STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 36
January 8, 2007

QUESTIONS

1. Do the Nevada Rules of Professional Conduct preclude an attorney from financing litigation costs through a loan obtained from a third-party lending institution in which the attorney is obligated to repay the loan and the client is in turn obligated to reimburse the attorney for litigation costs?

2. May the separate agreement requiring the client to be responsible for litigation expenses also require the client to reimburse counsel for the interest and other costs associated with obtaining the loan to fund litigation costs?

ANSWERS

1. An attorney may borrow funds from a third-party lending institution for the purpose of obtaining funds for use in paying litigation costs. The attorney must agree to be responsible for the repayment of the loan, interest, and associated reasonable fees irrespective of the outcome of the litigation. Repayment of the loan may not be contingent on the success of the litigation for which the loan is obtained.

1a. As respects the lender, counsel must be the obligor on the loan and be solely responsible for the repayment of the loan without regard to the outcome of the matter.

1b. Prior to obtaining any such loan, counsel must disclose the planned loan and its terms and conditions and also obtain the client's written consent to the loan.

1c. In addition, as with litigation costs generally, the client must be responsible for reimbursing counsel's reasonable incurrence of costs and disbursements related to the litigation. Counsel may not agree to absolve the client of the responsibility for repayment of costs in order to obtain the client's consent for the loan and may not advance funds to the client as a means of soliciting or retaining the client's business.

1d. An attorney may agree to pledge assets as security for such a loan in accordance with counsel's best judgment. However, counsel is not required to seek a loan to finance litigation expenses and is not required to pledge any particular assets as

security necessary to obtain a loan for litigation expenses.

2. An agreement providing that the client is responsible for reimbursing counsel for litigation expenses incurred in connection with the representation may also provide that the client is responsible for reasonable interest expense incurred in connection with any agreed loan to counsel for purposes of advancing litigation costs.

2a. When the client is asked to agree to be responsible for repayment of costs that potentially include loan interest, the maximum interest charge must be specified in the agreement and must be a reasonable under the circumstances in light of the credit markets at the time any such loan is procured.

AUTHORITIES RELIED UPON

Nevada Rules of Professional Conduct 1.8 and 5.4
State Bar Association Opinions cited herein.
Cases and authorities cited herein.

DISCUSSION

Attorneys representing personal injury claimants frequently find that even where counsel fees are contingent on success (and therefore not imposed upon the client absent some recovery), plaintiff clients lack sufficient funds to contemporaneously pay the out-of-pocket litigation expenses required to prosecute the claim. Traditionally, attorneys have been permitted to advance these funds and pay ongoing litigation costs provided that the client remains ultimately responsible for the costs. Where a claim is successful, repayment of costs typically is made from the proceeds of settlement or judgment in the manner.

In tort claims such as those involving product liability or professional malpractice, the costs required for successful prosecution of the claim can be substantial, running in the hundreds of thousands of dollars. Even where counsel views the claim as strong and anticipates obtaining a significant settlement or judgment, it may be financially impractical for the plaintiff's lawyer to advance costs of this magnitude, just as it is impractical for most clients (who are usually individuals of modest means) to pay such costs on an ongoing basis.

In response to these economic realities, counsel representing claimants may wish to borrow the funds necessary to pay litigation costs. The question then arises whether a loan of this type is permitted under the Nevada Rules of Professional Conduct. There is no Nevada Rule prohibiting such arrangements, nor are such loans prohibited under the ABA Model Rules of Professional Conduct. However, the Committee is of the opinion that certain safeguards should be maintained to ensure that any borrowing by counsel does not adversely affect the client's claim or the integrity of

the judicial system.

The typical type of loan envisioned by counsel seeking funds for litigation costs would be a "recourse" loan for which counsel is responsible for repayment regardless of the case outcome. However, the attorney could use potential fees from the representation as cash collateral or could make other arrangements with a bank or other lending institution regarding security for the loan. The lender would be an arms-length third party that otherwise has no interest in the outcome of the litigation. The loan would provide funds to be used for litigation costs as reasonably necessary for the prosecution of the claim. This could take the form of a lump sum loan or a line of credit. The attorney would pay a monthly interest charge on the loaned funds, remitting the principal of the loan when the case is resolved.

