

Ethics Informational Packet

FINANCIAL ASSISTANCE TO CLIENTS

Courtesy of
The Florida Bar
Ethics Department

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PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 16-1 October 21, 2016

Advisory ethics opinions are not binding.

A personal injury lawyer may “forgive” repayment of advanced costs from a client’s recovery where there has been no agreement for the inquirer to be unconditionally responsible for the costs at the outset of representation, the cost “forgiveness” occurs after settlement, and the inquirer will receive no fees for the representation. The lawyer must be mindful of third party interests in the settlement funds and the lawyer’s obligation of candor to third parties.

RPC: 4-1.8(e), 4-4.1, 4-8.4(c), 5-1.1(f)

Opinions: 96-1; Michigan Ethics Opinion RI-14

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented in the inquiring lawyer's letter are as follows.

The inquirer represents a client in a negligence case. Subsequent to stating a cause of action, an appellate decision changed the law, which eliminated the cause of action. The parties then reached a settlement. The total of the client’s outstanding medical bills and costs are nearly double the amount of the settlement. The inquirer advanced the litigation costs on behalf of the client, to be repaid by the client contingent on the outcome of the matter. The settlement exceeds the amount of costs advanced by the inquirer by a small amount. The inquirer, who is not taking a fee, would like to reduce the amount of costs owed to the inquirer by the client so that the client may receive some of the settlement after resolving outstanding medical liens and subrogated interests.

The inquirer asks whether the inquirer may reduce the amount of the costs that the client owes the inquirer in light of Florida Ethics Opinion 96-1, which states that a lawyer cannot agree to be unconditionally responsible to pay for a client’s litigation costs.

Rule 4-1.8(e), Rules Regulating the Florida Bar, is the rule regarding financial assistance to clients. The rule states:

(e) Financial Assistance to Client. 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.

Rule 4-1.8 (e)(1) permits a lawyer to advance court costs and expenses of litigation provided the client repays the advances if there is a recovery. The exception under Rule 4-1.8 (e)(2) permits a lawyer to pay an indigent client's court costs and litigation expenses without any reimbursement requirement. As the facts indicate, the inquirer's client is not indigent.

The comment to the rule elaborates and explains the reasons for the prohibition against financial assistance:

Financial assistance

Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer advancing a client court costs and litigation expenses, including the expenses of diagnostic medical examination used for litigation purposes and the reasonable costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Michigan Ethics Opinion RI-14 (1989) provides additional background regarding the origin of the prohibition against financial assistance:

MRPC 1.8 (e) is the result of the common law rules against champerty and maintenance. Champerty is an investment in the cause of action of another by purchasing a percentage of any recovery. Maintenance is another form of investment by providing living or other expenses to finance litigation. When a lawyer has a financial stake in the outcome of a client's lawsuit, there is a legitimate concern that the lawyer's undivided loyalty to the client may be compromised in an effort to protect the lawyer's personal financial investment in the outcome. Also financial support to a client could interfere with settlement efforts, by enabling the client to prolong the dispute.

Florida Ethics Opinion 96-1 addresses the issue of financial assistance to clients. The opinion considered a factual situation where a lawyer agreed to be responsible for costs in representing a state agency, regardless of whether there was a recovery. The Committee cited to Rule 4-1.8(e) and stated with respect to the proposed contract:

This rule prohibits an attorney from providing financial assistance to a client in connection with pending or contemplated litigation. The rule, however, contains an exception permitting the attorney to advance court costs and expenses of litigation on behalf of a non-indigent client, the repayment of which may be contingent on the outcome of the matter. See, e.g., Florida Ethics Opinion 72-27; Iowa Opinion 93-2; Mississippi Opinion 225; North Carolina Opinion 124.

Although this exception permits attorney and client to agree that the client's repayment of advanced costs and expenses will be contingent on the outcome of the matter, it clearly contemplates that such repayment will be made if a sufficient recovery is obtained. In contrast, the inquiring attorney proposes an outright payment of costs for a non-indigent client, rather than an advancement.

