The Supreme Court of Ohio

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OPINION 2012-3
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Non-recourse Civil Litigation Advance Contracts: Guidance for Ohio Lawyers

SYLLABUS: Ohio lawyers may inform clients of the non-recourse civil litigation advances that are offered by alternative litigation finance (ALF) providers and regulated by R.C. 1349.55. If a client pursues such an advance, the lawyer must recognize the following ethical obligations the transaction creates:

1. Prof.Cond.R. 1.1, 1.4, and 2.1 require the lawyer to communicate with the client and provide competent, candid advice about the nature of the transaction and its terms.
2. Under Prof.Cond.R. 1.4, the lawyer must ensure that the ALF provider does not interfere with the lawyer's duty to exercise independent professional judgment.
3. Due to the confidentiality provisions of Prof.Cond.R. 1.6, the lawyer shall not reveal information about the representation to the ALF provider without securing the client's informed consent. The lawyer may only obtain informed consent after explaining to the client the risks of sharing information with an ALF provider, including the potential waiver of attorney-client privilege.
4. The lawyer must also obtain the client's informed consent before providing a case evaluation to an ALF provider pursuant to Prof.Cond.R. 2.3 as the evaluation may materially and adversely affect the client's interests.

QUESTION PRESENTED: What are the ethical considerations for Ohio lawyers with clients entering into the non-recourse civil litigation advance contracts regulated by R.C. 1349.55?

APPLICABLE RULES: Rules 1.1, 1.4, 1.6, 2.1, and 2.3 of the Ohio Rules of Professional Conduct

OPINION:

Background

Alternative litigation finance (ALF) is the "provision of capital (money) by nontraditional sources to civil plaintiffs, defendants, or their lawyers to support litigation-related activities." Garber, *Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns*, RAND Inst. for Civil Justice Law, Fin., and Capital Mkts. Program, (2010) 1. In the United States, there are generally three types of ALF: non-recourse funding provided to individual plaintiffs (consumer legal funding), loans to plaintiffs' law firms, and investments in commercial litigation. *Id.* The American Legal Finance Association (ALFA), a trade group for ALF providers, has a membership of approximately 30 companies.[1] There may be as many as 80 other ALF providers operating in the U.S.[2] Because of the increasing proliferation of ALF and lawyers' deficient knowledge of the ethical issues associated with ALF transactions, the American Bar Association (ABA) Commission on Ethics 20/20 recently formed a working group to study ALF in the context of the lawyer-client relationship. The working group submitted its report to the ABA House of Delegates in February 2012, and the report is a comprehensive guide for lawyers on the ethical areas of concern with all types of ALF. *See* ABA Commission on Ethics 20/20, Informational Report to the House of Delegates (February 2012).[3] This Advisory Opinion is limited to non-recourse civil litigation advance contracts between consumers and ALF providers, and will offer guidance to Ohio lawyers whose clients are considering, or have already entered into, such contracts. This Opinion is neither an endorsement nor a condemnation of ALF.

"Non-recourse civil litigation advance contract" is the statutory term for consumer legal funding in Ohio. R.C. 1349.55. Through these contracts, ALF providers advance funds to individuals who have pending civil (usually personal injury) claims, and the individual agrees to pay the provider the

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[1] American Legal Finance Assn., Member Providers, http://www.americanlegalfin.com/OfficersAndMembers.asp (accessed Sept. 24, 2012).

[2] Garber at 10, note 14.

[3] Available at: http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf (accessed Sept. 25, 2012).

amount advanced plus additional financing fees. When viewed as a percentage of the amount advanced, these fees are substantially higher than the interest rates on credit cards and bank loans. Payment becomes due when the individual recovers funds in the civil case, and the fees usually increase as the length of time to recovery increases. As the advance is a non-recourse transaction, the individual is only required to repay the advance and remit the contractual fees if he or she receives proceeds in the underlying civil case. A typical condition of the advance is that the individual is represented by a lawyer on a contingency-fee basis.[4]

Rancman v. Interim Settlement Funding Corp.

Consideration of non-recourse civil litigation advance contracts in Ohio must begin with *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St.3d 121, 2003-Ohio-2721, 789 N.E.2d 217. Rancman was a personal injury plaintiff who contracted with two ALF providers for non-recourse advances secured by her pending civil claim. The providers advanced $6,000 and $1,000 to Rancman, who ultimately settled her case for $100,000. Rancman refused to honor the repayment terms of her contracts with the ALF providers and instead repaid the advances at eight percent interest.[5] She then sued the funding providers, requesting rescission of the contracts and a declaratory judgment that the providers' sales practices were "unfair, deceptive, and unconscionable." *Id.* at ¶ 5.

The trial court in *Rancman* determined that the two advances from the ALF providers constituted usurious loans that violated R.C. Chapter 1321, Ohio's Small Loan Act. *Id.* The court of appeals found the loans to be void under R.C. 1321.02 because the ALF providers had not acquired the statutorily-required licenses for lenders. *Id.* At trial and before the court of appeals, the ALF providers argued that the advances to Rancman were investments, not loans. *Id.*[6]

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[4]For a detailed explanation of consumer legal funding transactions, *see* Garber at 9-13. The summary provided herein is based upon this material.

[5] The $6,000 advance was provided in exchange for the first $16,800 recovered if the case was disposed in 12 months, $22,200 if disposed in 18 months, and $27,600 if disposed in 24 months. The $1,000 advance was secured by the next $2,800 Rancman received. If Rancman lost the case, the contracts did not require repayment of the $7,000 advance.

[6] The standard position of ALF providers is that non-recourse civil litigation advances are investments, not loans. A Colorado trial court, however, recently determined that the advances are loans subject to state consumer protection laws. *See Oasis Legal Fin. Group v. Suthers*, Dist. Ct., City and Cty. Of Denver, Colo. 10CV8380 (Sept. 28, 2011).

