ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.4(b), 1.6(a), 1.8(e), 1.16(e) with its Comment [10], and 5.4(a). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 92-9
January 22, 1993

Topic: Financial Support to Clients; Confidentiality

Digest: Attorney may ethically assist clients in obtaining loans for payment of attorney fees, providing the attorney protects the client's confidences and meets his fiduciary obligation of complete disclosure.

Ref.: Illinois Rules of Professional Conduct, Rules 1.4(b), 1.6 (a), 1.8(d), 1.16(e), and 5.4(a)
ISBA Opinion 295 (1968)

FACTS

Attorney A is requesting an opinion as to whether or not attorneys may ethically become associated with Finance Company for the purpose of obtaining loans for clients to pay attorney fees. The attorney pays an initial fee of $500 for which he is given the right to submit loan applications from clients. Upon approval of the loan, the client would be solely responsible for its repayment. The attorney would receive the loan proceeds, less a 10% fee.

QUESTIONS

1. Does an attorney who assists in obtaining financing for a client to pay his fee violate Rule 1.8(d), which prohibits advances or guaranteed financial assistance in connection with contemplated

or pending litigation.
2. Does the attorney's agreement to pay a 10% fee to Finance Company A constitute a fee splitting arrangement in violation of Rule 5.4(a)?

OPINION

Rule 1.8(d) provides in part:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client,...

The type of financial assistance prohibited by the Rule is the guaranteeing of financial assistance or direct assistance by the attorney to the client with the exception that the attorney is allowed to advance the "expenses of litigation." The fact situation presented does not violate Rule 1.8(d) since the attorney is assisting the client in making financing available between the client and some third party without directly involving the attorney in the making of the loan or guaranteeing of the loan.

This issue was addressed previously in Opinion No. 295 (1968). In that opinion, the Committee found a particular plan for bank financing to be ethical. The Committee recognized the need of the general public to have legal services made more available. The issues dealt with in that decision were confidentiality or information and possible disputes over legal fees.

We affirm our position, in Opinion No. 295, that financial plans which are suggested by an attorney are permissible when certain requirements are met. First, there must be compliance with Rule 1.6, which concerns confidentiality. The attorney must fully disclose to the client that the information contained in the loan application will be forwarded and disclosed to the lender. We encourage the attorney to document the disclosure by written instrument. Rule 1.6 provides in part:

> (a) ...a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure.

Secondly, the attorney, as fiduciary, has the duty to disclose to the client his complete involvement in the transaction. It is the Committee's opinion that the attorney's duty, as a fiduciary, requires that the transaction and terms be fair and reasonable to the client. The terms must be fully disclosed and transmitted to the client in writing in a manner reasonably understood. see Rule 1.4(b).

Therefore, this fact situation would require the attorney disclose to the client the complete details of the loan and the nature of his association with Finance Company A. He must disclose the fact that he was required to make an initial payment of $500 in order to submit loan applications to this particular lender. He must also inform the client that he is discounting his attorney fees by 10% as part of the agreement to submit the loan applications to Finance Company A. Additionally, the fiduciary relationship requires that the attorney inform the client that his representation is not contingent upon the use of Finance Company A and also that the client is free to obtain alternative financing.

An additional question submitted by the inquirer is whether or not the practice of discounting the

attorney fee would be a fee sharing agreement in violation of Rule 5.4(a). The Committee finds that an attorney's agreement to discount a portion of a loan given to a client is distinguishable from an attorney's agreement to share fees with a non-attorney. The facts as set out in the inquiry indicate a business agreement between the attorney and the finance company by which the attorney agrees to accept that portion of his fee which was financed minus a 10% service charge. This practice makes it possible for the business to bear a portion of the cost of the loan thereby making the borrower more attractive to the lender. The business benefits since its product can be sold to customers who do not possess sufficient cash.

We believe that the problem that could arise due to an early withdrawal of an attorney is adequately addressed by Rule 1.16(e), which requires the withdrawing attorney to promptly refund any part of the fee paid which is not earned.

For the reasons stated, the Committee is of the opinion that it is ethical for an attorney to suggest a loan agreement with a particular financial institution for the payment of his legal fees on the conditions that he complies with Rule 1.6 concerning the disclosure of confidences and also that he meets his further fiduciary obligations concerning full disclosure of all the terms of his involvement with the financial institution, the terms of the transactions are fair and reasonable, and also the client's right to obtain alternative financing. See also Rule 1.4(b) requiring full explanation of the transaction in term the client can understand.

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