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Virginia State Bar

LEO: Acquiring an Interest in Litigation - LE op. 1155

Acquiring an Interest in Litigation - Personal Injury Representation: Assisting Clients to Obtain Loan From Finance Company

November 15, 1988

You advise that you have represented personal injury clients for many years and are confronted 90 percent of the time with an innocent victim of an automobile accident who has incurred unanticipated medical bills and injuries which have put him or her out of work. In almost half of these cases, your clients do not have the benefit of health insurance or disability insurance. You are also confronted daily with requests for a loan from your clients in order to obtain proper medical treatment and medication so they may continue to pay their mortgages as well as provide food and other necessities for their families. On numerous occasions, you have referred your clients to banks to obtain loans; however, due to the loss of their jobs as a result of their injuries, they are poor credit risks and it is virtually impossible for them to obtain loans. There being no other alternative, you attempt to obtain liens against your client's case to provide them credit which, in most cases, the landlords and hospitals simply reject.

You have asked the Committee to consider the propriety of your persuading a finance company to agree to loan funds ranging from \$1,000 to \$10,000 to personal injury clients who cannot get bank loans. You have proposed that the company would investigate the case to confirm the liability, damages, and insurance coverage with the client's written consent. If the investigation revealed facts or evidence pertinent to the case which the client's attorney did not already know, said facts would be conveyed to that attorney at no expense. If the loan is approved, the loan would become due upon resolution of the case either by settlement or trial and the borrower would be charged at a lawful interest, similar to that used by major credit card companies. Upon obtaining a favorable settlement or verdict the client would direct the attorney involved to repay the loan out of the case proceeds. In no way would the attorney guarantee, cosign, or be responsible for the loan, except that he would honor a lien on the case.

The Committee believes DR.5-103 (B) is the appropriate and controlling rule relative to your inquiry, and it provides as follows:

While representing a client in connection with contemplated or pending litigation a lawyer shall not advance or guarantee financial assistance to his client, except that the 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, provided the client remains ultimately liable for such expenses (see also LEO. 34).

The Committee would also direct your attention to Professional Guidance Opinion no.86-36 from the Philadelphia Bar Association, which states that a lawyer may not act as a guarantor for a bank loan for his client; however, he may attempt to convince the bank to grant the loan and to take a security interest in the client's personal injury case.

Under the facts as you have presented them in your inquiry, the Committee opines that there

would not be a violation of Disciplinary Rule 5-103(B) as long as the attorney does not guarantee or cosign for the loan.

Committee Opinions November 15, 1988

Virginia State Bar

LEO: Attorney/Client Relationship: Engaging LE Op. 1219

Attorney/Client Relationship: Engaging in Arrangement of Champerty and Maintenance; Multiple Representation- Conflict of Interest: Attorney Engaging in Making A Loan to One Client Through Another Client/Lender.

April 3, 1989

Your firm has advised that it has a wealthy individual client who is willing to make small loans to your personal injury clients for the purpose of assisting those personal injury clients with their living expenses during the pendency of their litigation. The prospective lender-client would make such loans in return for 15% interest and a promissory note in which the personal injury client would agree to repay the loan contingent upon his or her receipt of settlement proceeds. Should there not be a settlement, the lender-client would bear the loss. Your firm would obtain the promissory note from the borrower-client for the benefit of the lender-client, and the lender-client would establish a separate bank account in his own name while designating your firm to draw upon it for the purpose of making the loans to the borrower-client(s). You further indicated that the lender-client would place approximately \$10,000 into the account with the typical loan being about \$200; thus a possible total of some 50 such loans could be made. You specify that the firm would not reimburse the lender-client for any losses borne by him as a result of the borrow-client not receiving a settlement.

Your firm has inquired as to the feasibility of such an arrangement under the requirements of the Virginia Code of Professional Responsibility.

It is well settled, and you have correctly identified the prohibition under DR:5-103(B) against a lawyer's advancing or guaranteeing financial assistance of his client for expenses other than those directly related to the expenses of litigation. The same rule permits the advancement of only those specific litigation expenses provided the client remains ultimately liable for such expenses. The clear intent of DR:5-103(B) is to preclude the lawyer's acquiring an interest in the outcome of the litigation, since holding such an interest would create a personal conflict in the lawyer and compromise his undivided loyalty to his client in order to protect the lawyer's own financial interest in the litigation. Furthermore, since the lawyer is precluded from providing such assistance to his client, his securing of another of his client to provide that assistance would be improper under DR:1-102(A)(2) if his purpose in doing so was to circumvent DR:5-103(B).

