The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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