In seeking a loan or line of credit, counsel may pledge assets as he or she sees fit in order to obtain the funds for litigation costs. However, counsel is not required to pledge any particular assets in order to obtain the loan. For example, a lawyer's duty of zealous and competent representation of an impecunious client does not require that the attorney mortgage all of his or her (or a law firm's) assets in order to obtain a loan for litigation costs thought necessary to the client's case. A lawyer's duties to the client do not require that he or she seek a loan at all. Rather, the prospect of an attorney borrowing to finance litigation expenses is simply one option available to attorney and client.

By operation of law, a litigant is responsible for litigation expenses absent an agreement or statute to the contrary. Consequently, if an attorney incurs obligations or expends funds on reasonable expenses for the client's matter, the client is responsible for repayment of these amounts regardless of whether the source of funds is a loan or counsel's own funds. However, where funds are borrowed to finance litigation, there should be a separate written agreement in which the client agrees to reimburse counsel for the loan and interest.

This opinion assumes that any loan to counsel for litigation costs conforms to the basic framework described above. Significant deviations from this type of arrangement may make the loan or reimbursement impermissible by creating improper incentives for counsel or clients. Consequently, members of the State Bar should read this opinion with caution and not assume that all forms of borrowing for litigation are automatically permitted.

It is particularly important to distinguish the type of loan to counsel envisioned in this Opinion and "factoring" or non-recourse lending by third parties. Under factoring or non-recourse arrangements, funds are lent directly to the client, usually at comparatively high interest rates, with the amount of repayment contingent on the degree of success of the claim. Critics, including state bar associations, have disapproved of such loans because they create another lien on plaintiff's potential

recovery and have potential to undermine the judgment of a client regarding settlement where a client has borrowed too much in relation to the value of the claim. *See, e.g.*, *Rancman v. Interim Settlement Funding Corp.*, 789 N.E. 217 (Ohio 2003); Utah State Bar, Ethics Advisory Opinion Committee, Utah Opinion 97-11, 97 WL 770890 (1997); Douglas R. Richmond, *Litigation Funding: Investing, Lending, or Loan Sharking?*, ABA PROFESSIONAL LAWYER 20 (2005)(providing further description of the practice; assessing cases; criticizing *Rancman*, particularly the Ohio Supreme Court's suggestion that all loans to litigants may be champertous); Felicia Galati, *Getting Involved in Getting Money for Your Civil Litigation Clients: An Ethical Quagmire*, NEV. LAWYER, March 2002 at 15.[1] However, such loans are permitted in many states. *See, e.g.*, *Fausone v. U.S. Claims, Inc.*, 915 So. 2d 626 (Fla. Ct. App. 2005)(enforcing lender's arbitration award against borrowing claimant).

Where a loan is not contingent on litigation success but is a conventional recourse loan that must be repaid irrespective of the outcome of the litigation it financed, courts and bar associations have generally approved such arrangements. *See Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997)(permitting attorney loans to a client in return for higher than normal contingent fee; abolishing doctrines of champerty, barratry, and maintenance), *Fausone v. U.S. Claims*, Inc., 915 So. 2d 626 ((Fla. Dist. Ct. App. 2005)(loans to claimant with repayment secured by contingent recovery permissible); *Johnson v. Wright*, 682 N.W. 2d 671 (Minn. Ct. App. 2004), *rev. granted*, 2004 Minn. LEXIS 657 (Oct. 19, 2004), *appeal dismissed* (Minn. Jan 10, 2005)(permitting loans where lender has expectation of repayment without regard to outcome of litigation but finding subsequent assignment agreement with 28 percent interest rate champertous and void as against public policy).

In Nevada, an attorney may refer a client to a third party lender for the purpose of obtaining a loan where counsel has some reasonable assurance that the lender will not impose unreasonable or impermissible terms on the client borrower. *See, e.g.*, State Bar of Nevada Comm. on Ethics and Professionalism Formal Op. No. 29 (Aug. 7, 2003). Commentators have defended nonrecourse contingency loans to plaintiffs. *See, e.g.*, Richmond, *Litigation Funding*, *supra;* Geoffrey Miller, *Payment of Expenses in Securities Class Actions: Ethical Dilemmas, Class Counsel, and Congressional Intent,* 22 REV. LITIG. 557 (2003); Joseph Molintaro, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223 (2003). *See also* Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649 (2005).