In the circumstances you have described, the lawyer's undivided loyalty to his individual lender-client and to his individual borrower-client(s) would be great diluted, most particularly since the lender-client's receipt of repayment is expressly contingent on the outcome of the suit. Under DR:5-105(B), a lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be likely to be adversely affected by his representation of another client, unless permitted by DR:5-105(C). under those permissive

provisions, the lawyer may continue multiple representation if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each. It is the opinions of the Committee, assuming that your firm is representing the lender-client in his lender capacity, that the arrangement you described clearly does not allow for obviously adequate representation of both the lender-client and the borrower-client(s). Thus, the arrangement would be improper and violate DR:5-105 (B) and (C).

Finally, since the arrangement provides the repayment of the principal to the lender-client only on the contingency of the borrower-client receiving settlement proceeds, the Committee is of the opinion that particular attention must be paid to any common law or statutory prohibitions against champerty and maintenance. The determination of whether or not the arrangement you describe would be champertous or provide maintenance to the litigant is a matter of law and thus beyond the purview of the Committee. Should it be violative of those provisions, however, the Committee recognizes that your firm's role in creating such arrangement would be violative of DR:7-102(A)(7), which prohibits a lawyer from counseling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent.

Committee opinion April 3, 1999

Virginia State Bar

LEO: Acquiring AN Interest in Client's Matter LE Op. 1269

Acquiring AN Interest in Client's Matter - Business Transactions Between Attorney and Client - Personal Interest: Attorney Making Loans to Client.

October 3, 1989

You have advised that you represent an injured client whose medical bills have been paid by his insurance carrier, but who has not been able to earn significant income to meet his living expenses. You further indicate that the client has no other source of income pending disposition on his claim. Your client will probably lose an additional six weeks of income during surgery and recuperation. You indicate that you have arranged for a third party to loan your client up to \$7,000 at 12% interest, under the terms of which loan the lender will be designated as a beneficiary under your client's life insurance policy and the client agreed to have any remaining outstanding debt act as a lien on any recovery made on the personal injury matter. Finally, you advise that the loan will not be contingent on any recovery but will remain the personal obligation of the client regardless of the outcome of the cause of action.

You have inquired as to the propriety of the terms of the loan as outlined and have further inquired as to the propriety of you loaning a client money pursuant to the same terms.

With regard to your first question, the Committee believes that prior LE Op. 1155 is dispositive of the issue.

With regard to your second question, the appropriate and controlling disciplinary rules are DR:5-103(A) and DR:5-104(A). Under DR:5-103(A), a lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client. A lawyer may, however, acquire a lien granted by law to secure his fee or expenses; and may contract with the client for a reasonable contingent fee in a civil case. Under Dr:5-104(A), a lawyer may not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to (continue to) exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure and provided that the transaction is not unconscionable, unfair or inequitable when made.

The Committee is of the opinion that loans made to clients for assistance with living expenses during the course of litigation constitute the lawyer's entering into employment and a business transaction that would allow his professional judgment to be attached by his own financial interest; thus such conduct would be improper and violative of both DR:5-103(A) and DR:104(A). The rule against a lawyer acquiring an interest in a client's litigation is based on concerns about compromised loyalty to the client in pursuing a result which should be in only the client's best interests. The lawyer's acquisition of a personal interest in the outcome of the litigation may result in the lawyer's independent judgment on behalf of his client becoming clouded by his interest in recouping his own funds.

In addition to the prohibition against a lawyer acquiring a proprietary interest in the litigation through the making of a loan to a client, the Committee is of the opinion that such a loan would create an improper adverse relationship between the lawyer as creditor and the client as debtor. The client's consent as described in DR:5-104(A), which, in other circumstances, might cure the conflict, would not suffice to alleviate the Impropriety created by the violation of DR:5-103(A).

Committee Opinion October 3, 1989