or certified United States mail, postmarked within five business days after receiving funds from the civil litigation funding company, to the address specified in the contract for the cancellation;

(c) The contract shall contain the following statement in at least twelve-point boldface type: "THE CIVIL LITIGATION FUNDING COMPANY AGREES THAT IT SHALL HAVE NO RIGHT TO AND WILL NOT MAKE ANY DECISIONS WITH RESPECT TO THE CONDUCT OF THE UNDERLYING LEGAL CLAIM OR ANY SETTLEMENT OR RESOLUTION THEREOF AND THAT THE RIGHT TO MAKE THOSE DECISIONS REMAINS SOLELY WITH YOU AND YOUR ATTORNEY IN THE LEGAL CLAIM.";

(d) The contract shall contain an acknowledgment by the consumer that such consumer has reviewed the contract in its entirety;

(e) The contract shall contain the following statement in at least twelve-point boldface type located immediately above the place on the contract where the consumer's signature is required: "DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT COMPLETELY OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO A COMPLETELY FILLED IN COPY OF THIS CONTRACT. BEFORE YOU SIGN THIS CONTRACT YOU SHOULD OBTAIN THE ADVICE OF AN ATTORNEY. DEPENDING ON THE CIRCUMSTANCES, YOU MAY WANT TO CONSULT

A TAX, PUBLIC OR PRIVATE BENEFIT PLANNING, OR FINANCIAL PROFESSIONAL. YOU ACKNOWLEDGE THAT YOUR ATTORNEY IN THE LEGAL CLAIM HAS PROVIDED NO TAX, PUBLIC OR PRIVATE BENEFIT PLANNING, OR FINANCIAL ADVICE REGARDING THIS TRANSACTION.";

(f) The contract shall contain a written acknowledgment by the attorney representing the consumer in the legal claim that states all of the following:

(i) The attorney representing the consumer in the legal claim has reviewed the contract and all costs and fees have been disclosed including the annualized rate of return applied to calculate the amount to be paid by the consumer;

(ii) The attorney representing the consumer in the legal claim is being paid on a contingency basis per a written fee agreement;

(iii) All proceeds of the civil litigation will be disbursed via the trust account of the attorney representing the consumer in the legal claim or a settlement fund established to receive the proceeds of the civil litigation from the defendant on behalf of the consumer;

(iv) The attorney representing the consumer in the legal claim is following the written instructions of the consumer with regard to the nonrecourse civil litigation funding;

(v) The attorney representing the consumer in the legal claim shall not be paid or offered to be paid commissions or referral fees; and

(vi) Whether the attorney representing the consumer in the legal claim does or does not have a financial interest in the civil litigation funding company; and

(g) All contracts to the consumer shall have in plain language, in a box with bold fifteen-point font stating the following in capitalized letters: "IF THERE IS NO RECOVERY OF ANY MONEY FROM YOUR LEGAL CLAIM OR IF THERE IS NOT ENOUGH MONEY TO PAY THE CIVIL LITIGATION FUNDING COMPANY BACK IN FULL, YOU WILL NOT OWE THE CIVIL LITIGATION FUNDING COMPANY ANYTHING IN EXCESS OF YOUR RECOVERY UNLESS YOU HAVE VIOLATED THIS PURCHASE AGREEMENT.".

(2) If a dispute arises between the consumer and the civil litigation funding company concerning the contract for nonrecourse civil

litigation funding, the responsibilities of the attorney representing the consumer in the legal claim shall be no greater than the attorney's responsibilities under the Nebraska Rules of Professional Conduct.

25-3304. Civil litigation funding company; prohibited acts.

(1) The civil litigation funding company shall not pay or offer to pay commissions or referral fees to any attorney or employee of a law firm or to any medical provider, chiropractor, or physical therapist or their employees for referring a consumer to the civil litigation funding company.

(2) The civil litigation funding company shall not accept any commissions, referral fees, or rebates from any attorney or employee of a law firm or any medical provider, chiropractor, or physical therapist or their employees.

(3) The civil litigation funding company shall not advertise false or intentionally misleading information regarding such company's product or services.

(4) The civil litigation funding company shall not knowingly provide nonrecourse civil litigation funding to a consumer who has previously sold and assigned an amount of such consumer's potential proceeds from the legal claim to another civil litigation funding company without first buying out that civil litigation funding company's entire accrued balance unless otherwise agreed in writing by the civil litigation funding companies and the consumer.

25-3305. Assessment of fees; restrictions; calculations.