The Supreme Court of Ohio never reached the question of whether Rancman's civil litigation advances were loans or investments. Instead, the Court analyzed the funding contracts under the common law doctrines of champerty and maintenance. *Id.* at ¶ 9-19. The Court defined maintenance as "assistance to a litigant in pursuing or defending a lawsuit provided by someone who does not have a bona fide interest in the case" and champerty as "a form of maintenance in which a nonparty undertakes to further another's interest in a suit in exchange for a part of the litigated matter if a favorable result ensues." *Id.* at ¶ 10. Finding that the "ancient practices of champerty and maintenance have been vilified in Ohio since the early years of our statehood," the Court condemned Rancman's funding contracts on several grounds. *Id.* at ¶ 11. The Court was critical of the ALF providers' attempt to profit from Rancman's case and their purchased interests in the litigation. The Court also denounced the disincentive to settle caused by the funding contracts and characterized civil litigation advances as speculative investments in lawsuits. *Id.* at ¶ 14-18. Champertors and maintainers were historically lawyers, and the Court recognized that the Code of Professional Responsibility (now the Rules of Professional Conduct) regulates the advance of expenses to clients and acquisition of proprietary interests in litigation. *Id.* at ¶12, citing former DR 5-103 (now Prof.Cond.R. 1.8). Nevertheless, the Court found that the ethics rules did not eliminate champerty and maintenance from the common law. *Id.* The Court ultimately held that "[e]xcept as otherwise permitted by legislative enactment or the Code of Professional Responsibility, a contract making the repayment of funds advanced to a party to a pending case contingent upon the outcome of that case is void as champerty and maintenance." *Id.* at ¶ 19.

Legislative Response to Rancman

After the *Rancman* decision in June 2003, Ohio was purportedly the only state that disallowed non-recourse civil litigation advances. 76 Ohio Report No. 186, Gongwer News Service, Inc. (Sept. 19, 2007) (proponent testimony of Gary Chodes, chief executive officer of Oasis Legal Finance, on H.B. 248, 127th General Assembly). Contemporaneous with *Rancman*, though, regulators were instituting ALF reforms. For example, in June 2004 and February 2005, the New York State Office of the Attorney General reached settlements with ten ALF providers in which the providers agreed to implement new business practices to protect consumers. The agreed changes included mandatory disclosure statements regarding the transaction, a five-day cancellation period, translation of contract terms for non-English speaking consumers, and a notarized

acknowledgment by the consumer's lawyer. New York State Office of the Attorney General, Feb. 28, 2005 Press Release, http://www.ag.ny.gov/press-release/personal-injury-cash-advance-firms-agree-reforms (accessed Aug. 27, 2012). Using the New York settlement terms as a guide, the Ohio General Assembly passed legislation governing non-recourse civil litigation advance contracts in 2008. *See* 77 Ohio Report No. 83, Gongwer News Service, Inc. (Apr. 29, 2008). The result is R.C. 1349.55, entitled "Non-recourse civil litigation advance contracts." As of June 2012, Ohio, Nebraska, and Maine are the only states that have enacted consumer protection laws concerning civil litigation advances. O'Brien, *Baker: Lawsuit Financing Debate Likely to Continue in State Legislatures*, http://www.legalnewsline.com/spotlight/236576-baker-lawsuit-financing-debate-likely-to-continue-in-state-legislatures (accessed Sept. 24, 2012).

R.C. 1349.55(A)(1) defines a "non-recourse civil litigation advance" as a "transaction in which a company makes a cash payment to a consumer who has a pending civil claim or action in exchange for the right to receive an amount out of the proceeds of any realized settlement, judgment, award, or verdict the consumer may receive in the civil lawsuit." R.C. 1349.55(B) sets forth a number of required components of contracts for non-recourse civil litigation advances including disclosures of the amount of the advance, fees, the amount to be repaid, and the annual rate of return, a five-day cancellation provision, translation of the contract terms, and a statement that the ALF provider agrees it does not have decision-making authority in the underlying civil case. R.C. 1349.55(B)(6) further mandates that the contract contain a written acknowledgment by the consumer's lawyer indicating that the lawyer reviewed the contract and determined that all costs and fees were disclosed, and verifying the lawyer is being paid on a contingency fee basis pursuant to a written agreement, will distribute case proceeds from the lawyer's trust account or a settlement fund, and is following the consumer's written instructions concerning the advance.

The legislative history reveals that the Ohio General Assembly created R.C. 1349.55 to address the Supreme Court's holding in *Rancman*, make non-recourse civil litigation advance contracts legal, and provide consumer protection to customers of ALF providers. Legislative Serv. Comm. Fiscal Note and Local Impact Statement, H.B. 248, 127th General Assembly; 77 Ohio Report No. 83, Gongwer News Service, Inc. (Apr. 29, 2008). Representative Louis Blessing, the sponsor of the bill that enacted R.C. 1349.55, testified that "[a]llowing legal finance providers to operate in Ohio under regulations that

protect the consumer will give plaintiffs in Ohio lawsuits needed financial relief." *Id*. Given that the Court in *Rancman* stated that non-recourse civil litigation advances could be legalized by "legislative enactment," this Advisory Opinion assumes that R.C. 1349.55 accomplished this purpose. The Court, however, has not considered a legal challenge to R.C. 1349.55 since its enactment.[7] If the Court struck down R.C. 1349.55 and the legality of non-recourse civil litigation advances was again called into question, the guidance provided in this Opinion may no longer be applicable.