The concerns raised by Rule 4-1.8(e) are that of the common law doctrines of champerty and maintenance, as well as the conflict of interest created when an attorney has a personal economic interest in the outcome of the matter. The committee recognizes that the concerns underlying the rule may be minimized when the client is a state agency, but is constrained to apply the rule as it is written. Accordingly, the committee concludes that, under the plain language of Rule 4-1.8(e), it would be ethically impermissible for the inquiring attorney to unconditionally be responsible for all costs and expenses as provided in the proposed agreement.

Nothing in the opinion, or in any subsequent opinion from the committee on the subject, defines "sufficient recovery."

The committee is of the opinion that the inquirer's proposal is permissible under the specific circumstances presented. The committee is of the opinion that the prohibition against a lawyer providing financial assistance to a litigation client expressed by Rule 4-1.8(e) and Florida Ethics Opinion 96-1 is inapplicable to the inquirer's circumstances. The committee believes that both the rule and opinion were intended to prohibit agreements made at the outset of representation for the lawyer to be unconditionally responsible for costs of litigation.

Even assuming the general prohibition against financial assistance is applicable to these circumstances, the committee is of the opinion that the underlying basis for the rule, the common law concerns of champerty and maintenance, does not appear to be present with the inquirer's facts. The inquirer proposes to forgo reimbursement of advanced costs at the end of the matter. The inquirer's decision at the end of representation to "forgive" some of the advanced costs did not affect the inquirer's independent professional judgment during the representation, including giving advice on settlement. The committee is of the opinion that in particular, there is no effect on the inquirer's judgment where the inquirer will not take any fees for the representation.

The committee also is of the opinion that the inquirer's proposal is permissible under these circumstances because, under the facts presented, the settlement is insufficient to cover the client's medical bills and costs associated with the representation. Thus, the committee is of the opinion that the exception allowing a lawyer to advance costs of litigation and make those advanced costs "contingent on the outcome of the matter" would permit the inquirer to reduce the amount of the costs the inquirer seeks to be reimbursed from the recovery, as the recovery is insufficient to cover all medical bills and litigation costs. The inquirer's decision to not seek reimbursement from the client for some of the costs that the inquirer has advanced on behalf of the client is thus contingent on the outcome of this matter: that the settlement does not cover the total amount of the client's medical bills and the costs advanced by the inquirer.

The committee cautions the inquirer to be mindful of the inquirer's obligations to third parties to whom the inquirer owes a legal duty and who have an interest in the settlement funds held in trust by the inquirer under Rule 5-1.1(f) and the comment, and the inquirer's general obligation of candor expressed in Rules 4-4.1 and 4-8.4(c).

In summary, the committee is of the opinion that the inquirer's proposal not to seek reimbursement for some of the costs the inquirer has advanced on behalf of the client is permissible under these specific circumstances: where there has been no agreement for the inquirer to be unconditionally responsible for the costs at the outset of representation, the cost "forgiveness" occurs after settlement, and the inquirer will receive no fees for the representation. The committee believes that the rule's prohibition is inapplicable because there was no agreement at the outset of representation for the inquirer to be responsible for the costs, and the committee believes that application of the exception to Rule 4-1.8(e) leads to the same result, as the recovery is insufficient to cover all medical bills and litigation costs and the repayment of the costs is therefore "contingent on the outcome of the matter" under the rule.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 00-3 March 15, 2002

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

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

RPC: 4-1.6, 4-1.7, 4-1.8(e)

OPINIONS: 65-39, 68-15, 70-8, 75-24, 92-6, Arizona Ethics Opinion 91-22, New York State Bar Opinion 666, Philadelphia Bar Association Opinion 91-9, South Carolina Ethics Opinion 94-04, South Carolina Ethics Opinion 92-06, South Carolina Ethics Opinion 91-15, Ohio Ethics Opinion 94-11, Virginia Ethics Opinion 115

CASES: *The Florida Bar re Amendments to Rules Regulating The Florida Bar* -- Rule 4-1.8(e), 635 So. 2d 968 (Fla. 1994)

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

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

This opinion discusses appropriate conduct of attorneys regarding advance funding companies assuming that the transactions offered by the companies are legal. Nothing in the

opinion should be viewed as endorsing advance funding companies or the use of advance funding companies in any way by The Florida Bar.

