

**163 N.J.L.J. 220**  
**January 15, 2001**

**10 N.J.L. 154**  
**January 22, 2001**

## **ADVISORY COMMITTEE ON PROFESSIONAL ETHICS**

**Appointed by the New Jersey Supreme Court**

### **OPINION 691**

#### **Referral of Personal Injury Client to Third-Party Factor Which Will Purchase an Interest in the Case**

The Advisory Committee on Professional Ethics has been asked whether an attorney may advise a client of the possibility of assigning to an independent factor a predetermined amount of the client's portion of a potential personal injury settlement or judgement in exchange for a present lump sum payment.

We have previously held that there is no impropriety in advising a client of the possibility of factoring an already acquired JUA judgement as long as the factor is totally independent of counsel. Opinion 670, 132 N.J.L.J. 978, 1 N.J.L. 1921 (1992). The Committee there emphasized that the litigation "has been fully and finally concluded with the litigant's and attorney's fees components of the judgement established and agreed upon by both client and counsel." *Id.* In such circumstances, it was held that counsel could advise a client of the possibility of factoring a judgment, but only after "satisfy[ing] himself or herself as to all currently available alternatives and the reasonableness of the proposed discounts under each alternative and present those alternatives to the client ... ." *Id.*

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While we now extend the holding of Opinion 670 to the present inquiry, we also add the requirement that counsel's participation in cases where litigation is ongoing be much more circumscribed than in those circumstances where a final judgment has been obtained.

In the case of an in-hand final judgment, the client is dealing only with the question of what the present value may be of a fixed fund over an unknown period of time. Under the present inquiry, both the amount of the fund, if any, and the time for collection are unknown. And although by reason of experience the attorney may be able to estimate value in such circumstances somewhat better than many clients, it is nevertheless beyond the reach of counsel's usual professional expertise, and the client should be clearly so advised. *See, generally*, RPC 1.2 (Scope of Representation).

As with all advisory opinions, we address only the ethical considerations of the contemplated conduct and not any substantive or regulatory considerations which may exist. Therefore, the Committee's opinion should not in any way be construed as sanctioning this or any other related business activity.

It is well settled that an attorney is prohibited from advancing funds to a client for living expenses. This prohibition is expressed in RPC 1.8(e) which 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.

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However, RPC 1.8 does not expressly or impliedly prohibit a lawyer from helping a client to obtain financial assistance from another, as long as the lawyer has no financial interest in the individual or entity which secures or provides that funding.

Clients in tort cases frequently approach their attorneys seeking financial advice or even an actual advance of monies to be collected from an anticipated personal injury settlement or judgment. On occasion, the client's need is great and the funds are necessary to forestall an eviction or to put food on the table. Faced with such pressures, the client may feel compelled to accept a settlement offer not in the client's best interests simply in order to survive financially. Nevertheless, an attorney may not provide those funds.

As related by the inquirer, however, the factor here will be totally independent of the attorney, and shall not be factoring or financing any portion of the as yet unrealized attorney's fee. The attorney will not otherwise profit or benefit from the business of the factor. Further, the factor will neither provide legal advice nor seek to control the direction of the litigation. These are conditions precedent to this Committee's approval of the proposal. Counsel must refrain from any relationship with or responsibilities to the factor which could in any way impair his or her duty of undivided fidelity to the client.

The assignment documents executed by the client will contain an acknowledgment of the lien by the attorney, who agrees to escrow the assigned amount and forward that amount to the factor out of the net proceeds, if any. There should be a clear understanding of what items will be subtracted from the proceeds to arrive at the net figure. Of particular importance to the Committee, the inquirer makes clear that the risk of there being insufficient net proceeds to satisfy the lien falls solely on the factor. Once the transaction has been completed, the factor will have a lien on the net proceeds of any settlement or judgment for the assigned amount.

An attorney who informs a client with limited resources that financial assistance may be available through established financial institutions can obviously be of material help to the client. This is particularly true when the anticipated settlement or judgment may not be realized, if at all, for an extended period of time simply because of the nature of the litigation process. Nevertheless, the attorney must not in any way dilute his primary responsibility to the client.

In his recitation of the facts, the inquirer also stated that "it is to be assumed that counsel is satisfied with the proposed discounts." The Committee disagrees with that assumption. Counsel's competence and duty lie in the litigation of the client's cause and, as circumstances may arise, to advise the client as to the possible settlement value of the case. As previously noted, counsel's relationship with the factor should not ordinarily extend materially beyond calling to the client's attention that there exist factors who may assist the client with financial matters. The appropriateness of a factor's proposal calls for a client's business decision as to which, as previously stated, the lawyer's experience and expertise may be of limited assistance. The Committee understands that the ability of the client to reach a reasonable business decision on such matters may depend heavily upon the client's financial sophistication. If the attorney believes that sophisticated financial advice is warranted, the attorney should recommend an appropriate professional for consultative advice.

An additional important issue raised by this inquiry is that of confidentiality of information. RPC 1.6(a) provides that "A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation ... ." The attorney must ensure that the client fully understands the risks of disclosure of such information, including the possible loss of the attorney-client privilege, before securing the client's authorization to disclose information the financial institution may require in order to assess the risk of the transaction. Upon securing such authorization, the attorney should still endeavor to limit, to the extent possible, the amount of information provided to the institution. For example, the attorney should provide the institution with only that information which would be discoverable by the attorney's adversary.

Philadelphia Bar Association Opinion 99-8 (February 2000). Under no circumstances should the attorney consider additional disclosures as impliedly authorized in order to carry out the transaction.

The inquirer further stated that “the role of the factor would be passive in the sense that it would neither provide legal advice nor seek to control the direction of the litigation.” There is no other role the factor may play. Pursuant to RPC 2.1, “In representing a client, a lawyer shall exercise independent professional judgment.” Under no circumstances may an attorney allow a lay individual or entity to direct or regulate the lawyer's professional judgment in rendering legal services, and this is true even if the individual or entity is compensating the attorney for the legal services performed for the client pursuant to RPC 1.8(f). *Cf.* RPC 5.4(c). Consequently, the attorney must, pursuant to RPC 1.2(a), exercise independent judgment in deciding whether and when to accept an offer of settlement, or whether to proceed to trial, and not allow the factor's interests or attempted input to affect the exercise of that judgment.

In conclusion, the Committee holds that a lawyer may ethically refer a client to a factor concerning a possible advance against an anticipated personal injury judgment or settlement, provided that the standards and limitations set forth above are followed.