

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 99-6**

Issued December 2, 1999

*[Withdrawn-by Board on October 3, 2003 due to Rancman v. Interim Settlement Funding Corp., 99 Ohio St.3d 121, 2003-Ohio-2721]*

**SYLLABUS:** An attorney may ethically refer a client who has been awarded a money judgment in a civil suit to a company that purchases a minority interest in the judgment and puts immediate cash in the hands of the client during an appeal of the judgment. The attorney must determine that the referral is in the best interest of the client. The company must not interfere with the attorney-client relationship and must not attempt to influence the litigation. A requirement that appellate counsel approved by the company be hired to assist the trial counsel in the appeal is an improper interference with the attorney-client relationship between the trial counsel and the client. It is ethically improper for an attorney to receive financial assistance from a company in exchange for the company receiving an interest in the attorney's anticipated proceeds from a client's money judgment.

**OPINION:** This opinion addresses the referral of clients who have been awarded money judgments in civil suits to companies that will purchase an interest in the money judgment and provide money to plaintiffs and their attorneys during appeals.

Is it ethically proper for an attorney to refer a client who has been awarded a money judgment in a civil suit to a company that will purchase an interest in the money judgment and provide immediate money to plaintiffs and their attorney during the appeal of the judgment?

Throughout Ohio and around the nation there are companies offering money to attorneys and plaintiffs who have been awarded money judgments in civil suits in exchange for an interest in the proceeds of the judgment if upheld on appeal. The companies are seeking referrals from attorneys whose clients have been awarded large money judgments. Upon referral, the company reviews the client's matter. If the company believes the money judgment will be upheld on appeal the company will purchase a minority interest in the judgment and will put immediate money into the hands of the client and attorney without recourse. If the judgment is overturned on appeal the company gets nothing and the client and attorney have no obligation to repay the money. The terms of the agreements vary from company to company. Some companies provide assurances in their promotional materials that the amount assigned will not exceed 50% of the judgment. Most companies promise not to control or interfere with the litigation. Some companies insist that the client obtain appellate counsel approved by the company to assist the trial

counsel in defending the appeal. The clients and attorneys who enter the agreements may use the moneys in any manner.

The offer of immediate financial assistance will be attractive to clients without funds to pay living expenses, medical expenses, or legal fees and expenses during a lengthy appeal. The offer of immediate money may also be enticing to an attorney who has advanced expenses of litigation during the trial court proceeding and who is now experiencing a delay in recouping the advanced costs while incurring additional expenditures during the appellate proceeding.

In this opinion, the Board applies the ethical rules to the question raised. The Board expresses no view as whether the proposed conduct of the company in acquiring an interest in a money judgment is legally proper in Ohio.

*Part 1: Money from company to plaintiff.*

The Board acknowledges that there are plaintiffs in need of financial assistance in order to sustain an appeal. A successful trial outcome is often preceded by years of effort and thousands of dollars. Appeals take more time and more money and delay a plaintiff from receiving a money judgment that has been awarded in a trial court. While being sensitive to the financial needs of clients, the Board is also cognizant of the ethical boundaries that the Ohio Code of Professional Responsibility places upon financial assistance to clients and improper influence by one other than the client.

DR 5-103(A) of the Ohio Code of Professional Responsibility prohibits, with narrow exceptions, a **lawyer** from acquiring a propriety interest in the cause of action or subject matter of litigation that the lawyer is conducting for the client.

**DR 5-103(A)** A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that a lawyer may:

- (1) Acquire a lien granted by law to secure the lawyer's fee or expenses.
- (2) Contract with a client for a reasonable contingent fee in a civil case.

DR 5-103(B) bars a **lawyer** from providing a client financial assistance other than advancing or guaranteeing the expenses of litigation. The rule, as amended, effective June 14, 1999 allows the risk of loss as to expenditures to be shifted from the client to the client's lawyer.

**DR 5-103(B)** While representing a client in connection with contemplated or pending litigation, a lawyer shall not provide financial assistance to a client, except that a lawyer may advance or guarantee the expenses of

litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, the repayment of which may be contingent on the outcome of the matter.

These rules help ensure that an attorney's loyalties to a client and professional judgment in a matter will not be impaired or diminished by an attorney's financial interest in a matter. "The proscription in DR 5-103 against the attorney's acquiring an interest in the outcome of a client's cause or litigation is grounded upon the possibility that the interest would adversely influence the attorney's ability to exercise impartial professional judgment (EC 5-7)." American Bar Foundation, *Annotated Code of Professional Responsibility* 199 (1996).

However, these rules do not govern the conduct of **non-lawyers**. DR 5-103(A) and (B) are rules of attorney ethics and do not serve as a bar to others such as a business company acquiring a proprietary interest in a cause of action or providing financial assistance to a client. Thus, it is the Board's view that the Code of Professional Responsibility does not prohibit an attorney from referring a client awarded a money judgment in a civil suit to a company that purchases a minority interest in the judgment and puts immediate cash in the hands of the client during appeal of the judgment.