Civil Litigation Advances and the Ohio Rules of Professional Conduct

A lawyer has asked the Board to identify the ethical obligations for lawyers whose clients enter into non-recourse civil litigation advance contracts pursuant to R.C. 1349.55. Under the Ohio Rules of Professional Conduct, four of a lawyer's general duties are of particular importance in a client relationship during which the client seeks a civil litigation advance: candid advice and communication, independent professional judgment, competence, and confidentiality. Some ALF transactions may create conflict of interest problems for lawyers if they are a participant in the transaction itself. This Opinion only addresses non-recourse civil litigation advance contracts between a client and an ALF provider. For guidance on ALF transactions involving lawyers, the following opinions of the Board should be consulted: Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2004-2 (June 3, 2004) (improper for lawyer, upon settlement, to sell or assign a legal fee to a funding provider in exchange for immediate payment at a small discount of the fee); Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2002-2 (Apr. 5, 2002) (lawyers discouraged from facilitating client loans that benefit both a lender and a consulting provider with which the lawyer has a business relationship); Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2001-3 (June 7, 2001) (law firms may obtain loans to advance expenses of litigation and deduct fees and costs of the loan from the client's settlement); Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 94-11 (Oct. 14, 1994) (lawyers cannot agree to pay a financing provider a percentage of their legal fee in exchange for a loan to the client).

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[7] Professor Stephen Gillers has suggested that the Court may see R.C. 1349.55 as "an intrusion on its inherent power to regulate the bar." Gillers, *Waiting for Good Dough: Litigation Funding Comes to Law*, 43 Akron L.Rev. 677, notes 15 and 101 (2010).

Candid Advice and Communication

Ohio lawyers may encounter clients at various points of connection with ALF providers. A client may see commercials sponsored by these providers on late-night television and seek their lawyer's guidance on obtaining a civil litigation advance to pay medical bills or living expenses during the pendency of their civil case. Some clients may approach an ALF provider on their own, sign a contract, and ask their lawyer to execute the acknowledgment required by R.C. 1349.55(B)(6). Yet another category of clients may want general advice on financing options if they are unable to earn a living due to injuries suffered in an accident and a lengthy settlement negotiation is expected. In all of these situations, the lawyer must function as the client's advisor.

The lawyer's role as advisor is set forth in Prof.Cond.R. 2.1: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social, and political factors that may be relevant to the client's situation." The Official Comment to Prof.Cond.R. 2.1 provides further insight on the lawyer's obligation to provide complete advice to clients. Comment [1] states that legal advice may involve "unpleasant facts and alternatives," and Comments [2] and [3] indicate that legal advice may require practical considerations such as costs, especially with clients inexperienced in legal matters. Further, Comment [5] allows lawyers to "initiate advice to a client when doing so appears to be in the client's best interest." The language of Rule 2.1 and the comments indicate that technical legal advice alone may provide little benefit to a client focused upon difficulties such as the inability to earn a living after sustaining injuries in an accident.

Related to the lawyer's duty to provide candid advice is the obligation to engage in proper communication with the client. Under Prof.Cond.R. 1.4(a), a lawyer shall promptly inform the client of decisions requiring informed consent, consult with the client on the means to accomplish the client's objectives, keep the client reasonably informed, comply with reasonable requests for information, and consult with the client about limitations on the representation imposed by the Rules of Professional Conduct. A lawyer must also "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Prof.Cond.R. 1.4(b).

To render candid advice and communicate in accordance with Prof.Cond.R. 1.4 and 2.1, a lawyer who is aware that his or her client needs financial assistance due to the injuries sustained in the underlying accident or tort should make the client aware of the options available. It is not improper to present a non-recourse civil litigation advance as one of the possible alternatives. In fact, the Board has already concluded that a lawyer may reference ALF providers as a choice for clients, and the ethics authorities in a number of other states agree. *See* Op. 94-11, *supra*; ABA Commission on Ethics 20/20, Informational Report, at notes 84, 85. However, the lawyer may not blindly refer clients to ALF providers. If a lawyer references a non-recourse civil litigation advance, or has a client inquiring about, or even demanding one, the lawyer must provide sufficient information on the risks and benefits of such an advance. The lawyer should be further prepared to make a recommendation to the client as to whether a non-recourse civil litigation advance is in the client's best interest based upon the facts and circumstances unique to the client's legal matter.

R.C. 1349.55(B)(5) requires non-recourse civil litigation advance contracts to contain a statement in which the client acknowledges that his or her lawyer has not provided tax, benefit planning, or financial advice concerning the transaction. Although the client disclaims this advice in the contract, R.C. 1349.55 requires a written acknowledgment by the lawyer stating that he or she has reviewed the contract and determined that all costs and fees have been disclosed including the annualized rate of return. Given this acknowledgment and the lawyer's ethical duties to advise and communicate, the contract review must incorporate a frank discussion with the client about the contract terms and the true cost of the advance. Because most non-recourse civil litigation advance contracts are structured such that the consumer's financial obligation under the contract increases as the time to recovery increases, the lawyer should make the client aware that the contract may create an incentive for the client to accept a premature or inadequate offer of settlement.

Finally, the Board advises lawyers to be cognizant of their role in the ALF transaction. If a lawyer goes beyond the statutorily-required ALF contract review and the accompanying discussion of the contract terms with the client and becomes an active participant in the transaction itself, the lawyer must consider the applicability of Prof.Cond.R. 1.8. Under Prof.Cond.R. 1.8(a), a lawyer may not enter into a business transaction with a client or acquire a pecuniary interest adverse to a client unless: 1) the transaction terms are fair and reasonable and fully disclosed to the client in writing; 2) the lawyer advises the

client to have independent counsel review the transaction and provides the client an opportunity for such review; and 3) the client consents in writing to the transaction terms and the lawyer's role in the transaction. "Where the lawyer represents the client in negotiations with the ALF supplier, and where the terms of the agreement may affect the rights the lawyer and client have, vis-à-vis one another, in the proceeds of any recovery…[s]uch a case likely involves the lawyer acquiring a 'pecuniary interest adverse to a client,' triggering the requirements of [Prof.Cond.R. 1.8(a)]." ABA Commission on Ethics 20/20, Informational Report, at 18-19.