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

Regarding loans from third parties to personal injury clients, this Committee has previously stated that "a lawyer may suggest to a client where the client may try to obtain financial help for individual needs. . . , but the lawyer should not become part of the loan process." Florida Ethics Opinion 75-24. The Committee stated that "[w]here the lawyer initiates the loan by recommending his client to the loan company, it seems to us that he is inherently representing to the loan company that the client's claim is meritorious." *Id.* The Committee cited to this opinion in Florida Ethics Opinion 92-6, which states that it is impermissible for an attorney to become involved in a financing agreement which required the attorney to become a trustee to benefit the company providing the loan to the attorney's client. The Committee additionally noted that "an attorney who routinely refers clients to a loan company and actively participates in the loan transactions would be providing financial assistance to those clients," albeit indirectly. Florida Ethics Opinion 92-6. When presented with the proposal at issue in opinion 92-6 in the form of a petition for a rule change, the Supreme Court of Florida stated that:

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

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

The majority of states who have examined these issues have determined that it is permissible for an attorney to provide a client with information about funding companies. See, e.g., Arizona Ethics Opinion 91-22 (attorney may refer personal injury client to funding company, but may not reveal information to the company without the client's consent, may not co-sign or guarantee the transaction, and may not tell the company that the lien is valid and

enforceable if in the attorney's opinion it is not); New York State Bar Association Opinion 666 (attorney may refer client to funding company which then takes a lien on the recovery, may provide information to the company only with informed consent of the client, but may not have an ownership interest in the company or receive any compensation from the company for the referral); Philadelphia Bar Association Opinion 91-9 (attorney may refer personal injury client to funding company which takes a lien on the recovery, but may not have an ownership interest in the company or receive any compensation from the company, must maintain independent professional judgment, and must have informed client consent to disclose information to the company); South Carolina Ethics Opinion 94-04 (if the transaction is not illegal, an attorney may tell a personal injury client about funding companies at the client's request or if it is in the client's interest, but should advise the client of the benefits and detriments of the transaction, should inform the client and company in writing that the client controls the litigation; the attorney may also pay the settlement proceeds to the company under a valid assignment); South Carolina Ethics Opinion 92-06 (an attorney may refer personal injury clients to a funding company and may honor the assignment of a portion of the claim to the company); South Carolina Ethics Opinion 91-15 (attorney may refer personal injury clients to a funding company in which the attorney has no interest, and may honor the assignment to the company as long as the client consents); Ohio Ethics Opinion 94-11 (attorney may not refer a client to a funding company which requires the attorney to give a percentage of the legal fee to the company, but may refer a client to a funding company if such an arrangement is not required, it is in the client's best interest, and the arrangement does not cause the attorney to violate the rules of professional conduct; the attorney should advise the client on alternative methods of obtaining assistance such as low interest credit cards, bank loans or personal loans from the client's family or friends); Virginia Ethics Opinion 115 (an attorney may request that a funding company provide a personal injury client with funding when other lending sources have declined to assist the client and may honor the company's lien on the recovery, but the attorney may not guarantee or co-sign the loan). The majority of states have concluded that providing information to a funding company at the client's request is permissible, with the informed consent of the client. They also conclude that an attorney may honor a client's assignment of a portion of the recovery to the funding company.

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

The attorney shall not recommend the client's matter to the funding company nor initiate contact with the funding company on a client's behalf. Florida Ethics Opinion 75-24. The attorney shall not co-sign or otherwise guarantee the financial transaction. Florida Ethics

Opinion 70-8. The attorney also shall not allow the funding company to direct the litigation, interfere with the attorney-client relationship, or otherwise influence the attorney's independent professional judgment. The attorney shall not have any ownership interest in the funding company or receive any compensation or other value from the funding company in exchange for referring clients.

