

**STATE BAR OF NEVADA**  
**STANDING COMMITTEE ON**  
**ETHICS AND PROFESSIONAL RESPONSIBILITY**

Formal Opinion No. 29

**August 7, 2003**

**QUESTION**

Is it ethically proper for an attorney to refer a client having a personal injury claim to a company that will advance money to the client during the pendency of the claim with repayment being made from the settlement?

**ANSWER**

Yes, it is ethically proper for an attorney to refer a client having a personal injury claim to a company that will advance the money to the client during the pendency of the claim, with repayment being made from the settlement.

**AUTHORITIES RELIED ON**

Supreme Court Rule 158; Supreme Court Rule 156; Supreme Court Rule 157; Supreme Court Rule 181; Supreme Court Rule 154; Supreme Court Rule 165, *Achrem v. Expressway Plaza Limited Partnership*, 112 Nev. 727, 917 P.2d 447 (1996); Cal. State Bar Formal Op. No. 2002-159; Ohio S. Ct. Ethics Op. 2002-2; Ariz. State Bar Op. No. 91-22; Md. State Bar Assn. Prof'l Guidance Comm., Guidance Op. No. 91-9; Felicia Galati, Assistant Bar Counsel, *Getting Involved in Getting Money for your Civil Litigation Clients: An Ethical Quagmire*, Nevada Lawyer, March 2002 at 15; *In Re: Discipline of Joe M. Laub*, January 9, 2002, Nev. S. Ct. Appeal No. 36322.<sup>(1)</sup>

**DISCUSSION**

For purpose of this analysis, the following assumptions have been made:

- The lawyer does not represent and has no financial interest in or business or personal relationship with the company making the cash advance, and will not represent either party in connection with the advance or otherwise receive any compensation as a result of the advance (the lawyer's fees for work on the client's claim being entirely contingent).
- The lawyer has no duties or responsibilities, other than those enumerated in SCR 165

(safekeeping property), for the advance to the client.

- Repayment of the advance is contingent upon recovery being made on the claim, and is subject to the payment of all prior liens (including the lawyer's fees). The advance is secured by an assignment of a portion of the proceeds of any recovery.
- The advance is itself legal and otherwise enforceable.

Supreme Court Rule 158(5) states that "a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation," except that in certain cases the lawyer may advance or even pay court costs and litigation expenses. This, with exceptions that are not applicable to the facts assumed here, an attorney is ethically prohibited from advancing money to a client during the pendency of the claim, with repayment being made from any resolution or settlement.

There is nothing in the Rules of Professional Conduct, however, which prohibits a lawyer from referring a client to an independent third party that would make such an advance. Assuming the lawyer does not represent and has no financial interest in or business or personal relationship with the company making the cash advance, and will not represent either party in connection with the advance or otherwise receive any compensation as a result of the advance, there would not be a violation of SCR 158. *Cf.* Cal. State Bar Formal Op. No. 2002-159 (a lawyer may refer a potential client to a broker for a real property loan to pay for attorney's fees and costs so long as the lawyer does not provide legal representation or receive compensation with regard to the referral or the resulting loan or escrow transactions, and has no undisclosed business or personal relationship with the broker); *see also* Ariz. State Bar Op. No. 91-22 (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.); Md. State Bar Assn. Comm. On Ethics, Docket 89-15 ("mere referral of clients to a lender willing to make loans would be ethically permissible."); Va. State Bar legal Ethics Op. No. 1155 ("[t]here would not be a violation. . . . as long as the attorney did not guarantee or cosign for the loan and the client remained ultimately liable for the expense."); Phila. Bar Assn. Prof'l Guidance Comm., Guidance Op. No. 91-9 (there is no violation of the ethical rules "[i]f the [attorney] does not have ownership or financial interest in the finance company and is not being paid any fee or other compensation by the finance company.>").