Nevada Rules of Professional Conduct 1.8 and 5.4 both caution against counsel acquiring financial or business commitments that may conflict with counsel's fiduciary duties to the client and counsel's independent judgment in conducting litigation, including evaluation of settlement decisions. More specifically, Rule 1.8(e) states:

(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.

The plain language of Rule 1.8(e) expressly authorizes counsel to advance litigation expenses and even permits counsel to make repayment contingent. Where the client is indigent, counsel's payment of court costs will as a practical matter be repaid only if the litigation is at least modestly successful. Nothing in Rule 1.8 or other sections of the Rules of Professional Conduct addresses the source of counsel's payment of litigation expenses and no provision of the Rules expressly or implicitly forbids counsel from borrowing in order to obtain funds for litigation. As a practical matter, many law offices depend on credit to sustain daily and ongoing operations. Under these circumstances, a blanket prohibition on case-specific borrowing in order to pay the expenses necessary to prosecute a client's claim would not make sense.

Loans directly to counsel on a recourse basis do not pose the problems associated with direct, contingent, nonrecourse loans to clients. A loan to counsel for reasonable litigation costs does not raise the problem of a client becoming overextended and unable to accept a reasonable settlement offer. Although there is always some risk that excessive borrowing for litigation expenses will compromise counsel's ability to properly advise the client regarding settlement, the Committee views this danger as sufficiently remote that it should not stand in the way of effective financing of litigation expenses. Most lawyers will have both expertise and self-interest that caution counsel against borrowing too much money for litigation or overspending on the case in relation to the value of the claim. If properly done, loans to counsel for litigation costs serve the public interest in preventing the abandonment of meritorious claims because of the limited resources or cash flow problems of plaintiffs and their counsel.

State bar associations that have considered the issue of loans to counsel for litigation costs appear to have overwhelmingly found such loans to be permissible. *See, e.g.*, Michigan Bar Committee on Ethics, Opinion No. RI-336 (Oct. 7, 2005); New York State Bar Ass'n Committee on Professional Ethics, Opinion No. 754 (Feb. 25, 2002); Utah State Bar Ethics Advisory Opinion Committee, Opinion No. 02-01 (Feb. 11, 2002); Missouri Bar Ass'n Informal Opinion No. 970066 (Aug. 20, 2001); Supreme Court of Ohio Board of Commissioners, Opinion 2001-3 (June 7, 2001); Los Angeles County Bar Ass'n Ethics Opinion No. 499, 22 L.A. Lawyer 77 (Sept. 1999); Illinois State Bar Ass'n Opinion No. 92-9 (Jan. 22, 1993); State Bar of Georgia Formal Advisory Opinion No. 92-1 (Jan. 14, 1992); Texas Commission on Professional Ethics, Opinion No. 465, V. 54 Tex. B.J. 76 (1991); Supreme Court of Tennessee Board of Professional

Responsibility, Advisory Ethics Opinion 98-A-659 (July 9, 1989); New Jersey Advisory Committee on Professional Ethics Opinion No. 603 , 120 N.J.L.J. 252 (July 30, 1987); State Bar of Florida Formal Advisory Op. No. 86-2 (April 15, 1986); Massachusetts Bar Ass'n Ethics Opinion No. 83-7 (May 12, 1983). There appear to no judicial decisions regarding the propriety of loans to counsel for litigation costs.

In short, there is no prohibition on such loans. However, to ensure that this type of borrowing by counsel does not create problems, the Committee recommends the following steps.

1. Disclosure to the client. The client should be advised of counsel's intention to procure a loan for the purposes of funding litigation expense in the client's matter. The client should be made aware of the basic nature of the loan and its material terms such as the loan amount, maximum interest rate, and operation. Counsel should explain that incurring debt in connection with a case could affect counsel's assessment of what constitutes reasonable resolution of the case and thus affect counsel's advice to the client regarding settlement. Similarly, the expenditure of significant court costs for which the client is responsible could cloud the client's judgment as to acceptable resolution of the case. The client should be reminded that pursuant to Nevada Rule 1.2, the decision regarding settlement rests with the client. Counsel of course should advise the client regarding settlement offers, options, and strategy, but may not make the settlement decision for the client.

2. Consent of the client. After having been advised of counsel's intention to borrow funds, the client must give written consent prior to the attorney's taking of the loan.

