

**ETHICS OPINION NO. 262
OF THE MISSISSIPPI BAR
RENDERED FEBRUARY 6, 2020**

CAVEAT: This Opinion is limited strictly to the facts as presented for analysis under Mississippi's Rules of Professional Conduct. The facts and questions outlined below and the opinion rendered is limited to ethical issues only.

The Ethics Committee of the Mississippi Bar has been asked to respond to the following question and hypothetical:

Is it ethical for an attorney to refer financing for legal services, excluding bankruptcy and contingency matters, through a third party broker that offers such financing through multiple potential lenders?

Our firm has been in discussions with a third-party legal financing business, that works with lenders to offer legal financing options to potential clients that may not otherwise be able to afford up-front retainers, similar to financing the purchase of goods. As part of the process we would direct the prospective client to the initial financing application.

Applicable Rules

The following Rules of Professional Conduct are applicable to this opinion. The relevant portions of those Rules provide:

Rule 1.8 Conflict of Interest: Prohibited Transactions

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or pecuniary interest adverse to a client unless:
 - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
 - (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
 - (3) the client consents in writing.
- (b) A lawyer shall not use information relating to representation of a client
 - (1) To the disadvantage of the client, or

- (2) To the advantage of himself or a third person, unless the client consents after consultation

...

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) The client consents after consultation;
- (2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) Information relating to representation of a client is protected as required by Rule 1.6.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

Rule 1.4 Communication

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

- (b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

Rule 1.15 Safekeeping Property

- (a) A lawyer shall clients' and third persons' property separate from the lawyer's own property. Funds shall be kept in a separate trust account
- (c) When a lawyer is in possession of property in which both the lawyer and another person claim an interest, the property shall be kept separate by the lawyer until completion of an accounting and severance of their respective interest.

Rule 1.16 Declining or Terminating Representation

- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest . . . and refunding any advance payment that has not been earned.

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Analysis

Nothing in Rule 1.8 prohibits a lawyer from referring a client to a fee financing company that advances the client funds to obtain legal services; provided the referring attorney has no interest in the lending institution, receives no fee for the referral, takes no direction from the lender regarding the matter financed, and discloses no information regarding the client's representation to the fee financing company. A client may not be able to afford a lawyer's upfront retainer at the outset of a representation but the lawyer is unwilling to accept incremental payments. This Committee previously opined that it was ethical for a lawyer to accept payment of his fees by credit card in Formal Opinion No. 135 (September 11, 1997). The Committee sees little difference between the acceptance of payment by credit card and the arrangement presented here, though some additional safeguards should be taken.

In the scenario described by the requester if the client is interested in financing the attorney's fee, the client completes an application with the third party lender. The lender then determines whether to approve the credit application and on what terms, establishing a lender/borrower relationship separate from the attorney client relationship. Further, under this scenario no information about the client's legal matter or its likelihood of success is provided by the lawyer to the finance company to implicate Mississippi Rule of Professional Conduct 1.6.

In such a scenario the lawyer must also still comply with his obligations under 1.4(b), 1.5(a) and (b), 1.15(a) and (c), 1.16(d) and 2.1. Pursuant to Mississippi Rules of Professional Conduct 1.4(b) and 2.1 the lawyer must explain the financing arrangement to the client to the extent reasonably necessary for the client to make an informed decision. This could include explaining the lawyer's relationship with the finance company, the costs and benefits of the transaction to the client, the terms of the client's arrangement with the finance company such as the interest rate and that the amount borrowed will have to be repaid regardless of the outcome of the legal matter, that other financing options exist, and any other factors relevant to the client's decision.

Additionally, any fee charged by the lawyer to the client, whether financed or not, must be reasonable pursuant to Rule 1.5. If the fee is increased due to financing it must not only still be reasonable, but the client must also be informed. If the fee financed is a retainer, advance fee or flat fee the funds received must be placed in a trust account as unearned fees until the lawyer has performed the agreed services to earn the fee pursuant to Rule 1.15(a) and (c) of the Mississippi Rules of Professional Conduct. If the client or lawyer terminates the representation prior to the lawyer fully earning the fee, any unearned portion must be returned to the client pursuant to Rule 1.16(d).

Conclusion

The Committee is of the opinion that a lawyer is not prohibited from directing clients to a third party broker to secure financing of the lawyer's fee provided the lawyer complies with his obligations under Rules 1.4, 1.5, 1.15, 1.16 and 2.1 of the Mississippi Rules of Professional Conduct.