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

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

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

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 96-3 February 15, 1997

An attorney may not ethically agree to pay fees and costs assessed to a client pursuant to the Offer of Judgment statute.

RPC: Rule 4-8.4(d), Rule 4-1.8(e)

Cases: *The Florida Bar re: Amendment to Rules*, 550 So. 2d 442 (Fla. 1989), *Goode v. Udhwani*, 648 So. 2d 247 (Fla. 4th DCA 1995)

Opinions: New York State Bar Ethics Opinion 1989-3

Misc: Florida Statute 768.79, Florida Rule of Civil Procedure 1.442

A member of the Florida Bar requests an advisory ethics opinion regarding the lawyer's ability to agree to pay costs and fees assessed against the lawyer's client in accordance with section 768.79, Florida Statutes. Specifically, the inquiring attorney has asked the following question:

Whether or not I, as attorney for plaintiff, may enter into an agreement with my client that if we go to trial and if we are unsuccessful and become subject to sanctions of attorney's fees and costs pursuant to the first defendant's Offer of Judgment, may I, as the attorney, agree to pay my clients' attorney's fees and costs to the defendant's insurer if we lose?

Pursuant to section 768.79 of the Florida Statutes (hereinafter, the "statute"), a plaintiff who refuses an offer of settlement made by the defendant must pay reasonable costs, including attorney's fees, incurred by the defendant from the date of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than the offer. Under the statute, the assessment of costs and fees against a client will occur, if at all, only at the conclusion of the litigation. The statute provides that a court must either set off such costs and fees against any award obtained by the client, or, if the client obtains an award less than the amount of the costs and fees, the court will enter a judgment against the plaintiff for the amount of costs and fees not covered by the plaintiff's award.

Referring to Florida Rule of Civil Procedure 1.442, which requires parties to comply with the procedures set forth in section 768.79, the Supreme Court of Florida has described the procedure governing offers of judgment as one "by which parties are sanctioned for failure to accept bona fide offers of settlement prior to trial." *The Florida Bar re: Amendment to Rules*, 550 So. 2d 442 (Fla. 1989). Additionally, in *Goode v. Udhwani*, 648 So. 2d 247 (Fla. 4th DCA 1995), the court stated that, "The purpose of section 768.79 was to serve as a penalty if parties did not act reasonably and in good faith in settling lawsuits."

The committee concludes that the proposed conduct would be prejudicial to the administration of justice, in violation of Rule 4-8.4(d), because it would defeat the purpose of the Offer of Judgment statute. In Opinion 1989-3, the New York State Bar Association Committee on Professional Ethics found that an agreement requiring a client to pay Rule 11 sanctions imposed upon a lawyer for filing non-meritorious claims was unethical because it defeated the purpose of the Rule and improperly shifted liability to the client. Similarly, the deterrent effect of the Offer of Judgment statute would be defeated if lawyers could insulate their clients from potential financial liability.

Furthermore, costs and fees assessed pursuant to this statute are not the type of "financial assistance" contemplated by Rule 4-1.8(e).

Based upon the foregoing, the committee concludes that the proposed conduct is ethically impermissible.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 96-1 October 1, 1996

An attorney may not unconditionally agree to be responsible for the costs associated with a client's litigation. While Rule 4-1.8(e) permits an attorney to advance costs and expenses of litigation on behalf of a non-indigent client, the rule contemplates repayment of such costs in the event of a recovery.

RPC: 4-1.8(e)

Opinions: 72-27; Iowa Opinion 93-2, Mississippi Opinion 225; North Carolina Opinion 124

A member of The Florida Bar has requested an advisory ethics opinion on the propriety of submitting a contract for representation proposal to a State agency in which the attorney agrees to be responsible for the costs, even if a recovery is obtained. Specifically, the contract provides, in pertinent part:

Payment for services covered by the resulting contracts will be based on a contingency fee percentage of the total dollars recovered and reimbursed to the Agency. Provider shall not separately bill costs, but shall absorb and pay all costs whatsoever. . . . and

All costs incurred by the contractors in performance under the contracts will be the responsibility of the contractors. No additional payments will be made to the contractors to reimburse them for travel expense, filing fees, court cost, or any other cost. . . .

