

State Bar of South Dakota

Ethics Opinion 2003-6

- **Rules: 1.2, 1.16, 8.4**
- **Subject: Champerty and Maintenance**
- **Summary: Law Firm is prohibited from entering into contractual relationship with client and third party for cash advance by third party prior to conclusion of dispute.**

FACTS

Law Firm represents client in a dispute concerning injuries sustained from an unknown event. Brand X is an out of state company that provides cash advances on pending personal injury claims. Before such advances are made, Brand X requires that client and Law Firm execute an agreement whereby Brand X will be repaid all sums advanced in addition to "user fees" upon resolution of the claim. The engagement letter submitted by Brand X indicates that it will have a lien upon the settlement proceeds.

DISCUSSION

The Ethics Committee guidelines restrict the committee from opining on conduct of a person other than the requesting lawyer and matters of substantive law. Accordingly, the scope of this opinion is limited to the requesting lawyers conduct. Four issues have been presented. The committee has agreed to respond to the following issue:

Can Law Firm enter into and execute the agreement?

Resolution of this issue depends on the ultimate substantive conclusion concerning the legality of the agreement in question, i.e., is it champertous. If the agreement is champertous, it is void as against public policy and is therefore unlawful and unenforceable. *See McKellips v. Mackintosh*, 475 NW2d 926, 929 (SD 1991) and SDCL 53-9-1. See also SDCL 16-18-10. Under these circumstances, Rule 1.2(d) and (e) apply, which states in pertinent part:

- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is ... fraudulent[.]
- (e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client regarding the relevant limitations on the lawyers conduct.

Rule 8.4(c) provides:

It is professional misconduct for a lawyer to: ...

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]

See also Rule 1.16(b)(1) and (2).

It is the opinion of the committee that if the proposed agreement is in violation of the laws prohibiting champerty or any other law, then lawyer is prohibited by the Rules of Professional Conduct from executing the agreement. Under these circumstances lawyer is required to advise client regarding the relevant limitations on his/her conduct, if any.

It is the opinion of the individual members of the committee that the agreement is in violation of the laws prohibiting champerty.

Brad A. Schreiber
Chair, Ethics Committee