(1) A civil litigation funding company may not assess fees for any period exceeding thirty-six months from the date of the contract with the consumer.

(2) Fees assessed by the civil litigation funding company shall compound at least semiannually but shall not compound based on any lesser time period.

(3) In calculating the annual percentage fee or rate of return, a civil litigation funding company shall include all charges payable directly or

indirectly by the consumer and shall compute the rate based only on amounts actually received and retained by a consumer.

25-3306. Effect of communication on privileges.

No communication between the attorney and the civil litigation funding company as it pertains to the nonrecourse civil litigation funding contract shall limit, waive, or abrogate the scope or nature of any statutory or common-law privilege, including the work-product doctrine and the attorney-client privilege.

25-3307. Civil litigation funding company; registration required; application; form; renewal.

(1) Unless a civil litigation funding company has first registered pursuant to the Nonrecourse Civil Litigation Act, the civil litigation funding company cannot engage in the business of nonrecourse civil litigation funding.

(2) A civil litigation funding company shall submit an application of registration to the Secretary of State in a form prescribed by the Secretary of State. An application filed under this subsection is a public record and shall contain information that allows the Secretary of State to make an evaluation of the character, fitness, and financial responsibility of the company such that the Secretary of State may determine that the business will be operated honestly or fairly within the purposes of the act. For purposes of determining a civil litigation funding company's character, fitness, and financial responsibility, the Secretary of State shall request a company to submit: A copy of the company's articles of incorporation, articles of organization, certificate of limited partnership, or other organizational documents; proof of registration with a Nebraska registered agent; and proof of a surety bond or irrevocable letter of credit issued and confirmed by a financial institution authorized by law to transact business in the State of Nebraska that is equal to double the amount of the largest funding in the past calendar year or fifty thousand dollars, whichever is greater.

(3) A civil litigation funding company may apply to renew a registration by submitting an application for renewal in a form prescribed by the Secretary of State. An application filed under this

subsection is a public record. The registration shall contain current information on all matters required in an original registration.

25-3308. Registration fee; renewal fee.

(1) An application for registration or renewal of registration under section 25-3307 shall be accompanied by either an application for registration fee or a renewal of registration fee, as applicable.

(2) The Secretary of State may, by rule and regulation, establish fees for applications for registration and renewals of registration at rates sufficient to cover the costs of administering the Nonrecourse Civil Litigation Act, in the event any such fees are required. Such fees shall be collected by the Secretary of State and remitted to the State Treasurer for credit to the Secretary of State Administration Cash Fund.

25-3309. Secretary of State; issue certificate of registration or renewal of registration; refusal to issue; grounds; suspend, revoke, or refuse renewal; temporary certificate; submission of data; contents; report.

(1) The Secretary of State shall issue a certificate of registration to a civil litigation funding company who complies with subsection (2) of section 25-3307 or a renewal of registration under subsection (3) of section 25-3307.

(2) The Secretary of State may refuse to issue a certificate of registration if the Secretary of State determines that the character, fitness, or financial responsibility of the civil litigation funding company are such as to warrant belief that the business will not be operated honestly or fairly within the purposes of the Nonrecourse Civil Litigation Act.

(3) The Secretary of State may suspend, revoke, or refuse to renew a certificate of registration for conduct that would have justified denial of registration under subsection (2) of section 25-3307 or for violating section 25-3304.

(4) The Secretary of State may deny, suspend, revoke, or refuse to renew a certificate of registration only after proper notice and an

opportunity for a hearing. The Administrative Procedure Act applies to the Nonrecourse Civil Litigation Act.

(5) The Secretary of State may issue a temporary certificate of registration while an application for registration or renewal of registration is pending.

(6) The Secretary of State shall require a civil litigation funding company registered pursuant to the act to annually submit certain data, in a form prescribed by the Secretary of State that contains:

(a) The number of nonrecourse civil litigation fundings;

(b) The amount of nonrecourse civil litigation fundings;

(c) The number of nonrecourse civil litigation fundings required to be repaid by the consumer;

(d) The amount charged to the consumer, including, but not limited to, the annual percentage fee charged to the consumer and the itemized fees charged to the consumer; and

(e) The dollar amount and number of cases in which the realization to the civil litigation funding company was less than contracted.

(7) The Secretary of State shall annually prepare and electronically submit a report to the Clerk of the Legislature and to the Judiciary Committee of the Legislature on the status of nonrecourse civil litigation funding activities in the state. The report shall include aggregate information reported by registered civil litigation funding companies.