

Committee Opinion
April 3, 1989

LEGAL ETHICS OPINION 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.

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 clients 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

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client will be or is 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 opinion 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 violative of 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.

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