3. Ordinarily, clients are obligated to repay counsel for the advancement of reasonable litigation expenses. This may be memorialized by specific agreement in a particular case and should be done when counsel borrows funds. The agreement between lawyer and client should specify the client's obligation, including whether the client is responsible for interest and other lending costs. *See Chittenden v. State Farm Mut. Auto Ins. Co.*, 788 So.2d 1140 (La. 2001)(attorney may enter into agreement requiring client to reimburse counsel for principal and interest on litigation-related loan); Florida Bar Ethics Opinion No. 86-2 (April 15, 1986)(attorney may charge interest on costs advanced for litigation). Pursuant to Rule 1.8(e), counsel may advance costs for an indigent client without expectation of repayment or may make repayment of litigation expenses contingent on the outcome of the matter irrespective of the source of funds for paying litigation expenses. Generally, the terms of the lawyer-client understanding as to responsibility for litigation expenses should be memorialized in a writing signed by the client.

4. Any loan obtained for purposes of litigation funding must be a "recourse" loan that counsel is obligated to pay.

5. The interest rate for the loan or letter of credit must be reasonable in light of the credit market in existence at the time of the loan.

6. The amount of funds borrowed by counsel must be reasonable in relation to the strength, magnitude, and complexity of the client's claim. Borrowed funds should be used only in connection with the claim, with funds not immediately spent on litigation costs placed in the attorney's trust account.

7. Counsel must take appropriate steps to ensure that the lender realizes that counsel has a fiduciary obligation to the client and must provide sound advice to the client regarding resolution of the case without regard to counsel's obligation to the lender. Counsel should also advise the lender that under Nevada Rule of Professional Conduct 1.2, the decision to settle remains one made by the client, not counsel and that the lender has no authority for attempting to control counsel's prosecution of the client's claim. *See also* Rule 5.4 (nonlawyer may not direct or control professional judgment of attorney).

8. Counsel may not secure the loan by encumbering assets that, should the loan be foreclosed, could reasonably impede counsel's ability to represent his or her clients. In the course of seeking funding for a particular client's litigation expenses, counsel may enter into reasonable security agreements with the lender but is not required as a condition of competent, zealous representation to go to any lengths to obtain borrowed funding for a particular case. Indeed, counsel's duties to other clients make expressly caution against borrowing too much for a particular case or pledging too many assets simply to secure a loan for a single claim.

9. Counsel should consider purchasing insurance covering default on the loan obligation in order to provide greater financial security to counsel and the client so that any looming loan payments will not cloud counsel's judgment or affect counsel's performance in prosecuting and resolving the claim. The premium costs or other reasonable charges in connection with obtaining such insurance may be treated like interest charges and may be part of the client's repayment obligations. However, where a loan is between the attorney and a lender (and the client obligated to repay the loan and interest in a separate agreement with counsel), the lender should not have any recourse against the client should the claim prove unsuccessful. If the claim results in a favorable settlement or judgment, the lender would presumably have rights to some portion of the proceeds in the manner of a lienholder.

10. Counsel may not utilize borrowing of litigation costs as a means of soliciting or retaining clients. *See In re Brown*, 298 Ore. 285, 692 P.2d 107 (Ore. 1984)(attorney suspended for two years for loaning money in order to entice claimant to leave existing counsel for lending lawyer); Kentucky Bar Ass'n v. Mills, 808 S.W.2d 804 (Ky. 1991)(attorney publicly reprimanded for lending $6,400 to client, apparently for basic

living expenses). Borrowing by the lawyer linked to a single case or claim must be for purposes of financing reasonable and necessary litigation costs and may not be used to provide material goods or living expenses to the client.[2]

CONCLUSION

If appropriately structured and obtained, with disclosure to the client and consent by the client, an attorney may borrow funds for the purpose of financing litigation costs reasonably necessary for the prosecution of a clients claim.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar

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[1] It should also be noted that this Opinion does not address the question of the propriety of loans between client and attorney for purposes other than litigation funding. *See* Kate A. Toomey, *Neither a Borrower Nor a Lender Be*, 17 UTAH BAR. J. 8 (Oct. 2004)(deputy bar counsel notes that lawyer-client loan transactions are generally barred by Professional Conduct Rule 1.8 absent special circumstances).

