The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 2001-3

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Withdrawn by Adv. Op. 2021-02 on April 9, 2021

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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: A law firm may obtain a loan from a third party financial institution to advance expenses of litigation in a personal injury matter accepted on a contingent fee basis and may deduct the interest fees and costs of the loan from a client's settlement or judgment provided that certain conditions are met. The law firm may not secure the loan with the client's settlement or judgment. The terms of the loan, including the amount borrowed, the interest rates, and costs of the loan must be appropriate and reasonable. At the outset of the representation, the client must be informed and must provide consent. The terms of the loan must be disclosed to the client and must be agreed upon by the client in the contingent fee agreement. The contingent fee agreement must inform the client of whether repayment of litigation expenses is contingent upon the outcome of the matter. The contingent fee agreement must clearly state whether contingent fee percentages are computed before or after deduction of costs and expenses. As required by Section 4705.15 (B) and (C) of the Ohio Revised Code, the contingent fee agreement must be reduced to writing, signed by the attorney and the client, and a signed copy must be given to the client. At the time of, or prior to the receipt of compensation, a signed closing statement must be provided to the client.

OPINION: This opinion addresses the ethical propriety of a law firm borrowing money, using the funds to advance costs and expenses of litigation in a personal injury matter accepted on a contingent fee basis, and then passing the interest fees and costs of the loan to the client as expenses of litigation.

> Is it proper for a law firm to obtain a loan from a third-party financial institution, use the money to advance costs and expenses of litigation in a personal injury matter accepted on a contingent fee basis, and then deduct the interest fees and costs of the loan from a client's settlement or judgment as an expense of litigation?

A law firm inquires as to obtaining a loan from a third-party financial institution for use in advancing expenses in a client's personal injury litigation. The law firm would secure the loan, but not with the client's settlement or judgment. The law firm would make monthly payments of interest to the institution and would be obligated to repay the loan. The law firm's obligation to repay the loan would be triggered at the conclusion of the client's representation by settlement or final judgment.

At the outset of the representation, the lawyer would disclose the arrangement between the law firm and the third-party financial institution. The lawyer and the client would enter into a contingent fee agreement that would include client approval of the loan agreement between the law firm and the financial institution. The contingent fee agreement would provide for the deduction of the interest fees and cost of the loan from the client's settlement or judgment. At the closing with the client, all of the figures would be set forth in writing.

As a reminder to Ohio attorneys, DR 2-101(E)(1)(c) requires that all communications to the public regarding fees and charges must clearly state whether contingent fee percentages are computed before or after deduction of costs and expenses and whether in the event of an adverse verdict or decision the litigant is liable for repayment of litigation expenses. In addition, as required by Section 4705.15 (B) and (C) of the Ohio Revised Code, a contingent fee agreement in a tort action must be reduced to writing, signed by the attorney and the client, and a signed copy must be given to the client. At the time of, or prior to the receipt of compensation, a signed closing statement must be provided to the client.

Part 1. Law firm obtaining a loan from a financial institution to advance litigation expenses.

Under DR 5-103(B) of the Ohio Code of Professional Responsibility, Ohio lawyers are permitted to advance the expenses of litigation and to allow a client's repayment of expenses to be contingent on the outcome of the matter. Examples of expenses that may be advanced include court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence. The repayment of expenses may be contingent on the outcome of the matter.

> DR 5-103(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the 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.

DR 5-103(B) does not address whether a lawyer may obtain a loan from a financial institution for use in advancing litigation expenses in personal injury litigation. Nor, does the rule address whether fees and costs of a loan obtained by a lawyer may be deducted from the client's settlement or judgment.

The Board considers the application of other rules, namely, DR 5-103(A), DR 5-104(A), and DR 3-102(A), to the question raised. The prohibition in DR 5-103(A) is that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting." Under the proposed facts, the law firm is not securing the loan with a client's settlement or judgment; therefore, the lawyer and the law firm are not obtaining a proprietary interest in any one specific cause of action.