Independent Professional Judgment

While providing candid advice and communicating with the client in a way that promotes informed decision making, lawyers shall exercise "independent professional judgment." Prof.Cond.R. 2.1. If the client has decided to obtain a non-recourse civil litigation advance, the lawyer must ensure that the ALF provider does not attempt to dictate the lawyer's representation of the client. As noted above, R.C. 1349.55(B)(3) requires non-recourse civil litigation advance contracts to contain a disclaimer stating that the provider does not have a right to make decisions regarding the underlying civil case and that such decisions belong to the consumer and their lawyer. As part of the contract review referenced in the R.C. 1349.55(B)(6) acknowledgment, the lawyer must verify that the disclaimer is present and discuss the language with the client. The lawyer should explain that the Rules of Professional Conduct obligate the lawyer to provide independent professional judgment throughout the representation and that any attempt by the ALF provider to interfere with the lawyer's judgment may require the lawyer to withdraw from the representation. *See* Prof.Cond.R. 1.16(a) (a lawyer shall withdraw if the representation will result in a violation of the Rules of Professional Conduct). Also during the representation, the lawyer is advised to monitor the ALF provider's influence on the client especially in regard to the decision to settle the underlying civil case.

The lawyer's written acknowledgment is a central part of the consumer protection provisions contained in R.C. 1349.55. The Board has been informed that because the acknowledgment is a statutory requirement, ALF providers often provide a boilerplate acknowledgment for the lawyer to sign. The Board advises lawyers to carefully scrutinize the proposed acknowledgment language, confirm that it complies with R.C. 1349.55(B)(6)(a)-(d), and execute the acknowledgment only if it accurate as to the current representation. If the

boilerplate acknowledgment contains provisions in addition to those set forth in R.C. 1349.55(B), before signing the acknowledgement the lawyer should verify that he or she is not agreeing to forego independent professional judgment or commit other violations of the Rules of Professional Conduct. As part of an effort to secure acknowledgment language that satisfies R.C. 1349.55 and the Rules of Professional Conduct, a lawyer may consider offering an addendum to the ALF provider's standard acknowledgment or draft his or her own acknowledgment for inclusion in the contract.

Competence

Lawyers must provide "competent representation" to clients, which "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Prof.Cond.R. 1.1. Competent representation may be provided through "necessary study" or associating with a lawyer who has expertise in the area in question and includes "adequate preparation." Prof.Cond.R. 1.1, Comments [2] and [5]. Further, lawyers "should consult with the client about the degree of thoroughness and the level of preparation required, as well as the estimated costs under the circumstances." *Id.*

As previously discussed, Prof.Cond.R. 2.1 requires a lawyer to provide candid advice to clients who wish to obtain a non-recourse civil litigation advance. Under Prof.Cond.R. 1.1, the lawyer must also be able to competently advise clients concerning such advances. If the lawyer is not familiar with the advance contracts regulated by R.C. 1349.55, he or she must take steps necessary to ensure the client receives competent legal advice. These steps may include reviewing legal resources to learn more about civil litigation advance contracts[8], consulting with a lawyer who has experience with consumer litigation funding, or referring the client to another lawyer for advice on the transaction.

[8] Legal scholars, commentators, and regulators have written extensively on consumer litigation funding, giving lawyers numerous options for study in this area. *See, e.g.,* Garber, *supra*; ABA Commission on Ethics 20/20, Informational Report, *supra*; Hashway, *Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances Within the Protection of Usury Laws*, 17 Roger Williams Univ. L.Rev. 750 (2012); DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup*, 80 Fordham L.Rev. 2791 (2012); Pardau, *Alternative Litigation Financing: Perils and Opportunities*, 12 U.C. Davis Bus.L.J. 65 (2011); Gillers, *supra.*

Confidentiality

One of the hallmarks of the lawyer-client relationship is the duty of confidentiality detailed in Prof.Cond.R. 1.6. Rule 1.6(a) provides that "a lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent * * *." The confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Prof.Cond.R. 1.6, Comment [3]. Although Rule 1.6 contains several exceptions to the general duty of confidentiality, this Advisory Opinion assumes that an exception does not apply.

Upon a consumer's initial application for a non-recourse civil litigation advance, the ALF provider conducts a case review to determine the potential recovery amount. As part of the case review, the provider typically contacts the consumer's lawyer and requests documentation that may include the retainer agreement, police or accident reports, proof of insurance, and medical records. Some providers require the consumer's lawyer to complete a questionnaire regarding the case.[9]

The duty of confidentiality found in Prof.Cond.R. 1.6 encompasses all information related to the representation of a client. Accordingly, a lawyer may not provide any information or documentation concerning a representation to an ALF provider without the client's informed consent. Because Prof.Cond.R. 1.6 fails to contain an exception for information that is publicly available, the lawyer must obtain informed consent even for records that may be maintained in a repository of public records (such as police or accident reports). Bennett, Cohen & Whittaker, *Annotated Model Rules of Professional Conduct*, 97 (7th Ed. 2011). Additionally, Prof.Cond.R. 1.6 prohibits a lawyer from disclosing a client's identity unless the disclosure is impliedly authorized or the client consents. *Id.* at 98. Should a lawyer receive a request for information from an ALF provider before the client notifies the lawyer that the client applied for an advance, the lawyer must secure the client's consent prior to identifying the client to the provider.

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[9]For general information on the application process, *see* ABA Commission on Ethics 20/20, Informational Report, at 30 and notes 115-118.