The contracts resulting from this RFP will be based on a contingency fee for actual cash recoveries received by the state. The maximum acceptable contingency fee is 25%. Any proposals with a contingency fee greater than 25% will be determined nonresponsive by the Agency and will be rejected. All costs incurred by the contractor(s) in performance under the contract(s) will be the responsibility of the contractor(s)[.]

Rule 4-1.8(e), Rules Regulating The Florida Bar, is the governing ethical standard:

(e) Financial Assistance to a Client. 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.

This rule prohibits an attorney from providing financial assistance to a client in connection with pending or contemplated litigation. The rule, however, contains an exception permitting the attorney to advance court costs and expenses of litigation on behalf of a non-indigent client, the repayment of which may be contingent on the outcome of the matter. See, e.g., Florida Ethics Opinion 72-27; Iowa Opinion 93-2; Mississippi Opinion 225; North Carolina Opinion 124. Although this exception permits attorney and client to agree that the client's repayment of advanced costs and expenses will be contingent on the outcome of the matter, it clearly contemplates that such repayment will be made if a sufficient recovery is obtained. In contrast, the inquiring attorney proposes an outright payment of costs for a non-indigent client, rather than an advancement.

The concerns raised by Rule 4-1.8(e) are that of the common law doctrines of champerty and maintenance, as well as the conflict of interest created when an attorney has a personal economic interest in the outcome of the matter. The committee recognizes that the concerns underlying the rule may be minimized when the client is a state agency, but is constrained to apply the rule as it is written. Accordingly, the committee concludes that, under the plain language of Rule 4-1.8(e), it would be ethically impermissible for the inquiring attorney to unconditionally be responsible for all costs and expenses as provided in the proposed agreement.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 92-6

March 1, 1993

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

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

RPC: 4-1.7, 4-1.8(e), 4-3.7(a), 4-8.4(a)

CPR: DR 5-103(B)

Opinion: 75-24

Case: *The Florida Bar v. McAtee*, 601 So.2d 1199 (Fla. 1992)

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

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

- (1) In consideration of the proceeds of the loan, the personal injury claimant would execute and deliver to the lender an interest-bearing promissory note.
- (2) In addition to the execution and delivery of the promissory note, the personal injury claimant would execute a trust declaration by which his or her lawyer would become a trustee for the benefit of the lender.
- (3) The personal injury claimant's lawyer would sign the trust declaration, thereby accepting responsibility for repayment to the lender of the loan out of the proceeds of the personal injury claim.
- (4) The personal injury claimant's lawyer would receive no pecuniary compensation from any source for his or her service as trustee.
- (5) The personal injury claimant's lawyer would advance none of his or her funds, either directly or indirectly, to his or her client.

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

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

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

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

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

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

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

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

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

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

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

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 75-24 November 30, 1975

A lawyer may not participate in an arrangement in which a small loan company agrees to make loans for living expenses to the attorney's clients awaiting settlements on the condition that the attorney and client sign an agreement that the loan will be repaid from the settlement proceeds.

CPR: EC 5-8; DR 5-103(B)

Opinions: 65-39, 68-15, 70-8, 72-27

Statute: F.S. §516

Vice Chairman Sullivan stated the opinion of the committee:

A company, duly registered as a small loan business pursuant to Chapter 516, Florida Statutes, is willing to make loans to persons who are awaiting settlement of estates or are involved in personal injury suits or in divorce cases and who are in immediate need of funds for living expenses.

The company considers an application for such a loan only upon the recommendation of a member of The Florida Bar representing the client seeking the loan. The company then makes its own determination about the basic security for each loan, i.e., the probability of success and recovery in the court proceeding. If it decides to make the loan, the company requires both the borrower and his lawyer to sign a loan disbursement agreement which obligates both lawyer and client to see that the loan is repaid from the proceeds of the settlement or judgment before other funds are disbursed.