The lawyer must not make such referral unless the lawyer determines it to be in the best interest of the client. In determining whether a referral would be in the client's best interest the lawyer must engage in frank discussion with the client regarding the client's need for financial assistance. The attorney must clearly explain to the client the terms of the agreement being entered. The client needs to know the facts regarding how much financial assistance is being provided and how much interest in the judgment the company is obtaining. The client should be informed that the company provides financial assistance only in cases that it believes likely to be upheld upon appeal. Thus, if the financial assistance is not absolutely necessary it may be unwise to enter an agreement to sell an interest in the proceeds of a money judgment. Some clients may prefer to seek independent advice. The client should be informed of this option. In addition, the attorney must inform the client that the company will not be permitted to interfere with the attorney-client relationship or to influence the litigation. Requiring that appellate counsel chosen by the company be hired to assist the trial counsel is an interference with the attorney-client relationship. Protection of the attorney-client relationship is paramount to a company's desire to control its risk.

*Part 2: Money from company to plaintiff's attorney.*

Having concluded that a lawyer may ethically refer a client, the Board considers separately the issue of whether an attorney may ethically receive financial assistance from a financing company in exchange for the company receiving an interest in the lawyer's anticipated proceeds from a client's money judgment. Most likely, a lawyer's interest would be a contingent fee interest in the judgment on appeal or a cost recovery right in the judgment, however, it could be an unpaid hourly fee interest.

For the reasons below, the Board finds it improper for a lawyer to enter an agreement to receive financial assistance from a financing company in exchange for the company receiving an interest in the lawyer's anticipated proceeds from a client's money judgment. When both the attorney and the client enter agreements to receive financial assistance from a company the attorney becomes intertwined in a business transaction involving a client.

Even though the client and the attorney may each have separate agreements with the company, the agreements are sufficiently related for this Board to consider it as a business transaction with a client. The Code restricts an attorney's business transactions with clients when there are "differing" interests therein unless there is client consent after full disclosure.

**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 professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

To make full disclosure, the lawyer would need to inform the client that the lawyer is receiving financial assistance from the company to pay fees or expenses and that the lawyer will keep the money regardless of how well or how poorly he or she defends the appeal. While most attorneys would pursue the appeal with vigor, it is conceivable that some attorneys would not be as motivated to do so. A client should not be asked to consent to this type of differing interest even after full disclosure.

Further, participation in such proposed agreement between the company and the attorney could improperly influence the attorney's professional judgment regarding settlement opportunities and the pursuit of the appeal. This is not permitted under the DR 2-107 (B) of the Ohio Code of Professional Responsibility. The Code absolutely prohibits influence by others than the client.

**DR 5-107 (B)** A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

An additional consideration is that the Code restricts fee payments from persons other than clients unless there is client consent after full disclosure.

#### **DR 5-107 AVOIDING INFLUENCE BY OTHERS THAN THE CLIENT**

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

- (1) Accept compensation for his legal services from one other than his client.

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

This rule allows the payment of fees from one other than the client when there is full disclosure and consent of the client. The rule is not interpreted by this Board to encompass the payment of legal fees and expenses to a lawyer in exchange for a part of the proceeds from a client's judgment. There is a distinction between a third person, such as a parent, child, or close friend, paying legal fees or expenses for a loved one and a company providing money to an attorney to cover the attorney fees or costs in exchange for an interest in the client's judgment. The parent, child, or close friend may be expecting reimbursement from the client, but the parent, child, or close friend is not purchasing an interest in the litigation.

An agreement for legal fees and expense reimbursement between a lawyer and a client should not become a matter between the lawyer, client, *and* a non-party to the lawsuit who seeks to obtain an interest in the judgment. The client and the attorney should be the ones to decide the litigation and fee matters free from outside influence. If a client receives financial assistance from the company and wishes to use the money to pay legal fees, that is the client's choice to do so. If a client is not satisfied with the attorney's performance on appeal and disputes the fee, the client may wish to seek the protection of fee dispute resolution in accordance with the governing bar rules [Gov. Bar R. V § 3(C), §4(G), and §11(E)(2)(a)]. If a lawyer wishes to relieve the client from paying the expenses of litigation, the lawyer now has discretion under newly amended DR 5-103(B) to allow the repayment to be contingent on the outcome of the matter. These and other related decisions need to be made free from the influence and presence of a business company. When an attorney receives financial assistance from a financing company in exchange for the company receiving an interest in the lawyer's anticipated proceeds from a client's money judgment, the company is improperly interfering with the litigation and fee matters.

### *Conclusion*

The Board advises that an attorney may ethically refer a client who has been awarded a money judgment in a civil suit to a company that purchases a minority interest in the judgment and puts immediate cash in the hands of the client during an appeal of the judgment. The attorney must determine that the referral is in the best interest of the client. The company must not interfere with the attorney-client relationship and must not attempt to influence the litigation. A requirement that appellate counsel approved by the company be hired to assist the trial counsel in the appeal is an improper interference with the attorney-client relationship between the trial counsel and the client. It is ethically improper for an attorney to receive financial assistance from a company in exchange for the company receiving an interest in the attorney's anticipated proceeds from a client's money judgment.

**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.**