Informed consent is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of action." Prof.Cond.R. 1.0(f). This language demonstrates that a lawyer must do more than simply obtain permission from the client to release information concerning the representation to an ALF provider or rely on a waiver executed by the client. An explanation of the risks of disclosing information to the provider must be part of the process of obtaining informed consent. One significant risk of providing representation information to an ALF provider is the waiver of attorney-client privilege. *See* ABA Commission on Ethics 20/20, Informational Report, *supra*, at 36. The concepts of privilege and waiver are legal doctrines beyond the scope of the Board's advisory authority. *See* BCGD Proc.Reg. 20(A)(4); Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2000-1 (June 1, 2000) at 5. Although the Board cannot address the specifics of privilege and waiver, Prof.Cond.R. 1.4 and 2.1 clearly obligate the lawyer to explore the possible waiver of privilege with the client and explain the potential consequences of a waiver before securing an informed consent. For a discussion of attorney-client privilege in the context of ALF, *see* ABA Commission on Ethics 20/20, Informational Report, at 32-35.

The Board recognizes that Prof.Cond.R. 2.3(a) permits a lawyer to "agree to provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client." This provision presumably allows a lawyer to provide a case evaluation to an ALF provider if the lawyer has determined that the evaluation is compatible with the lawyer-client relationship. Rule 2.3 does not give the lawyer an unlimited ability to engage in outside evaluations. Under Prof.Cond.R. 2.3(b), if the evaluation is "likely to affect the client's interests materially and adversely," the lawyer must obtain the client's informed consent before providing the evaluation. Again, there is a significant risk that disclosure of information to an ALF provider about a client representation will constitute a waiver of attorney-client privilege. Like Prof.Cond.R. 1.6, then, Prof.Cond.R. 2.3(b) also requires informed consent prior to participation in a case evaluation for an ALF provider. Prof.Cond.R. 2.3 does not eradicate the confidentiality requirements of Prof.Cond.R. 1.6, and even after providing an evaluation of a case for an ALF provider, the lawyer may not disclose additional client information to the provider or a third party without the client's informed consent. Prof.Cond.R. 2.3(c).

CONCLUSION: Ohio lawyers may inform clients of the non-recourse civil litigation advances that are offered by alternative litigation finance (ALF) providers and regulated by R.C. 1349.55. If the client pursues such an advance, lawyers must recognize the ethical obligations the transaction creates.

Under Prof.Cond.R. 1.4 and 2.1, the lawyer shall communicate with the client about the transaction and provide candid advice, including a review of the true cost of the advance and the impact it may have on a potential settlement. Pursuant to Prof.Cond.R. 1.1, the lawyer must be able to provide competent advice regarding a civil litigation advance, which may require outside study, consultation with a lawyer with experience in consumer litigation funding, or a referral to another lawyer for an independent review of the contract.

Additional ethical considerations are the duties of independent professional judgment and confidentiality found in Prof.Cond.R. 1.4 and 1.6, respectively. When a client decides to pursue a civil litigation advance, the lawyer shall ensure that his or her independent professional judgment is not influenced by the ALF provider. The lawyer may not reveal the client's identity to an ALF provider or disclose information about the representation without securing the client's informed consent. The process of obtaining informed consent to share information with an ALF provider must include a discussion concerning the potential waiver of attorney-client privilege and the consequences of such a waiver. Like the release of confidential client information to an ALF provider, rendering a case evaluation for an ALF provider pursuant to Prof.Cond.R. 2.3 requires informed consent because the evaluation may materially and adversely affect the client's interests.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.

The Supreme Court of Ohio

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OFFICE OF SECRETARY

OPINION 2004-2

Issued June 3, 2004

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: It is improper for an attorney, upon reaching a settlement agreement in a client's legal matter, to sell or assign his or her legal fee to a funding company in exchange for immediate cash at a small discount to the full value of the legal fee. Such sale or assignment of an attorney's legal fee is an improper division of legal fees with a non-attorney and is an interference with the duty of loyalty in an attorney-client relationship.

OPINION: The opinion addresses the propriety of an attorney selling a legal fee to a funding company upon reaching a settlement of a client's legal matter.

> Is it proper for an attorney, upon reaching a settlement agreement in a client's legal matter, to sell or assign his or her legal fee to a funding company in exchange for immediate cash at a small discount to the full value of the legal fee?

A funding company offers opportunities for attorneys in sole proprietorships to sell their legal fees to the funding company as soon as reaching settlement agreements in clients' legal matters. Rather than waiting for payment of settlement funds, the attorney gets immediate cash from the funding company at an amount less than the full value of the legal fee. The client awaits payment of the settlement funds and disbursement, but the attorney receives his or her legal fee immediately from the funding company. The funding company profits from the difference between the full legal fee, paid from the settlement, and the discounted amount it funded to the attorney.

Pertinent rules in the Ohio Code of Professional Responsibility are set forth.

> DR 3-102 Dividing legal fees with a nonlawyer
>
> (A) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
>
> (1) An agreement by a lawyer with his or her firm, partner, or associate may provide for the payment of money, over a

reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

(2) An agreement to purchase the practice of a deceased, disabled, or disappeared lawyer in accordance with DR 2-111 may provide for the payment of money, over a reasonable period of time, to a nonlawyer.

(3) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer a portion of the total compensation that fairly represents the services rendered by the deceased lawyer.

(4) A lawyer or law firm may include nonlawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(5) A lawyer participating in a lawyer referral service that satisfies the requirements of DR 2-103(C) may pay to the service a fee calculated as a percentage of legal fees earned by the lawyer in his or her capacity as a lawyer to whom the service has referred a matter. This percentage fee is in addition to any reasonable membership or registration fee established by the service.

DR 5-107 Avoiding influence by others than the client

(A) Except with the consent of his [her] client after full disclosure, a lawyer shall not:

(1) Accept compensation for his [her] legal services from one other than his [her] client.

(2) Accept from one other than his [her] client any thing of value related to his [her] representation of or his [her] employment by his [her] client.

