L.E.I. 2005-02
LEGAL FUNDING PLANS

Introduction

The Lawyer Disciplinary Board sees the need to issue a formal advisory opinion on the ethical propriety of a lawyer assisting, encouraging or referring a client to participate in a program in which a company advances money to personal injury or other claimants secured by the claimant's potential recovery in the claim/case. The Board understands that there are too many variations of these companies to issue one blanket opinion to cover all scenarios. However, the Board issues this opinion to offer guidance to lawyers regarding the numerous potential ethical problems associated with these legal funding plans.

Most cases impacted by these legal funding plans have certain things in common: 1) Client is without funds to cover his everyday personal expenses; 2) client anticipates recovery in a personal injury civil action or other claim; and 3) legal funding plan gains information from the client and the lawyer in order to determine the amount of money the company is willing to advance to the client.

Rules Implicated

Several of the *West Virginia Rules of Professional Conduct* may be compromised by this type of transaction, namely: Rules 1.4(b) 1.6, 1.7(b), 1.8(e), and 2.1. The first rule we will consider is Rule 1.8(e), which provides, "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except . . ." for certain

exceptions which are not relevant to this opinion. In the typical legal funding transaction, the lawyer introduces the client to the company (hereinafter referred to as "ABC, Inc."), provides an opinion as to the value of the claim, signs a letter of protection guaranteeing payment to ABC, Inc., and withholds an appropriate sum upon settlement to be paid to ABC, Inc. While this transaction facilitates financial assistance to the client by a third party, ABC, Inc., the lawyer is not actually providing direct financial assistance to the client. Therefore, the lawyer would not be in direct violation of Rule 1.8(e) of the *West Virginia Rules of Professional Conduct*.

Nonetheless, serious consideration should be given to several other Rules before an lawyer becomes involved with companies such as ABC, Inc. Rule 1.6 of the *West Virginia Rules of Professional Conduct* provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
> (1) to prevent the client from committing a criminal act; or
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a client.

Rule 1.6 has been given a broad construction; "information relat[ed] to the representation" protects much more than what is covered by the evidentiary lawyer-client privilege. Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995). The comment to Rule 1.6 explains that the ethical rule protects "all information, whatever its source."

Although the typical ABC, Inc. transaction requires a client to sign a document which expressly authorizes the lawyer to release to the company all relevant information relating to the lawyer's representation in the claim, that document alone does not satisfy the requirements of Rule 1.6(a). Rule 1.6(a) expressly prohibits the lawyer from disclosing information related to the representation unless the client consents after consultation. Consultation, as defined in the Terminology section of the *West Virginia Rules of Professional Conduct,* is "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Thus, it appears that the kind of "consultation" anticipated by Rule 1.6(a) would include discussion of, among other things, whether the disclosure of information to ABC, Inc. might waive the attorney-client or work product privileges[1] or render discoverable other undiscoverable information. To avoid

[1] The attorney-client and work product privileges are creatures of the laws of evidence and civil procedure, not of the Rules of Professional Conduct. Whether these privileges would be waived by disclosures to a litigation funding plan is a legal question which the Lawyer Disciplinary Board declines to address. Lawyers are encouraged to research this topic and examine each situation on a case by case basis. An often cited case in this area is *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997).

violating Rule 1.6(a), a lawyer must have a significant conversation with the client as to all the possible negative consequences of the lawyer's disclosures to the legal funding plan.

In addition, lawyers considering referring their clients to companies such as ABC, Inc. should consider Rule 1.4(b), which provides "A lawyer should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Legal funding sometimes plans charge exorbitant interest rates or excessive monthly service charges. Some of these companies become involved with clients when they are in an extremely vulnerable state. The clients are typically unable to work due to their injuries; the clients have little or no income; and the client overwhelmed by medical and other bills. In these situations, the client may enter into an unconscionable agreement without sound guidance from his/her lawyer. Further, the attorney's fee is protected under all circumstances in these transactions, even if the client's final recovery is minimal. Rule 1.4(b) mandates that the lawyer fully and sufficiently communicate to his client all of the possible negative consequences of such a transaction, including, but not limited to, the company's interest rates, service charges, and the possible effects on attorney-client privilege as discussed above.

These legal funding plans may also interfere with Rule 2.1 of the *West Virginia Rules of Professional Conduct*. Some of these companies send advertising material to lawyers containing statements such as, "with the wolf (i.e. bill collectors) removed from their door,

the client is more willing and able to allow you to try the case as you see best."[2] Statements of this type appeal to the lawyer's self-interest. The lawyer must continually bear in mind Rule 2.1, which states, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." If an attorney allows anything, including his or her self-interest, or the interest of a third party to interfere with his "independent professional judgment," the lawyer is in violation of Rule 2.1. In the instant situation, if an attorney refers or introduces a client to ABC, Inc. to meet the client's immediate need for money specifically to allow the lawyer the freedom to pursue the case his/her way, the lawyer would violate Rule 2.1. Furthermore, Rule 2.1 prohibits the lawyer from allowing the funding company to direct the litigation.

