PROFESSIONAL ETHICS OF THE FLORIDA BAR
OPINION 00-3
March 15, 2002

An attorney may provide a client with information about companies that offer non-recourse advance funding and other financial assistance in exchange for an interest in the proceeds of the client's case if it is in the client's interests. The attorney may provide factual information about the case to the funding company with the informed consent of the client. Although the attorney may honor the client's valid written assignment of a portion of the recovery to the funding company, the attorney may not issue a letter of protection to the funding company.

Note: This opinion was approved by The Florida Bar Board of Governors on March 15, 2002.

RPC: 4-1.6, 4-1.7, 4-1.8(e)
OPINIONS: 65-39, 68-15, 70-8, 75-24, 92-6, Arizona Ethics Opinion 91-22, New York State Bar Opinion 666, Philadelphia Bar Association Opinion 91-9, South Carolina Ethics Opinion 94-04, South Carolina Ethics Opinion 92-06, South Carolina Ethics Opinion 91-15, Ohio Ethics Opinion 94-11, Virginia Ethics Opinion 115
CASES: *The Florida Bar re Amendments to Rules Regulating The Florida Bar -- Rule 4-1.8(e)*, 635 So.2d 968 (Fla. 1994)

The Committee has recently received numerous inquiries regarding various proposals to assist personal injury clients in obtaining non-recourse advance funding for the clients' personal expenses unrelated to the costs and attorneys' fees in the litigation pending recovery in their cases. The inquiring attorneys have received communications from funding companies offering to provide funds to personal injury clients in exchange for an assignment of part of the proceeds of the clients' cases. The attorneys specifically would like to know if they are permitted to provide the clients with information about the funding companies, provide information about the clients' cases to the funding companies, and provide the funding companies with letters of protection.

Whether a particular arrangement between the client and a funding company complies with applicable statutes is a legal question, outside the scope of an ethics opinion. The Committee therefore makes no comment on the legality of these transactions. *See, e.g., Kraft v. Mason*, 668 So.2d 679 (Fla. 1996). *But see, Rancman v. Interim Settlement Funding Corp.*, 2001 WL 1339487 (Ohio 2001). If the transactions are illegal, an attorney must not participate in the transaction in any way. If a client requests information about or assistance with obtaining the funding, the attorney should advise the client about the illegal nature of the transaction and must not participate in or assist the client with the transaction. Rule 4-1.2(d).

This opinion discusses appropriate conduct of attorneys regarding advance funding companies assuming that the transactions offered by the companies are legal. Nothing in the opinion should be viewed as endorsing advance funding companies or the use of advance funding companies in any way by The Florida Bar.

This Committee has previously indicated that attorneys cannot personally loan money to clients in connection with pending litigation. Florida Ethics Opinion 65-39. The Committee has also advised that an attorney may not indirectly loan funds to clients in connection with pending litigation through a nonprofit corporation funded by attorney contributions. Florida Ethics Opinion 68-15.

Regarding loans from third parties to personal injury clients, this Committee has previously stated that "a lawyer may suggest to a client where the client may try to obtain financial help for individual needs. . ., but the lawyer should not become part of the loan process." Florida Ethics Opinion 75-24. The Committee stated that "[w]here the lawyer initiates the loan by recommending his client to the loan company, it seems to us that he is inherently representing to the loan company that the client's claim is meritorious." *Id*. The Committee cited to this opinion in Florida Ethics Opinion 92-6, which states that it is impermissible for an attorney to become involved in a financing agreement which required the

attorney to become a trustee to benefit the company providing the loan to the attorney's client. The Committee additionally noted that "an attorney who routinely refers clients to a loan company and actively participates in the loan transactions would be providing financial assistance to those clients," albeit indirectly. Florida Ethics Opinion 92-6. When presented with the proposal at issue in opinion 92-6 in the form of a petition for a rule change, the Supreme Court of Florida stated that:

The Bar argues that the proposed amendment will result in inevitable conflicts of interest among lawyer, client, and lending institution, as well as discouraging settlements. We agree. . . . . We find that the rule amendment LRM proposes would violate both subsections of rule 4-1.8, thus creating possible conflicts of interest. This Court has disciplined members of the Bar for advancing funds or assisting others to do so. *The Fla Bar v. Hastings*, 523 So. 2d 571 (Fla. 1988);*The Fla. Bar v. Wooten*, 452 So 2d 547 (Fla. 1984); *The Fla. Bar v. Dawson*, 318 So. 2d 385 (Fla.), cert. denied, 423 U.S. 995, 96 S. Ct. 422, 46 L. Ed. 369 (1975). Lawyers should not be encouraged or allowed to do indirectly what they cannot do directly. The majority of states likewise prohibit this conduct. We therefore reject LRM's proposed rule amendment.