(B) A lawyer shall not permit a person who recommends, employs, or pays him [her] to render legal services for another to direct or regulate his [her] professional judgment in rendering such legal services.

It is unethical for an attorney to sell his or her legal fees. An attorney who upon reaching a settlement agreement sells or assigns his or her legal fee to a funding company is dividing a legal fee with a non-attorney. The attorney gets only part of his or her legal fee--the amount advanced by the funding company. The non-attorney funding company gets the rest of the attorney's legal fee. This proposed conduct violates DR 3-102(A). None of the exceptions to the division of fees with non-lawyers, listed in DR 3-102(A)(1) through (5), applies.

Delay between reaching a settlement agreement and the payment of the settlement funds is not justification for a lawyer selling his or her legal fee to obtain immediate cash. Delay is part of the process. Attorneys and clients should be well aware that money does not appear like magic upon reaching a settlement agreement.

A lawyer's legal representation of the client does not end upon reaching a settlement agreement, but continues from settlement agreement through the time of receiving and disbursing the settlement money. A lot can happen in that interval. As one example, settlement agreements requiring court approval always carry uncertainty as to whether approval will be forthcoming from the court. Until the money agreed upon in the settlement is paid and disbursed, the attorney has not completed his or her legal representation of the client.

Not only does the proposed sale or assignment of legal fees violate the rule barring division of fees with non-lawyers, it is an interference with the attorney-client relationship. Pursuant to the proposed assignment and sale agreement, inter alia:

- The attorney (assignor) "agrees that it will not consent to, or permit, any change to the terms of the settlement and/or resolution of the Case that will affect Assignee's interest in the Legal Fee, including, without limitation, the amount or payment terms of the Legal Fee."

- The attorney (assignor) "grants to Assignee a security interest in all Assignor's present and future accounts, chattel paper, equipment, instruments, investment property, documents, letter of credit rights and general intangibles."

- The attorney (assignor) promises that "[a]t Assignee's request, Assignor will notify the insurance company or similar party that it is obligated to pay the Settlement Amount and/or Legal Fee (and Assignee may also so notify such party) of the terms of this Assignment and Assignor will direct such insurance company or similar party to make any proceeds for such Settlement Amount payable to Assignee instead of (and not to) Assignor."

These types of provisions interfere with the attorney-client relationship by diluting an attorney's loyalty to a client and promoting an appearance that the attorney's new loyalty is to the funding company.

Thus, this Board advises as follows. It is improper for an attorney, upon reaching a settlement agreement in a client's legal matter, to sell or assign his or her legal fee to a funding company in exchange for immediate cash at a small discount to the full value of the legal fee. Such sale or assignment of an attorney's legal fee is an improper division of legal fees with a non-attorney and is an interference with the duty of loyalty in an attorney-client relationship.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.

The Supreme Court of Ohio

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OPINION 2002-2

Issued April 5, 2002

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: It is improper under DR 5-101(A)(1) and DR 5-104(A) of the Ohio Code of Professional Responsibility for a lawyer to provide loan applications and make referrals of clients to lenders recommended to the law firm by a consulting company that receives commissions or referral fees from the lender for each loan completed and also receives an annual consulting fee from the law firm, unless there is full disclosure and informed consent. Because of the interrelated multiple business transactions that impact the attorney-client relationship, the requirement of full disclosure and informed consent would be difficult to meet without the benefit of independent legal counsel for each client. To preserve client loyalty which is a fundamental aspect of the attorney-client relationship and to avoid even the appearance of professional impropriety, lawyers are discouraged from the proposed use of the attorney-client relationship to facilitate client loans that financially benefit both a lender and a consulting company with which the lawyer has business relationships. Further, lawyers are cautioned that the degree of involvement of a law firm, a lawyer, or law firm staff in the client loan application process may trigger legal implications such as a requirement of their licensure and regulation by the Division of Financial Institutions of the Department of Commerce which might jeopardize the attorney's duty to preserve client confidences and secrets.

OPINION: This opinion addresses a lawyer's use of the attorney-client relationship to facilitate client loans that financially benefit both a lender and a consulting company with which the lawyer has business relationships.

> Is it proper for a lawyer to provide loan applications and make referrals of clients to lenders recommended to the law firm by a consulting company that receives commissions or referral fees from the lender for each loan completed and also receives an annual consulting fee from the law firm?

A law firm pays an annual membership fee to a consulting company to select, implement, evaluate, and manage products and services used by the law firm in operating its law practice. As part of the agreement, the consulting company contracts with various service providers to provide products and services to the law firms in an efficient and cost saving manner. Each member law firm is eligible to receive the favorable terms and conditions offered by the service providers listed with the consulting company.

The consulting company's list of service providers typically includes, but is not limited to telecommunications, office supplies, computers, office equipment, court reporting, accounting, marketing, banking, and insurance. The consulting company now proposes the addition of "client financing lenders" to its list of service providers.

It is anticipated that the consulting company would select one or more client financing lenders to become service providers. The consulting company would evaluate and select client financing lenders as service providers based upon established criteria, such as:

- Capability to originate the loan in a fast and efficient manner;
- Ability to close and service the loan;
- Ability to provide competitive interest rates and disclosure of interest rates to qualified applicants;
- Ability to create monthly payment schedules based upon the amount and length of the loan;
- Strength of the client financing lender's balance sheet;
- Client financing lender's knowledge of the legal industry.

Member law firms would agree to make available the lender's electronic loan application so that a law firm client could complete the loan applications online at the law firm office. In addition, the scope of duties of the law firm to the client financing lender would be to:

- Establish an account with the client financing lender;
- Make available the client financing lender's credit application for completion by the client;
- Verify the identity of the client/borrower;
- Provide an estimate of the expenses of litigation or legal representation in order for the client financing lender to determine the loan amount;
- Provide proof to the client financing lender through a standard billing statement that the law firm performed legal services or advanced costs and expenses.