For those practitioners considering a third party lender cash advance for their clients, it may be prudent to review an article entitled *Getting Involved in Getting Money for you Civil Litigation Clients: An Ethical Quagmire*, by Felicia Galati, Assistant Bar Counsel, initially published in the April 2001 *Nevada lawyer* and reprinted in the March 2002 *Nevada Lawyer*. The article concludes that "[g]iven the ethical ramifications of third-party lender arrangements, it is advisable to those who brave this territory to do so with extreme caution." *Id.*, at p. 17.

In other words, the lawyer should consider other ethical rules that may come into play with such a referral. For example, Supreme Court Rule 156 provides in pertinent part: "[A] lawyer shall not reveal information relating to representation of a client unless the client consults after consultation. . . ." Before making an advance, the company will likely require information about the claim from the attorney. Such information could include the nature and extent of the client's injuries, the theories of liability, insurance and coverage issues, medical records, and other information regarding the relative strengths and merits of the client's claim. The attorney is ethically prohibited from disclosing any such information under SCR 156, unless the client consents to such disclosure. <sup>(2)</sup>

An attorney should also be aware of Supreme Court Rule 157, which addresses conflicts of interest. SCR 157 provides in pertinent part: "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client;" and "a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's present factual scenario, the lawyer has no financial interest in the lending company, the lawyer does not represent the lending company, and the lawyer has no financial liability for the advance. So long as there is no financial or professional relationship between the attorney and the company, SCR 157 will not be violated. <sup>(3)</sup> Essentially, the attorney has merely referred her client to an independent company that provides a service.

Moreover, in an appeal from a Northern Nevada Disciplinary Board, the Nevada Supreme Court stated that, in furtherance of SCR 151 (Competence), "a lawyer has a duty to conduct a reasonable investigation of persons to whom the lawyer refers his client for services". *In re: Discipline of Joe M. Laub* January 9, 2002, Appeal No. 36322. As such, the referring attorney would appear to have an obligation to conduct a reasonable investigation as to the entity making the advance. <sup>(4)</sup>

Finally, consideration should be given as to whether the cash advance is permissible under Nevada law. Presently, assignment of a personal injury claim is not permissible, however, a personal injury plaintiff may assign a portion of the proceeds of a tort action without violating public policy. *Achrem v. Expressway Plaza Limited Partnership*, 112 Nev. 737, 739-40, 917 P.2d 447, 448-49 (1996) (when only proceeds are assigned, the plaintiff retains control over the action, and the assignee cannot pursue the action independently). If the advance is secured by an assignment of a portion of the proceeds from the claim, the advance is allowed. Further, under the facts presented, repayment of the advance is contingent upon recovery being made on the claim, and is subject to payment of all prior liens. In situations where the attorney is provided notice of a lien that secured the cash advance, the safekeeping of property obligations enumerated in SCR 165 must also be considered and adhered to.

### CONCLUSION

It is ethically proper for an attorney to refer a personal injury client to a company that will advance money to the client, with repayment being made from any settlement or

resolution, if the attorney has no financial interest in the company and the client consents after consultation. Given the potential ethical problems arising from such an advance, however, the attorney should be mindful of the corresponding ethical issues addressed herein.

***This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.***

1. Not citable as authority. SCR 123.

2. The Client's consent should only be made after a consultation between the client and the attorney. It would be prudent for the attorney to advise the client as to the potential ramifications of disclosing such information, including whether the attorney-client privilege may be waived as a result of any such disclosure and whether the company's files and its evaluation of the claim is discoverable in the client's case. Preferably, the client's consent would be in writing.

3. Ohio S. Ct. Ethics Op. 2002-2 ("when a lawyer agrees to provide loan applications for a lender and participates in referrals that provide financial benefit to a lender and a consulting company that have business relationships with the law firm, the lawyer dilutes his . . . loyalty to the client and may create an appearance of impropriety").

4. It does not appear that the Laub opinion was published, rendering it un-citable as authority, under SCR 123.