The Florida Bar re Amendments to Rules Regulating The Florida Bar -- Rule 4-1.8(e), 635 So.2d 968 (Fla. 1994). The Committee has not addressed whether an attorney could honor a letter of protection to a funding company, and has not elaborated on our advice in Opinion 75-24 as to the extent to which an attorney may "try to obtain financial help" for clients without becoming involved in the process of obtaining financial assistance. The Committee now undertakes to answer these questions.

The majority of states who have examined these issues have determined that it is permissible for an attorney to provide a client with information about funding companies. See, e.g., Arizona Ethics Opinion 91-22 (attorney may refer personal injury client to funding company, but may not reveal information to the company without the client's consent, may not co-sign or guarantee the transaction, and may not tell the company that the lien is valid and enforceable if in the attorney's opinion it is not); New York State Bar Association Opinion 666 (attorney may refer client to funding company which then takes a lien on the recovery, may provide information to the company only with informed consent of the client, but may not have an ownership interest in the company or receive any compensation from the company for the referral); Philadelphia Bar Association Opinion 91-9 (attorney may refer personal injury client to funding company which takes a lien on the recovery, but may not have an ownership interest in the company or receive any compensation from the company, must maintain independent professional judgment, and must have informed client consent to disclose information to the company); South Carolina Ethics Opinion 94-04 (if the transaction is not illegal, an attorney may tell a personal injury client about funding companies at the client's request or if it is in the client's interest, but should advise the client of the benefits and detriments of the transaction, should inform the client and company in writing that the client controls the litigation; the attorney may also pay the settlement proceeds to the company under a valid assignment); South Carolina Ethics Opinion 92-06 (an attorney may refer personal injury clients to a funding company and may honor the assignment of a portion of the claim to the company); South Carolina Ethics Opinion 91-15 (attorney may refer personal injury clients to a funding company in which the attorney has no interest, and may honor the assignment to the company as long as the client consents); Ohio Ethics Opinion 94-11 (attorney may not refer a client to a funding company which requires the attorney to give a percentage of the legal fee to the company, but may refer a client to a funding company if such an arrangement is not required, it is in the client's best interest, and the arrangement does not cause the attorney to violate the rules of professional conduct; the attorney should advise the client on alternative methods of obtaining assistance such as low interest credit cards, bank loans or personal loans from the client's family or friends); Virginia Ethics Opinion 115 (an attorney may request that a funding company provide a personal injury client with funding when other lending sources have declined to assist the client and may honor the company's lien on the recovery, but the attorney may not guarantee or co-sign the loan). The majority of states have concluded that providing information to a funding company at the client's request is permissible, with the informed consent of the client. They also conclude that an attorney may honor a client's assignment of a portion of the recovery to the funding company.

The Florida Bar discourages the use of non-recourse advance funding companies. The terms of the funding agreements offered to clients may not serve the client’s best interests in many instances. The

Committee continues to have concerns, as discussed in Opinion 92-6, of the problems that can arise when a client obtains financial assistance from a third party, such as the client's lack of incentive to cooperate. This Committee can conceive of only limited circumstances under which it would be in a client's best interests for an attorney to provide clients with information about funding companies that offer non-recourse advance funding or other financial assistance to clients in exchange for an assignment of an interest in the case. Under these limited circumstances an attorney may advise a client that such companies exist only if the attorney also discusses with the client whether the costs of the transaction outweigh the benefits of receiving the funds immediately and the other potential problems that can arise. Only after this discussion may a lawyer provide the names of advance funding companies to clients.

The attorney shall not recommend the client's matter to the funding company nor initiate contact with the funding company on a client's behalf. Florida Ethics Opinion 75-24. The attorney shall not co-sign or otherwise guarantee the financial transaction. Florida Ethics Opinion 70-8. The attorney also shall not allow the funding company to direct the litigation, interfere with the attorney-client relationship, or otherwise influence the attorney's independent professional judgment. The attorney shall not have any ownership interest in the funding company or receive any compensation or other value from the funding company in exchange for referring clients.