The prohibition in DR 5-104(A) is that "[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. A law firm's decision to obtain a loan from a third party financial institution does not involve the lawyer in a business transaction with a client, provided that the loan is not secured by the client's settlement or judgment. In contrast, financial assistance from a financing company to a law firm, used to pay a lawyer's legal fees and expenses and secured by the company receiving an interest in the lawyer's anticipated proceeds from a client's money judgment, intertwines the attorney in a business transaction with a client. *See*, Ohio Sup Ct, Bd of Comm'rs on Grievances & Discipline, Op. 99-6 (1999) advising that "[i]t 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."

The prohibition in DR 3-102(A) is that "[a] lawyer or law firm shall not share legal fees with a non-lawyer, except that [exceptions not applicable herein]. When a law firm obtains a loan that is not secured by a client's settlement or judgment, it does not constitute the sharing of legal fees with a non-lawyer. In contrast, a loan between a lawyer and a third-party financial institution secured by a specific client's settlement or judgment constitutes an improper division of a legal fee with a non-lawyer. *See,* Ohio Sup Ct, Bd of Comm'rs on Grievances & Discipline, Op. 94-11 (1994) advising that "[i]t 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 require 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."

Upon review of these rules, the Board finds that there is no rule prohibiting a lawyer from obtaining a loan from a third party institution for use in advancing the expenses of litigation provided that the loan is not secured by the client's settlement or judgment. However, the client should be informed. Under DR 5-107(A), a lawyer should inform the client that the law firm is obtaining a loan for use in advancing the expenses of litigation and obtain client consent.

> DR 5-107 (A) Except with the consent of his [her] client after full disclosure, a lawyer shall not:
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> > (2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.

Part 2. Deducting interest fees and costs of a loan from a client's settlement or judgment.

As to the deduction of interest fees and costs of a loan from the client's settlement or judgment, the Board finds it proper to do so. Interest fees and costs of a loan obtained by a law firm are a client's "expenses of litigation." The interest fees and costs of a loan obtained by a law firm are not the law firm's "costs of doing business." Since clients are not always financially able to obtain a loan to finance the expenses of litigation, the clients look to lawyers to advance the expenses of litigation. Depending upon a lawyer's

financial position, a lawyer may need to obtain a loan in order to advance the litigation expenses. As a fiduciary for the client, the lawyer must negotiate appropriate and reasonable loan terms.

Other state ethics committees find it proper for interest to be deducted from a client's judgment or settlement. *See e.g.*, Ass'n of Bar of the City of New York, Formal Op. 1997-1 (1997); Illinois State Bar Ass'n, Op. 94-6 (1994); State Bar of Georgia, Formal Op. 92-1 (1992); New Jersey Sup Ct, Advisory Comm, Op. 603 (1987); Missouri, Office of Chief Disciplinary Counsel, Informal Op. 970066 (undated). Further, in *Chittenden v. State Farm Mutual Automobile Insurance Company*, No. 00-C-0414, 2001 WL 508342, at *6 (La May, 15, 2001), the Louisiana Supreme Court held that an attorney is not ethically prohibited from entering an agreement that obligates the client to reimburse the attorney for interest charged on loans used to fund litigation expenses.

This Board finds it proper for the interest fees and costs of a loan, used for advancing litigation expenses, to be deducted from a client's settlement or judgment, provided that certain conditions are met. Thus, this Board advises that a law firm may obtain a loan from a third party financial institution to advance expenses of litigation in a personal injury matter accepted on a contingent fee basis and may deduct the interest fees and costs of the loan from a client's settlement or judgment provided that certain conditions are met. The law firm may not secure the loan with the client's settlement or judgment. The terms of the loan, including the amount borrowed, the interest rates, and costs of the loan must be appropriate and reasonable. At the outset of the representation, the client must be informed and must provide consent. The terms of the loan must be disclosed to the client and must be agreed upon by the client in the contingent fee agreement. The contingent fee agreement must inform the client of whether repayment of litigation expenses is contingent upon the outcome of the matter. The contingent fee agreement must clearly state whether contingent fee percentages are computed before or after deduction of costs and expenses. As required by Section 4705.15 (B) and (C) of the Ohio Revised Code, the contingent fee agreement must be reduced to writing, signed by the attorney and the client, and a signed copy must be given to the client. At the time of, or prior to the receipt of compensation, a signed closing statement must be provided to the client.

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.