The second sentence of Rule 2.1 provides that in rendering advice, the lawyer may refer to other considerations such as moral, economic, social and political factors. One relevant economic factor which should be clearly and thoroughly discussed with the client is the economic impact upon the client of the company's service or interest charges. In some cases, the charge will be a substantial percentage of the settlement or verdict. Depending on the amount of the charge, the client's actual interest in the ultimate settlement or verdict may be significantly diminished.

Another rule which must be considered in the legal funding plan transaction is Rule 1.7(b), which provides, in pertinent part:

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[2] Connecticut Bar Association, Informal Opinion Number 99-42(September 17, 1999).

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to . . . a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affect; and (2) the client consents after consultation.

The comment following Rule 1.7 maintains that, "Loyalty is an essential element to the lawyer's relationship to a client." These legal funding plans tend to adversely affect the essential loyalty that a lawyer owes to his client. For example, most of these plans protect the lawyer's fee in its entirety while burdening the client with service charges or interest fees. Some advertisements from these companies purport to remove the immediate financial pressure on the client, allowing the lawyer to try the case as he/she desires. This creates a potential situation in which the lawyer's own interest in collecting a larger contingent fee erodes the undivided loyalty which the lawyer owes to his/her client. *See* Connecticut Bar Association, Informal Opinion Number 99-42(September 17, 1999). While the cash advance from a lending company may satisfy the client's immediate need for cash, the service or interest charges that are later assessed might substantially burden the client in the future. If a West Virginia lawyer presents or introduces ABC, Inc.'s legal funding plan to a client for the intentional purpose of allowing the lawyer the opportunity to control the decision-making process in the litigation, the lawyer would be in violation of Rule 1.7(b) by allowing his own interest to materially limit his representation of the client.

As quoted previously, Rule 1.7(b) provides exceptions which would allow the lawyer to refer the client to ABC, Inc. "Reasonably believes," as defined in the Terminology section

of the Rules, means that the lawyer actually believes the matter in question and that the circumstances are such that the belief would be reasonable in the eyes of a prudent and competent attorney. Once the attorney determines he/she satisfies the exceptions to Rule 1.7(b), the lawyer must then secure the client's consent after consultation. Again, to avoid violating Rule 1.7(b), a lawyer must have a meaningful conversation with the client as to the lawyer's interests and any other potential conflicts of interests that may arise from the client's and the lawyer's transaction with the legal funding plan.

Conclusion

The Board finds that the lawyer may not refer the client to any legal funding plan in which the lawyer, his/her law firm, or the lawyer's family member has an ownership interest. Additionally, the lawyer shall not receive any compensation or other value from the funding plan in exchange for referring clients. These would undoubtedly violate Rules 1.8(e) and 1.7(b).

Furthermore, the lawyer may, at the client's request, honor the funding plan's letter of protection signed by the client. However, the lawyer is prohibited from providing a letter of protection to the funding plan signed by the lawyer because this would make the lawyer a part of the loan process, a violation of Rules 1.8(e) and 1.7(b).

Ultimately, the lawyers should not recommend the client's matter to the legal funding plan nor contact the plan on a client's behalf. While the lawyer may provide information to the funding plan upon the client's written request, the West Virginia Lawyer Disciplinary

Board strongly cautions attorneys against involvement with these plans. In this respect, the Board agrees with the Florida Bar which has discouraged Florida attorneys from involvement in such funding companies noting:

> The Florida Bar discourages the use of non-recourse advance funding companies. The terms of the funding agreements offered to clients may not serve the client's best interests in many instances. The Committee continues to have concerns, as discussed in Opinion 92-6, of the problems that can arise when a client obtains financial assistance from a third party, such as the client's lack of incentive to cooperate. This Committee can conceive of only limited circumstances under which it would be in a client's best interests for an attorney to provide clients with information about funding companies that offer non-recourse advance funding or other financial assistance to clients in exchange for an assignment of an interest in the case. Under these limited circumstances an attorney may advise a client that such companies exist only if the attorney also discusses with the client whether the costs of the transaction outweigh the benefits of receiving the funds immediately and the other potential problems that can arise. Only after this discussion may a lawyer provide the names of advance funding companies to clients.

Whether a particular transaction between the client and a lending company complies with applicable federal and state statutes and case law are legal questions beyond the scope of an ethics opinion. The Board makes no comment on the legality of these types of transactions, particularly with regard to usury, barratry, champerty and maintenance.

APPROVED by the Lawyer Disciplinary Board on the26th day of August, 2005.

Cheryl L. Connelly, Chairperson
Lawyer Disciplinary Board