The attorney may provide information to a funding company about the case at the client's request. Before providing the company with such information, the attorney must advise the client about the effects of the disclosure, including whether any privileges such as attorney-client and work product may be waived if the information is disclosed to the funding company, and obtain the client's informed consent. Rule 4-1.6. If the client, after consultation, requests that the attorney provide the funding company with confidential information, the attorney is not obligated to provide work product material, such as the attorney's personal notes. However, the attorney may provide copies of documents such as medical records and accident reports if the client requests. The attorney is not obligated to bear the costs of copying the documents. Additionally, the attorney shall not provide the funding company with an opinion regarding the worth of the client's claim or the likelihood of success. Rule 4-1.7, Florida Ethics Opinion 75-24.

Finally, the attorney may, at the client's request, honor a client's valid, written assignment of a portion of the recovery to the funding company. The attorney may not, however, provide a letter of protection to the funding company signed by the attorney.

In conclusion, an attorney may, under the circumstances set forth above, provide a client with information about companies that offer non-recourse advance funding and other financial assistance in exchange for an interest in the proceeds of the client's case. The attorney may provide factual information about the case to the funding company with the informed consent of the client. Although the attorney may honor the client's valid written assignment of a portion of the recovery to the funding company, the attorney may not issue a letter of protection to the funding company.

[Revised: 08-24-2011]

OPINION 92-6
March 1, 1993

An attorney's involvement with a proposed corporation that would loan money to claimants in personal injury matters would be unethical. Under the proposed plan, in order to ensure repayment of the loan from the recovery the attorney and the client would sign a trust declaration by which the attorney would become a trustee for benefit of the loan company.

Note: This opinion was approved by the Board of Governors at its February 1993 meeting.

RPC: 4-1.7, 4-1.8(e), 4-3.7(a), 4-8.4(a)
CPR: DR 5-103(B)
Opinion: 75-24
Case: The Florida Bar v. McAtee, 601 So.2d 1199 (Fla. 1992)

The inquiring attorney previously received an informal staff opinion concerning the inquiry presented below. At the inquirer's request, the Committee reviewed the staff opinion. Following the Committee's affirmance of the staff opinion, the inquirer petitioned for Board of Governors review. The Board approved the result reached in the staff opinion, but directed that the Committee render an advisory opinion to provide guidance to the practicing bar.

The inquiring attorney states that his client is considering forming a corporation that would loan money to claimants in personal injury matters. The loans would be made pursuant to the following arrangement:

(1) In consideration of the proceeds of the loan, the personal injury claimant would execute and deliver to the lender an interest-bearing promissory note.

(2) In addition to the execution and delivery of the promissory note, the personal injury claimant would execute a trust declaration by which his or her lawyer would become a trustee for the benefit of the lender.

(3) The personal injury claimant's lawyer would sign the trust declaration, thereby accepting responsibility for repayment to the lender of the loan out of the proceeds of the personal injury claim.

(4) The personal injury claimant's lawyer would receive no pecuniary compensation from any source for his or her service as trustee.

(5) The personal injury claimant's lawyer would advance none of his or her funds, either directly or indirectly, to his or her client.

(6) The ownership and management of the lender would be completely independent of the personal injury claimant's lawyer.

The inquiring attorney has asked whether the participation of the personal injury claimant's lawyer in the proposed financing arrangement would be ethically permissible. For the reasons expressed below, the Committee is of the opinion that an attorney's participation in this financing arrangement would be unethical.

In Opinion 75-24 we concluded that it would be improper for an attorney to participate in an arrangement in which a lender would agree to make loans to the attorney's clients for living expenses on the condition that attorney and client sign an agreement that the loan would be repaid from the settlement proceeds. Although Opinion 75-24 was decided under the former Code of Professional Responsibility, for purposes of this inquiry former DR 5-103(B) and present Rule 4-1.8(e) are substantially similar. Rule 4-1.8(e) provides:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

In reality, an attorney who routinely refers clients to a loan company and actively participates in the loan transactions would be providing financial assistance to those clients. Such conduct would be unethical even though the attorney would be providing financial assistance indirectly rather than directly. An attorney may not violate the Rules of Professional Conduct through the acts of another. Rule 4-8.4(a). Therefore, if the loan proceeds were used for anything other than "court costs and expenses of litigation," the attorney would be acting unethically by participating in the proposed financing arrangement.

