

Issue Presented: Whether a lawyer may inform a client or prospective client regarding third-party financing options or otherwise identify a third party lender that might loan the client/prospective client funds to pay for the lawyer's services?

Answer: Yes, so long as the lawyer (1) explains the potential arrangement to the client or clarifies that the client must rely solely on information provided by the third-party lender to make the decision; (2) clarifies there may be other options to pay for legal services including other lenders; (3) does not charge an unreasonably higher fee for the representation because of the financing arrangement and does advise the client if the lawyer will charge a higher fee to account for finance charges; (4) treats the funds as the client's until they are earned and delivers them to the client upon termination of representation; (5) informs the client if the lawyer believes the financing arrangement conflicts with the client's best interests and obtains the client's written consent to continuing representation; and (6) addresses any financial or attorney-client relationship lawyer has or has had with the lender.

Rules Implicated: 1.2, 1.4, 1.5, 1.6, 1.7, 1.9, 1.15, and 1.16.

### **FACTS**

Some of Lawyer's Clients or potential Clients have financial difficulty paying a retainer or flat fee. Lawyer knows of finance companies ("Lenders") willing to lend people money to pay for legal services. Lawyer has inquired whether Lawyer may include a link to these Lenders' websites on Lawyer's own website, or otherwise identify Lenders for and to Clients or potential Clients. Lawyer has provided the committee with a formal opinion from the American Bar Association, ([https://www.americanbar.org/content/dam/aba/images/news/2018/11/formal\\_opin\\_484.pdf](https://www.americanbar.org/content/dam/aba/images/news/2018/11/formal_opin_484.pdf)), which Lawyer believes addresses the issue.

### **DISCUSSION**

The Committee agrees ABA Formal Opinion 484 ("ABA Opinion") addresses most, if not all, of the issues implicated by Lawyer's inquiry, and other matters outside the specific scope of Lawyer's request. However, the Committee will separately address the Lawyer's specific inquiry here, including the issues the Committee believes are relevant.

- 1. The Lawyer must either (1) explain the details of the potential financing arrangement in sufficient detail to satisfy Rule 1.4(b); or (2) sufficiently clarify (to satisfy Rule 1.2(c)) that the Lawyer is not offering any advice about the arrangement or the Lender, and that the Client must obtain that information and advice from the Lender.**

Rule 1.4(b) requires Lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Relatedly, Rule 1.2(c) states

that Lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the Client gives informed consent.

Read in concert, these two provisions require Lawyer to do one of two things when presenting the Client or potential Clients with a third-party financing arrangement as an option for paying for Lawyer's services. As noted in the ABA Opinion, Lawyer's identification of a Lender, whether directly to the Client or generally to the public, such as through a link on Lawyer's website, could be construed as an implied representation that Lawyer has vetted that Lender or otherwise endorses the Lender's qualifications and services. Lawyer must either actually investigate that Lender and confirm that it will properly serve the Client's needs, and confirm that Client has the financial wherewithal to enter into such an arrangement, or clarify that Lawyer has not done so, is not vouching for that Lender's qualifications or reputation, and is deferring to the Lender to determine Client's financial condition and advise the Client. Regarding links to the Lender's website on Lawyer's website, the Lawyer must present a sufficiently-prominent disclaimer to similar effect.

Relatedly, Lawyer should advise Client that financing with Lender is only one of multiple potential options for obtaining funds for the representation (such as borrowing from a traditional bank, borrowing from friends or family, etc.) and should likewise note there may be other Lenders willing to provide equal or superior financing options for the Client. Lawyer should include similar disclosures/disclaimers on Lawyer's website if a link to Lender's website is provided.

**2. If the Lawyer will charge a higher fee because of the Client's arrangement with a Lender, the Lawyer must communicate that Lawyer will do so, and must not charge an unreasonably higher fee.**

The Lender might require Lawyer to be enrolled with or subscribed to the Lender's program for a fee paid by Lawyer either on a per-client or flat-fee basis. Lawyer can charge a higher fee to account for these charges, but the fee must still be "reasonable" as required by Rule 1.5(a), and Lawyer must communicate this surcharge to the Client, preferably in writing as contemplated by both Rule 1.4(b) and 1.5(b). The Committee cannot articulate a standard for what would be "reasonable" in any situation. However, obviously, Lawyer cannot increase the fee by more than the fee the Lender charges for that particular Client matter, or by more than is necessary for Lawyer to defray the cost of a periodic flat-fee subscription with the Lender over multiple client matters. Likewise, the matter the Lawyer is addressing for Client may incur a sufficiently low legal fee that the subscription fee to be passed on to the Client is unreasonably high as a proportion of the fee itself.