The loans average between \$100 and \$600 although on occasion the company makes loans up to its legal limit of \$2,500. The loan agreement calls for monthly payments, but in practice the loans are repaid from the proceeds of funds received from court proceedings or not at all. A lawyer representing a loan applicant has no personal liability on the loan but obviously is obligated to comply with the terms of the loan disbursement agreement.

We are asked whether a lawyer may ethically participate in this arrangement, and our answer is that he may not.

DR 5-103(B) forbids a lawyer from advancing or guaranteeing financial assistance to clients except it allows a lawyer to advance or guarantee litigation expenses provided the client remains ultimately liable for them. EC 5-8 and our Opinion 72-27 are to the same general effect. In Opinion 70-8 the Committee said that a lawyer should not guarantee a client's financial obligation for litigation expenses.

In Opinion 65-39, decided under the former Canons, the Committee said a lawyer should not advance living expenses to a client pending settlement of a lawsuit. The Opinion did state that generally lawyers can assist clients in obtaining financial support but did not suggest how this could be done.

In Opinion 68-15, also decided under the former Canons, the Committee disapproved a proposal similar in many ways to the present one. A lawyer proposed instituting a non-profit lending fund financed by contributions from lawyers. The lawyers would process loans to accident victims, and the loans would be secured by assignments of claims and repaid by proceeds of settlements or judgments.

Although the CPR allows a lawyer to advance litigation costs under certain conditions, we do not believe that concept should be expanded. Where the lawyer initiates the loan by recommending his client to the loan company, it seems to us that he is inherently representing to the loan company that the client's claim is meritorious. It becomes unclear whether the lawyer is acting for the client or the loan company.

Even though the lawyer recommending a loan applicant has no personal liability on the loan, the amount of the recovery in court in relation to the amount of the loan also presents problems in relation to the lawyer's right to recover costs he may have advanced and the lawyer's right to a contingent fee from that recovery, as well as payment of other outstanding litigation expenses.

A lawyer may suggest to a client where the client may try to obtain financial help for individual needs, Opinion 65-39, but the lawyer should not become part of the loan process.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 72-27

Originally issued July 30, 1972

Revised April 23, 1993

A lawyer may advance or guarantee fees of medical witnesses in accordance with Rule of Professional Conduct 4-1.8(e).

RPC: 4-1.8(e)

A lawyer whose firm frequently represents plaintiffs in personal injury litigation advises that he is often requested by medical witnesses to guarantee payment of their witness fees. He asks whether he may properly do so under the Rules of Professional Conduct.

Rule 4-1.8(e) provides:

(e) Financial Assistance to Client. 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.

Clearly the lawyer is permitted, but not required, to advance litigation costs and expenses—including witness fees—on behalf of a client. Subdivision (1) of this rule allows the lawyer and a non-indigent client to agree that the client is obligated to repay the lawyer for advanced costs and expenses only if a recovery is obtained. In a contingent fee case, any such agreement should be included in the required written employment contract.

Subdivision (2) allows the lawyer and an indigent client to agree that the lawyer will pay the litigation costs and expenses of the indigent client if a recovery is not obtained.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 70-8

Originally issued May 29, 1970

Revised April 23, 1993

It is not permissible for an attorney to give a letter of indemnification to a bonding company on behalf of an out-of-state plaintiff when the terms of the proposed indemnification agreement require the attorney to reimburse the surety only after the plaintiff has failed to do so. There is no ethical distinction between an attorney's becoming surety on his client's possible obligation to an opposing litigant and his becoming surety on the same possible obligation to a surety company which has become surety on the client's cost bond.

RPC: 4-1.8(e)

Statutes: F.S. § 57.011, 454.20

Rule: Fla.R.Jud.Admin. 2.060(f)

A member of The Florida Bar states that he frequently represents out-of-state clients and on many occasions is requested by defendants' attorneys to file cost bonds pursuant to Section 57.011, Florida Statutes. He further states that a local bonding company has agreed to issue nonresident plaintiff cost bonds upon the attorney's request, provided that, as attorney for plaintiff, he signs a letter of indemnification agreeing to indemnify that surety for any losses if the plaintiff fails to do so.

