

OPINION NO. 91-22
September 30, 1991

FACTS:

The inquiring attorney has recently become aware of the existence of "personal injury loan services," which consist of non-lawyers who make short-term, high-interest loans to personal injury claimants. The loans are secured by liens on the proceeds of the personal injury claims.

The inquiring attorney doubts the legal enforceability of such liens. Nevertheless, some of his clients have requested his assistance in obtaining these loans.

QUESTION:

Is it ethically improper for a lawyer to assist a client having a personal injury claim in obtaining a loan from a "personal injury loan service"?

ETHICAL RULES INVOLVED:

ER 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, . . .

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ER 1.7. Conflict of Interest: General Rule

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(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. . . .

ER 1.8. Conflict of Interest: Prohibited Transactions

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(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, provided the client remains ultimately liable for such costs and expenses; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

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ER 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6.

ER 8.4. Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

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OPINION:

ER 1.8(e) prohibits a lawyer from lending money to a client in connection with pending or contemplated litigation, except for advances of costs and expenses of litigation, provided the non-indigent client remains ultimately liable therefore. However, there is nothing in the Rules of Professional Conduct that requires a lawyer to prevent a client from seeking the services of third parties who will lend the client money, unless the lawyer's assistance to the client in obtaining a loan from a third party is such that he or she is violating any of the Rules of Professional Conduct personally or through the acts of another. See ER 8.4(a). In fact, there is little difference, from a lawyer's standpoint, between the situation proposed by the inquiring attorney, and the situation where a lawyer assists a personal injury client in obtaining a medical lien from a health care provider.

We do not believe that referring a client to a personal injury loan service would normally violate ER 1.8(e) through the acts of another. As long as the inquiring attorney has no interest in the personal injury loan service that would affect

his independent judgment on behalf of his client, it would not violate ER 1.8(e) for him to assist his client in obtaining a loan. Whether or not the inquiring attorney has a conflict of interest in this respect is determined by ER 1.7(b); in other words, the inquiring attorney must use his independent judgment and determine whether his representation of his client will be "materially limited" by any responsibilities he may have to the personal injury loan service.

However, the inquiring attorney's assistance to his client in obtaining the loan must be fairly limited. The inquiring attorney may not reveal any information relating to the representation of the client to the personal injury loan service unless the client consents after consultation. ER 1.6. The inquiring attorney may not ethically co-sign or guarantee a loan to a client provided by a third party. See our Opinion No. 91-19 (June 17, 1991). Finally, ER 4.1 imposes an ethical responsibility on the inquiring attorney to disclose material facts to the personal injury loan service when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client (unless disclosure is prohibited by ER 1.6). If the inquiring attorney concludes that the lien of the personal injury loan service is unenforceable, he may not misrepresent or imply to the loan service that the lien is valid. In our Opinion No. 88-02 (January 11, 1988), we discussed a lawyer's responsibilities to health care providers who provide services to the lawyer's clients having personal injury claims secured by liens against the proceeds of such claims:

Depending on the circumstances, the attorney's signing of the [lien] form may mislead the health care provider by creating or reinforcing beliefs on the part of the provider that the attorney knows or has reason to know are erroneous -- e.g., that the lien is legally enforceable against the client, that there is a legally enforceable obligation by the attorney to honor the lien agreement, and/or that the lien agreement will be honored. As a consequence, in some circumstances, the attorney's signing of the form may have the effect of inducing the provider, based on such erroneous beliefs, to take action that the provider might not otherwise take, such as providing further services to the patient or refraining from seeking prompt payment from the patient. In such circumstances, the attorney's signing of the form, without more, may constitute a violation of ER 4.1(a).

Opinion No. 88-02 at 3-4. Therefore, the inquiring attorney may be prohibited from signing a lien form or otherwise asserting the validity of the lien without also taking steps to avoid misleading the personal injury loan service, such as modifying the lien form, making an appropriate disclosure, or issuing a disclaimer. See Opinion No. 88-02 at 4.

Our decision is in accord with opinions issued by professional ethics committees in other jurisdictions. See Virginia State Bar Ethics Opinion 1155 (12/15/88) (ABA/BNA Lawyers' Manual on Professional Conduct, p. 901:8747) (a lawyer may set up an agreement with a finance company to lend money to a client based on the company's investigation of the client's case, if the client consents); Maryland State Bar Ethics Opinion 89-15 (10/25/88) (ABA/BNA Lawyers' Manual, supra, p. 901:4321) (a lawyer may refer clients to a lender willing to make loans conditioned upon repayment from case proceeds, as long as the lawyer doesn't guarantee or co-sign the loan and maintains client confidentiality). Cf. Virginia State Bar Ethics Opinion 1219 (4/3/89) (ABA/BNA Lawyers' Manual, supra, p. 901:8754) (a lawyer may not arrange for one of his clients to lend money (at 15% interest) to another client, where loan repayment would be contingent on the outcome of the case, because loyalty to both clients would be "diluted" under these circumstances).

In conclusion, we are of the opinion that the inquiring attorney may assist his client in obtaining a loan from a personal injury loan service, as long as the attorney has no interest in the loan service, does not guarantee repayment of the loan, and maintains client confidentiality. If the inquiring attorney believes that the lien of the loan service against his client's personal injury recovery is legally invalid, he may not misrepresent or imply to the loan service that he believes the lien is legally enforceable.