NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 666 (73-93) 6/3/94

Topic: Conflict of interest; maintenance; referring client to institution that will lend money for living expenses contingent on resolution of personal injury claim

Digest: Lawyer may refer client to institution that will lend money for client's living expenses contingent on the resolution of personal injury claim.

Code: DR 4-101(B), (C)(1); 5-103(B).

QUESTION

May a lawyer refer a client to a financial institution that will lend the client money for living expenses, where the repayment of the loan is contingent on the successful resolution of the client's claim for personal injuries?

OPINION

New York has long proscribed "maintenance." The First Department, for example, has a separate rule of court that expressly forbids, "any attorney, directly or indirectly, as a consideration for [the placing of a] retainer, [to] pay any expenses attending the prosecution or defense of any … claim or action." Rules of the Appellate Division, First Department, 22 N.Y.C.R.R. §603.18. The perceived evils addressed by the traditional prohibition are the stirring up of unmeritorious litigation and the improper solicitation of retainers to pursue it. Thus, prior to *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), when lawyer advertising was proscribed, condemnation of maintenance often was combined with references to "barratry" and "champerty." Whether, or to what extent, those concerns continue to be viable in an age of widespread lawyer advertising, and whether the proposed conduct should be deemed "indirectly" paying a client for the placement of a retainer in construing the rule against maintenance, are matters of law on which this committee does not opine. Thus, in answering the question, we express no opinion as to whether the proposed conduct would violate the substantive law of New York. If what is proposed is illegal, then it would perforce be unethical. *See, e.g.,* N.Y. State 495 (1978).

Ethically, the principles underlying the traditional ban on maintenance found their expression in DR 5-103(B). That rule prohibits a lawyer from advancing litigation expenses, the repayment of which is contingent on the outcome of the claim, because the client must remain "ultimately liable" for the expenses. *See, e.g.,* N.Y. State 553 (1983); N.Y. State 464 (1977). The client must bear those expenses regardless of the outcome of the claim. The rule was only recently eased in this State for "indigent" clients "represented on a pro bono basis"; as of September 1990, lawyers are permitted to may the expenses of litigation without holding such clients ultimately liable. DR 5-103(B)(2).

In the instant matter, the lawyer does not propose to "pay" or "advance" any part of the loan. The lawyer's sole function would be to refer the client to a lending institution that then would assess the value of the claim and take a lien on its proceeds to secure the loan. Thus, a mere referral to the lending institution would not be unethical *per se.* *See* Philadelphia Op. 91-9 (1991), indexed in ABA/BNA Lawyers' Manual on Professional Conduct at 1001:7502 (not improper for lawyer to refer clients to finance company which would make loans based on its assessment of the client's cases). *Cf.* Fla. Op. 75-24 (1975), indexed in Maru's Digest of Bar Association Ethics Opinions at 10832 (1980 Supp.) (unethical for lawyer to recommend a client to a lending institution that would loan client fund to cover living expenses pending outcome of base where lawyer, in effect, guarantees payment of loan).

The lawyer must be careful not to compromise confidentiality in disclosing information to the lending institution. The client must be made aware of such a possibility and any disclosures to the lending institution by the lawyer should be made with the fully informed consent of the client. *See* DR 4-101(B), (C)(1); see also Philadelphia Op. 91-9. Furthermore, the lawyer cannot own an interest in the lending institution, as that would indirectly constitute a loan by the lawyer to the client. Finally, the lawyer cannot be paid a fee or receive any other compensation from the lending institution. *Cf.* S.C. Op. 92-06 (192), indexed in ABA/BNA Lawyers' Manual on Professional Conduct at 1001:7090 (lawyer may form corporation to make consumer loans to plaintiffs, secured by proceeds of a case, provided the loans are not to clients of the lawyer); Md. Op. 84-11 (1983), indexed in ABA/BNA Lawyers' Manual on Professional Conduct at 801:4334 (lawyer may not arrange for bank loan to pay for legal fees from litigation).

CONCLUSION

For the reasons stated and subject to the qualifications discussed above, the question posed is answered in the affirmative.