The lawyers would refer clients in need of financing to pay the costs and expenses in contingent fee cases and clients in need of financing to pay attorney fees as well as costs and expenses in non-contingent fee cases. The lawyers would not refer law firm clients for financing of attorney fees in contingent fee cases.

The law firm and the lawyers would not receive referral fees from the lender or from the company. Lawyers would have discretion as to whether to refer law firm clients in need of financial assistance to the client financing lender recommended by the company or to consider any other available financing option. The choice as to whether to use a lender would be made by the client.

The consulting company would be paid either a referral fee or a commission from the lender on each loan made to a client referred by the law firm. The consulting company would not have an equity or ownership interest in the lenders.

The Board must determine whether a lawyer providing loan applications and making referrals to client financing lenders is proper under the Ohio Code of Professional Responsibility in view of the above business agreements that exist among the law firm, the company, and the lender.

The following rules apply:

> DR 5-101(A)(1) Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial, business, property, or personal interests.
>
> DR 5-104(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his [her] professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

DR 5-101(A)(1) prohibits a lawyer from accepting employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's business interests. A lawyer who makes available loan applications and refers clients to a lender recommended to the law firm by a consulting company that receives commissions or referral fees from the lender for each loan completed and also receives an annual consulting fee from the law firm has a business interest under DR 5-101(A)(1) that may reasonably affect the lawyer's exercise of professional judgment in making client referrals to lenders.

A lawyer's exercise of professional judgment may be influenced by reliance on the consulting company's judgment as to an appropriate lender. A lawyer's exercise of judgment may be influenced by the convenience of having a pre-selected lender's loan application available through the law office. A lawyer's exercise of professional judgment may be subtly influenced by a desire to further the consulting company's ability to negotiate good deals from service providers, by making referrals that contribute to the consulting company's overall continued financial success.

Further, DR 5-104(A) prohibits a lawyer from entering a business transaction with a client when there are differing interests therein. "'Differing interests' include every

interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting inconsistent, diverse, or other interest." Definitions Section, Ohio Code of Professional Responsibility.

Circuitously, a lawyer enters a business transaction with a client as a result of the multiple business arrangements, the financial success of which in part hinges upon the attorney-client relationship. The law firm enters a business agreement with a consulting company, the consulting company enters an agreement with a lender, the law firm enters an agreement with the lender to make loan applications available to clients, the lawyers refer clients to the lender, and the lender enters agreements with the lawyers' clients that financially benefit the lender and the consulting company.

A consequence of the business transactions is that differing interests arise in the attorney-client relationship. A client's interest is to obtain financing when needed from the best available source. A client expects his or her lawyer to exercise, free of compromise, independent professional judgment in making referrals to client financing lenders. A lawyer's interest is to properly refer a client who needs financing to the best available source, but the lawyer's interest may be compromised by the business transaction. The lawyer knows that the consulting company will benefit financially on the loans made to law firm clients by the lender. The lawyer knows that a strong and financially successful consulting company may be better able to negotiate cost saving deals for the law firm with other service providers. Further, the lawyer knows that the convenience of completing a loan application at the lawyer's office may influence the lawyer's judgment in making the referral as well as the client's judgment as to obtaining financing.

To resolve conflicts prohibited under DR 5-101(A)(1) and DR 5-104(A), full disclosure and informed consent are options within the rules. Nevertheless, in view of the interrelated multiple business transactions that impact the attorney-client relationship, the requirement of full disclosure and client consent would be difficult to meet without the benefit of independent legal counsel for the client.

Client loyalty is a precept that is fundamental to the attorney-client relationship. 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 or loyalty to the client and may create an appearance of impropriety. The broad mandate of Canon 9 is a reminder to the legal profession that "A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY."

A client's interest should be paramount in the attorney-client relationship, not the interests of third persons.

> EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his [her] client and free of compromising influences and loyalties. Neither his [her] personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalties to his [her] client.

Preservation of the personal nature of the attorney-client relationship, including loyalty to the client, fosters the exercise of professional judgment on behalf of a client.

> EC 3-2 The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.

To preserve client loyalty which is a fundamental aspect of the attorney-client relationship and to avoid even the appearance of impropriety, lawyers are discouraged from using the attorney-client relationship to facilitate client loans that financially benefit both a lender and a consulting company with which the lawyer has business relationships.

Further, the degree of involvement by a law firm, a lawyer, or law firm staff with lenders in the client loan applications process may trigger legal implications. For example, if a law firm, lawyer, or law firm staff engages in loan activities that require licensing by the Division of Financial Institutions in the Department of Commerce, they would be subject to state regulation and licensure which might jeopardize the preservation of client confidences and secrets. A lawyer with questions regarding what constitutes regulated activities with regard to loans should contact the Department of Commerce for guidance.

In conclusion, the Board advises that it is improper under DR 5-101(A)(1) and DR 5-104(A) of the Ohio Code of Professional Responsibility for a lawyer to provide loan applications and make referrals of clients to lenders recommended to the law firm by a consulting company that receives commissions or referral fees from the lender for each loan completed and also receives an annual consulting fee from the law firm, unless there is full disclosure and informed consent. Because of the interrelated multiple business transactions that impact the attorney-client relationship, the requirement of full disclosure and informed consent would be difficult to meet without the benefit of independent legal counsel for each client. To preserve client loyalty which is a fundamental aspect of the attorney-client relationship and to avoid even the appearance of professional impropriety, lawyers are discouraged from the proposed use of the attorney-client relationship to facilitate client loans that financially benefit both a lender and a consulting company with which the lawyer has business relationships. Further, lawyers are cautioned that the degree of involvement of a law firm, a lawyer, or law firm staff in the client loan application process may trigger legal implications such as a requirement of their licensure and regulation by the Division of Financial Institutions of the Department of Commerce which might jeopardize the attorney's duty to preserve client confidences and secrets.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.