[2] Cases and commentary are divided on whether counsel may provide reasonable amounts to a client for subsistence living expenses. *Compare In re Amendments to Rules Regulating the Florida Bar*, 635 So. 2d 968 (Fl. 1994)(no violation of rules for attorney to provide modest amount of funds to indigent client for basic needs without expectation of repayment); *Louisiana State Bar Ass'n v. Edwins*, 329 So.2d 437 (La. 1977)(loan for client's necessary medical treatment not a violation) *with State v. Smolen*, 17 P.3d 456, (Okla 2000)(citing cases)(prohibiting such expenditures); *Shea v. Virginia State Bar Disciplinary Board*, 236 Va. 442, 374 S.E.2d 63 (Va. 1988)(same). This Opinion takes no position on this issue. However, to the extent that Nevada law may permit counsel to pay subsistence-like living expenses for a needy client, the amounts involved should logically be small enough that counsel will not need to finance such payments through a loan.

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. **29**

August 7, 2003

QUESTION

Is it ethically proper for an attorney to refer a client having a personal injury claim to a company that will advance money to the client during the pendency of the claim with repayment being made from the settlement?

ANSWER

Yes, it is ethically proper for an attorney to refer a client having a personal injury claim to a company that will advance the money to the client during the pendency of the claim, with repayment being made from the settlement.

AUTHORITIES RELIED ON

Supreme Court Rule 158; Supreme Court Rule 156; Supreme Court Rule 157; Supreme Court Rule 181; Supreme Court Rule 154; Supreme Court Rule 165, *Achrem v. Expressway Plaza Limited Partnership*, 112 Nev. 727, 917 P.2d 447 (1996); Cal. State Bar Formal Op. No. 2002-159; Ohio S. Ct. Ethics Op. 2002-2; Ariz. State Bar Op. No. 91-22; Md. State Bar Assn. Pof'l Guidance Comm., Guidance Op. No. 91-9; Felicia Galati, Assistant Bar Counsel, *Getting Involved in Getting Money for your Civil Litigation Clients: An Ethical Quagmire*, Nevada Lawyer, March 2002 at 15; *In Re: Discipline of Joe M. Laub*, January 9, 2002, Nev. S. Ct. Appeal No. 36322.[(1)]

DISCUSSION

For purpose of this analysis, the following assumptions have been made:

- The lawyer does not represent and has no financial interest in or business or personal relationship with the company making the cash advance, and will not represent either party in connection with the advance or otherwise receive any compensation as a result of the advance (the lawyer's fees for work on the client's claim being entirely contingent).

- The lawyer has no duties or responsibilities, other than those enumerated in SCR 165

(safekeeping property), for the advance to the client.

- Repayment of the advance is contingent upon recovery being made on the claim, and is subject to the payment of all prior liens (including the lawyer's fees). The advance is secured by an assignment of a portion of the proceeds of any recovery.

- The advance is itself legal and otherwise enforceable.

Supreme Court Rule 158(5) states that "a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation," except that in certain cases the lawyer may advance or even pay court costs and litigation expenses. This, with exceptions that are not applicable tot he facts assumed here, an attorney is ethically prohibited from advancing money to a client during the pendency of the claim, with repayment being made from any resolution or settlement.

There is nothing in the Rules of Professional Conduct, however, which prohibits a lawyer from referring a client to an independent third party that would make such an advance. Assuming the lawyer does not represent and has no financial interest in or business or personal relationship with the company making the cash advance, and will not represent either party in connection with the advance or otherwise receive any compensation as a result of the advance, there would not be a violation os SCR 158. *Cf.* Cal. State Bar Formal Op. No. 2002-159 (a lawyer may refer a potential client to a broker for a real property loan to pay for attorney's fees and costs so long as the lawyer does not provide legal representation or receive compensation with regard to the referral or the resulting loan or escrow transactions, and has no undisclosed business or personal relationship with the broker); *see also Ariz.* State Bar Op. No. 91-22 (inquiring attorney may assist his client in obtaining a loan from a personal injury loan service, as long as the attorney has no interest in the loan service, does not guarantee repayment of the loan, and maintains client confidentiality."); Md. State Bar Assn. Comm. On Ethics, Docket 89-15 ("mere referral of clients to a lender willing to make loans would be ethically permissible."); Va. State Bar legal Ethics Op. No. 1155 ("[t]here would not be a violation. . . . as long as the attorney did not guarantee or cosign for the loan and the client remained ultimately liable for the expense."); Phila. Bar Assn. Prof'l Guidance Comm., Guidance Op. No. 91-9 (there is no violation of the ethical rules "[i]f the [attorney] does not have ownership or financial interest in the finance company and is not being paid any fee or other compensation by the finance company.").