Other practical problems exist. For example, in some cases a client might stand to receive no cash from a recovery because the client's entire share of the expected recovery proceeds had been "advanced" by, and thus was owed to, the loan company. Upon realizing that no cash would be forthcoming, the client could decide to cease cooperating with the attorney or simply to forego pursuing the matter. In such a situation, the fact that the client's share of the expected recovery already had been received by the client could adversely affect the relationship between attorney and client. The attorney's interest would be served by settlement of the case, yet the client might have little incentive to settle or even to cooperate in pursuing the case.

An attorney's involvement in the loan process to the extent contemplated by the proposed arrangement also would raise the issue of the attorney's duty to arrange for financing on the most advantageous terms available for the client. Would the attorney be obligated to "shop" the client's case to various loan companies in order to obtain the best deal? Must the attorney counsel the client on how much money the client should borrow?

Additional ethical concerns could arise as a result of the attorney's participation in the proposed arrangement. It is apparent that, in the event of a dispute between the client and the loan company, the attorney would be placed squarely in the middle. A principal purpose underlying Rule 4-1.8(e) is to prevent unnecessary conflict between attorney and client. In the view of the Committee, an attorney's involvement in the proposed financing arrangement would serve only to increase the likelihood of such conflict. Furthermore, the attorney's extensive involvement in the loan process could result in the attorney being ethically precluded from representing the client in litigation resulting from the dispute-for example, Rule 4-3.7(a) would prohibit the attorney from representing the client in the litigation if the attorney would be a necessary witness on the client's behalf.

Finally, under existing ethics rules a potential conflict of interest would be present if an attorney acted to protect the lender's interest by agreeing to act as trustee for benefit of the lender. See *The Florida Bar v. McAtee* , 601 So.2d 1199 (Fla. 1992), and Rule 4-1.7. Attorney McAtee was disciplined for representing a personal injury client while, without that client's knowledge or consent, simultaneously representing the medical provider that had filed a notice of lien against the personal injury client's recovery. Although such conflicts often can be waived by the affected clients, it is evident that our statement in Opinion 75-24 seems especially applicable to the financing arrangement proposed by the inquiring attorney:

Where the lawyer initiates the loan by recommending his client to the loan company, it seems to us that he is inherently representing to the loan company that the client's claim is meritorious. It becomes unclear whether the lawyer is acting for the client or the loan company.

In closing, it is noted that the Committee's opinion is directed at the financing arrangement presented by the inquiring attorney; we have not been asked, nor do we attempt, to provide an opinion concerning ethically proper use of "letters of protection" in personal injury cases.

[Revised: 08-24-2011]

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 72-43
February 23, 1973

A lawyer may assign to a third party an account receivable representing professional fees as long as the client consents and the assignment limits to the lawyer the right to sue in the event of default.

CPR: EC 2-23, DR 4-101

Vice Chairman Zehmer stated the opinion of the committee:

The inquiring attorney poses the following simple question:

Is there any ethical prohibition against an attorney assigning an account receivable from one client to a third party after his professional services have been rendered and all that remains is collection of the client's funds owing for the professional services rendered?

For purposes of this inquiry, the Committee assumes that the professional services have been completed and the fee fixed and agreed upon.

The assignment of a receivable representing a fee for professional services immediately raises concern about the confidential relationship between lawyer and client, including such confidential matters as the client's need for legal services and amount of the fee owed for such services. Such assignment also poses ethical problems should the client fail to make the required payments to the assignee in view of the admonition in EC 2-23 that a lawyer "should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client."

However, the CPR does not prohibit the assignment of receivables representing professional fees. Therefore, keeping in mind that potential ethical problems exist, the Committee concludes that assignment of such receivables is ethically appropriate provided (1) the client is fully informed of the proposed assignment by his lawyer, and agrees to such assignment and making payment to the designated assignee; and (2) the assignment is limited by agreement of the lawyer and the assignee so that, in the event of default by the client, only the lawyer may initiate or authorize suit to collect the amount owed by the client.

The client's agreement is a sufficient waiver of confidentiality and other objections to the assignment. The limitation on the right to initiate suit obviates problems under EC 2-23.

The Committee does not express any opinion on the ethical propriety of an assignment of receivables from a client if the client does not have knowledge of and consent to such assignment.

[Revised: 08-24-2011]