The Supreme Court of Ohio

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OPINION 94-11

Issued October 14, 1994

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

[Not current-subsequent rule amendments to DR 5-103(B), eff. Jun. 14, 1999.]

SYLLABUS: It is improper under DR 3-102(A) of the Ohio Code of Professional Responsibility for an attorney to refer a client to a financing company that requires the attorney to prospectively agree to pay the company a percentage of a legal fee when earned as a quid pro quo for the company's agreement to loan money with interest to a client. Such conduct may also violate DR 5-107(B).

OPINION: This opinion addresses whether it is proper for an attorney to refer a client to a financing company that requires the attorney to prospectively agree to pay the company a percentage of a legal fee when earned as a quid pro quo for the company's agreement to loan money to the client. In essence, the finance company pays the attorney the amount billed for legal services minus the agreed upon percentage. The client repays the "loan" through monthly payments with interest to the finance company.

Ethical problems arise when a lawyer, prior to accepting or providing legal representation, enters an agreement to give a percentage of his or her legal fee to a financing company in exchange for the company's agreement to loan high interest rate money to a client. First, there is an improper agreement to divide a legal fee with a non-lawyer in violation of DR 3-102 (A). Second, there is a likelihood of improper influence by a non-lawyer upon a lawyer's independent professional judgment in violation DR 5-107(B). The rules are set forth below.

> **DR 3-102(A)** A lawyer or law firm shall not share legal fees with a non-lawyer, except that:
>
> > (1) An agreement by a lawyer with his [her] firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his [her] death, to his [her] estate or to one or more specified persons.
> >
> > (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

> (3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.
>
> **DR 5-107(B)** A lawyer shall not permit a person who recommends, employs, or pays him [her] to render legal services for another to direct or regulate his [her] professional judgment in rendering such legal services.

Disciplinary Rule 3-102 (A) broadly prohibits dividing legal fees with non-attorneys, and the exceptions within the rule do not apply to a division with a financing company. Some states may justify such division, but this Board cannot. See e.g., Illinois State Bar Ass'n, Op. 92-9 (1993) (viewing the division as a business agreement between the attorney and the finance company that "'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"; State Bar of Texas, Op. 481 (undated) (viewing the division as a finance arrangement rather than a fee-splitting arrangement, provided that the finance corporation does not solicit clients and does not perform legal services); Oregon State Bar, Op. 1993-1 (1993) (view is unclear as to why it is not considered a prohibited division of fees.)

It is this Board's view that a lawyer's prospective agreement to pay a finance company a percentage of a legal fee not yet earned in exchange for the company's agreement to loan a client money is not a business arrangement outside of the Code's restraint. First, it is different from a referral to a collection agency. Referrals to collection agencies are permissible only when the fees sought to be collected have been fully earned, the lawyer has made personable and amicable attempts to collect the fee, and the compensation to the collection agency is made on the basis of the amount collected, not the amount billed as legal service. See Ohio SupCt, Bd of Comm’rs on Grievances and Discipline, Op. 91-16 (1991). See also, Maine Bd of Bar Overseers, Op. 138 (1994), (permitting an attorney to enter an agreement with a financing company to remit a percent of amount collected). Second, it does not help to characterize the agreement as a purchase of accounts receivable. At the time of the agreement, no legal services have been performed and in some cases no attorney client relationship has been established. Finally, it cannot be justified as an administrative or service fee necessary to doing business when the finance company is receiving interest on its loans.

In addition, such agreements increase the likelihood that a lawyer's professional judgment will be influenced by a non-lawyer since the lawyer is being paid by the finance company. For example, a lawyer's decision as to whether to enter an attorney client relationship may become based solely upon the financing company's view of the client, rather than

upon a lawyer's traditional and professional decisions regarding a client's needs, case merits, and personal commitment to making legal services available. A further hazard is that the lawyer's performance of legal services may easily be affected by the lawyer's knowledge that the finance company will take a certain percent of legal fees earned in a particular case. This may have the subtle effect of making some cases seem more worthy of the lawyer's effort than others. It may also have the effect of legal fees being raised beyond what is customarily charged.

Thus, in answer to the question raised, this Board advises that it is improper under DR 3-102 (A) of the Ohio Code of Professional Responsibility for an attorney to refer a client to a financing company that requires the attorney to agree to pay the company a percentage of a prospective legal fee when earned as a quid pro quo for the company's agreement to loan money with interest to a client. Such conduct may also violate DR 5-107 (B).

Nevertheless, this opinion is not to be construed as a blanket prohibition on a lawyer's referral of a client to a financing company. However, before referral to a financing company, a lawyer must carefully consider whether the referral is in the client's best interest. A lawyer should consider whether he or she could provide pro bono representation or whether the client might be eligible to receive pro bono representation elsewhere. A lawyer should assist the client in determining whether payment of the legal services or costs and expenses of litigation could be accomplished through the use of the client's already established credit cards, particularly if the interest rates are lower. See Opinion 91-12 (1991). A lawyer should encourage a client to consider other possible sources of loans that might carry lower interest rates, such as bank loans or personal loans from family or friends. An attorney should consider whether or not to advance or guarantee the expenses of litigation as permitted under DR 5-103 (B). See Op. 87-001 (1987) ("[i]t is ethically proper for an attorney to advance expenses of litigation on behalf of a client, provided the client remains ultimately liable for such expenses"); Op. 94-5 (1994) (advising on the issue of settling a lawsuit against a client for expenses of litigation). Finally, the attorney must be satisfied that the terms and conditions of the financing company do not involve the attorney in a violation of the Ohio Code of Professional Responsibility.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.