**3. The Lawyer must treat the funds the same as any other Client funds under Rules 1.15 and 1.16**

The Lender might transmit or deliver the funds directly to the Lawyer so the Client never has them. The funds still belong to the Client. The funds received by Lawyer from the Lender must remain segregated in a separate trust account until earned (See Rule 1.15(a) and (d)), and any unearned funds must be returned to the Client upon completing the representation (See Rule 1.16(d)).

**4. The Lawyer must not reveal information protected by Rule 1.6 to the Lender**

It is possible that, instead of disbursing the funds as a lump sum to Client or Lawyer at the outset of representation the Lender will pay Lawyer on a monthly or other periodic basis, requiring Lawyer to submit monthly statements or invoices to the Lender. Under Rule 1.6(a), Lawyer may not reveal information related to the representation of the Client unless the Client gives informed consent or there is an exception to the general rule including those articulated in Rule 1.6(b). None of the exceptions apply here. If Lawyer must submit periodic statements to Lender to receive payment, Lawyer must not provide confidential information related to the representation without Client's informed consent. The Committee's opinion is that an invoice that does not list the services provided, but simply states an amount due "for services rendered" or words to that effect will not violate Rule 1.6(a).

**5. The Lawyer must obtain Client's informed written consent to the representation if Lawyer believes financing is not in the Client's best interest**

Even if Lawyer has adequately communicated to the Client that Lawyer is not advising Client regarding whether borrowing funds from the Lender is in Client's best interest, Lawyer may still receive information from the Client indicating that it is not in Client's best interest, financial or otherwise, to borrow funds from the Lender. Lawyer would then have a concurrent conflict of interest under Rule 1.7(a)(2) arising from Lawyer's responsibility to represent Client's best interests and the Lawyer's "personal interest" in being compensated for Lawyer's services. Before Lawyer can continue representing Client under these circumstances, Lawyer must obtain Client's written informed consent to further representation, as contemplated by Rule 1.7(b), which would include advising the Client that Lawyer does not believe obtaining or continuing to obtain Lender's financing is advisable.

**6. If the Lawyer has a financial interest in the Lender or if the Lender is a current or former client of Lawyer, the Lawyer must address these potential conflicts.**

Lawyer also might have an ownership or other financial interest in the Lender or the Lender may be a current or former client.

The first situation implicates Rule 1.8(a), regarding a lawyer entering a business transaction with or securing an adverse pecuniary interest to a client. Lawyer would have to determine that the arrangement and terms of the financing are fair and reasonable and fully communicated to the Client, advise the Client in writing of the advantages of seeking independent legal advice, allow the Client to seek independent legal advance, and obtain written informed consent from the Client to the general terms of the financing arrangement and of the Lawyer's interest in the Lender and the arrangement.

The second situation may implicate Rule 1.7(a)(2) or Rule 1.9. The Lawyer will need to consider whether Lawyer's relationship with the Lender presents a "material limitation" on Lawyer's ability to advise both Lender and Client (regarding a current Lender client) or whether Lawyer's previous relationship with the Lender presents a "materially adverse" position between Lender and Client regarding a "substantially related" matter, or afforded information Lawyer could use to the Lender's disadvantage now (regarding a former Lender client). If either situation is presented, the informed written consent contemplated by those rules would be required.

### **CONCLUSION**

It is the Committee's opinion that Lawyer may inform Clients or potential Clients about the availability of third-party financing through a Lender to help pay for Lawyer's services subject to the following:

1. The Lawyer must either fully vet the Lender and the advisability of Client entering into an arrangement with Lender or inform the Client or potential Clients that Lawyer is not doing so, but is leaving it to the Client and Lender to have those discussions. Any website links to Lender's website should present similar disclaimers.
2. The Lawyer must clarify that there are other ways to obtain the funds to pay for legal services, and that the Lender is just one of multiple Lenders that might lend the funds. Any website links to Lender's website should present similar information.
3. Any fee the Lawyer charges to the Client to defray fees or costs the Lender charges to Lawyer related to the Lender's financing must be reasonable and clearly communicated to the Client, preferably in writing.
4. The Lawyer must treat the funds received from the Lender like any other Client funds, i.e. segregated in a separate account until earned and returned to the Client upon termination of representation.
5. The Lawyer must not reveal confidential information related to the representation to the Lender absent Client's informed consent.
6. The Lawyer must obtain Client's written informed consent to continued representation if Lawyer believes obtaining financing from a Lender is not in Client's best interest, including disclosing Lawyer's opinion to Client.

7. If Lawyer has or has previously had a financial or attorney-client relationship with the Lender, the Lawyer must address any conflict-of-interest issues that arise from that relationship.