We are asked whether the proposed arrangement is permissible under the Rules of Professional Conduct.

Under Florida law an attorney cannot become a surety on any bond of his client in any judicial proceeding. Section 454.20, Florida Statutes; Rule 2.060(f), Florida Rules of Judicial Administration. Whether the conduct proposed by the inquiring attorney violates either the cited statute or rule is a question of law and hence beyond jurisdiction of this committee. However, the Committee is of the opinion that there is no ethical distinction between an attorney's becoming surety on his client's possible obligation to an opposing litigant and his becoming surety on the same possible obligation to a surety company which has become surety on the client's cost bond. In either case, the attorney is acting as surety for his client. The proposed scheme would, it seems, constitute an attempt to do indirectly that which the attorney is prohibited from doing directly.

Moreover, the giving of a letter of indemnification by the attorney seems to go beyond the permissible limits of Rule 4-1.8(e), as the terms of the proposed indemnification agreement require the attorney to reimburse the surety only after the plaintiff has failed to do so.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 68-15

May 7, 1968

A nonprofit lending fund financed by contributions from attorneys for the purpose of providing loans to accident victims, which loans would be secured by assignment of the victims' claims and would be repaid from the proceeds of the victims' cases, would be improper.

Canon: 10

Chairman MacDonald stated the opinion of the committee:

A member of The Florida Bar proposes the institution of a nonprofit lending fund which would be financed by contributions from attorneys, and which would provide loans for accident victims. The proposal contemplates that the loans would be processed by applications through attorneys representing the prospective borrowers in connection with their accident claims. The loan would be secured by an assignment of this claim and would be repaid out of the proceeds of the settlement.

In our judgment this plan would be violative of Canon 10.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 65-39

June 15, 1965

A lawyer may not advance living expenses to a client pending settlement and collection of a claim, judgment, or award.

Canons: 6, 10

Opinions: ABA 288, NY City 779

Chairman Smith stated the opinion of the committee:

In fine, a member of The Florida Bar inquires if it is unethical for an attorney to advance money to a client for living expenses while awaiting payment of the client's claim against a third party. Further, he asks us to assume that the client badly needs the money for basic necessities and inquires if it would make a difference (1) if there was no dispute as to liability, the third party was financially responsible at the time, and the client was simply waiting to determine the result of medical treatment or (2) if settlement had been agreed upon and the attorney was merely awaiting receipt of the release and draft.

This Committee has considered and answered the same inquiry, or ones quite similar, on several occasions. Canon 6 provides that an attorney should not allow himself to be placed in inconsistent positions and Canon 10 prohibits an attorney from acquiring a financial interest in the subject matter of litigation he is handling. The member indicates his awareness of Opinion 288 of the Professional Ethics Committee of the American Bar Association and the holding therein that an attorney may not ethically lend or advance living expenses to clients during the pendency of personal injury actions even though the clients are injured and cannot work. The same conclusion has been reached by a similar committee for the Bar Association of the City of New York, Opinion 779.

This Committee heretofore has agreed with the views expressed in the opinions aforementioned. It continues to do so. Further, it is our opinion that the additional circumstances stated in this inquiry do not prompt a different response in either case posed.

The rule prohibiting an attorney from acquiring a financial interest in the litigation of a client has proved to be of benefit both to the public and the bar. The plight of a client undoubtedly will invoke the sympathies of his attorney from time to time. In our opinion, however, the solution does not lie in relaxing a salutary ethical standard. Generally the lawyer can assist his client in obtaining the essential financial support from appropriate sources and/or can assist in postponing payment of outstanding debts. This would be particularly true in those cases when payment of third party claims is assured. In those cases where such solution is not possible the remedy, in our opinion, does not lie in alteration of the Canons of Ethics.