For those practitioners considering a third party lender cash advance for their clients, it may be prudent to review an article entitled *Getting Involved in Getting Money for you Civil Litigation Clients: An Ethical Quagmire*, by Felicia Galati, Assistant Bar Counsel, initially published in the April 2001 *Nevada lawyer* and reprinted it in the March 2002 *Nevada Lawyer*. The article concludes that "[g]iven the ethical ramifications of third-party lender arrangements, it is advisable to those who brave this territory to do so with extreme caution." *Id.*, at p. 17.

In other words, the lawyer should consider other ethical rules that may come into play with such a referral. For example, Supreme Court Rule 156 provides in pertinent part: "[A] lawyer shall not reveal information relating to representation of a client unless the client consults after consultation. . . ." Before making an advance, the company will likely require information about the claim from the attorney. Such information could include the nature and extent of the client's injuries, the theories of liability, insurance and coverage issues, medical records, and other information regarding the relative strengths and merits of the client's claim. The attorney is ethically prohibited from disclosing any such information under SCR 156, unless the client consents to such disclosure.[(2)]

An attorney should also be aware of Supreme Court Rule 157, which addresses conflicts of interest. SCR 157 provides in pertinent part: "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client;" and "a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's present factual scenario, the lawyer has no financial interest in the lending company, the lawyer does not represent the lending company, and the lawyer has no financial liability for the advance. So long as there is no financial or professional relationship between the attorney and the company, SCR 157 will not be violated.[(3)] Essentially, the attorney has merely referred her client to an independent company that provides a service.

Moreover, in an appeal from a Northern Nevada Disciplinary Board, the Nevada Supreme Court stated that, in furtherance of SCR 151 (Competence), "a lawyer has a duty to conduct a reasonable investigation of persons to whom the lawyer refers his client for services". *In re: Discipline of Joe M. Laub* January 9, 2002, Appeal No. 36322. As such, the referring attorney would appear to have an obligation to conduct a reasonable investigation as to the entity making the advance.[(4)]

Finally, consideration should be given as to whether the cash advance is permissible under Nevada law. Presently, assignment of a personal injury claim is not permissible, however, a personal injury plaintiff may assign a portion of the proceeds of a tort action without violating public policy. *Achrem v. Expressway Plaza Limited Partnership*, 112 Nev. 737, 739-40, 917 P.2d 447, 448-49 (1996) (when only proceeds are assigned, the plaintiff retains control over the action, and the assignee cannot pursue the action independently). If the advance is secured by an assignment of a portion of the proceeds from the claim, the advance is allowed. Further, under the facts presented, repayment of the advance is contingent upon recovery being made on the claim, and is subject to payment of all prior liens. In situations where the attorney is provided notice of a lien that secured the cash advance, the safekeeping of property obligations enumerated in SCR 165 must also be considered and adhered to.

CONCLUSION

It is ethically proper for an attorney to refer a personal injury client to a company that will advance money to the client, with repayment being made from any settlement or

resolution, if the attorney has no financial interest in the company and the client consents after consultation. Given the potential ethical problems arising from such an advance, however, the attorney should be mindful of the corresponding ethical issues addressed herein.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

1. Not citable as authority. SCR 123.

2. The Client's consent should only be made after a consultation between the client and the attorney. It would be prudent for the attorney to advise the client as to the potential ramifications of disclosing such information, including whether the attorney-client privilege may be waived as a result of any such disclosure and whether the company's files and its evaluation of the claim is discoverable in the client's case. Preferably, the client's consent would be in writing.

3. Ohio S. Ct. Ethics Op. 2002-2 ("when a lawyer agrees to provide loan applications for a lender and participates in referrals that provide financial benefit to a lender and a consulting company that have business relationships with the law firm, the lawyer dilutes his . . . loyalty to the client and may create an appearance of impropriety").

4. It does not appear that the Laub opinion was published, rendering it un-citable as authority, under SCR 123.