

The Supreme Court of Ohio

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Non-recourse Civil Litigation Advance Contracts: Guidance for Ohio Lawyers

SYLLABUS: Ohio lawyers may inform clients of the non-recourse civil litigation advances that are offered by alternative litigation finance (ALF) providers and regulated by R.C. 1349.55. If a client pursues such an advance, the lawyer must recognize the following ethical obligations the transaction creates:

1. Prof.Cond.R. 1.1, 1.4, and 2.1 require the lawyer to communicate with the client and provide competent, candid advice about the nature of the transaction and its terms.
2. Under Prof.Cond.R. 1.4, the lawyer must ensure that the ALF provider does not interfere with the lawyer's duty to exercise independent professional judgment.
3. Due to the confidentiality provisions of Prof.Cond.R. 1.6, the lawyer shall not reveal information about the representation to the ALF provider without securing the client's informed consent. The lawyer may only obtain informed consent after explaining to the client the risks of sharing information with an ALF provider, including the potential waiver of attorney-client privilege.
4. The lawyer must also obtain the client's informed consent before providing a case evaluation to an ALF provider pursuant to Prof.Cond.R. 2.3 as the evaluation may materially and adversely affect the client's interests.

QUESTION PRESENTED: What are the ethical considerations for Ohio lawyers with clients entering into the non-recourse civil litigation advance contracts regulated by R.C. 1349.55?

APPLICABLE RULES: Rules 1.1, 1.4, 1.6, 2.1, and 2.3 of the Ohio Rules of Professional Conduct

OPINION:

Background

Alternative litigation finance (ALF) is the “provision of capital (money) by nontraditional sources to civil plaintiffs, defendants, or their lawyers to support litigation-related activities.” Garber, *Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns*, RAND Inst. for Civil Justice Law, Fin., and Capital Mkts. Program, (2010) 1. In the United States, there are generally three types of ALF: non-recourse funding provided to individual plaintiffs (consumer legal funding), loans to plaintiffs’ law firms, and investments in commercial litigation. *Id.* The American Legal Finance Association (ALFA), a trade group for ALF providers, has a membership of approximately 30 companies.¹ There may be as many as 80 other ALF providers operating in the U.S.² Because of the increasing proliferation of ALF and lawyers’ deficient knowledge of the ethical issues associated with ALF transactions, the American Bar Association (ABA) Commission on Ethics 20/20 recently formed a working group to study ALF in the context of the lawyer-client relationship. The working group submitted its report to the ABA House of Delegates in February 2012, and the report is a comprehensive guide for lawyers on the ethical areas of concern with all types of ALF. *See* ABA Commission on Ethics 20/20, Informational Report to the House of Delegates (February 2012).³ This Advisory Opinion is limited to non-recourse civil litigation advance contracts between consumers and ALF providers, and will offer guidance to Ohio lawyers whose clients are considering, or have already entered into, such contracts. This Opinion is neither an endorsement nor a condemnation of ALF.

“Non-recourse civil litigation advance contract” is the statutory term for consumer legal funding in Ohio. R.C. 1349.55. Through these contracts, ALF providers advance funds to individuals who have pending civil (usually personal injury) claims, and the individual agrees to pay the provider the

¹ American Legal Finance Assn., Member Providers, <http://www.americanlegalfin.com/OfficersAndMembers.asp> (accessed Sept. 24, 2012).

² Garber at 10, note 14.

³ Available at:

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf (accessed Sept. 25, 2012).

amount advanced plus additional financing fees. When viewed as a percentage of the amount advanced, these fees are substantially higher than the interest rates on credit cards and bank loans. Payment becomes due when the individual recovers funds in the civil case, and the fees usually increase as the length of time to recovery increases. As the advance is a non-recourse transaction, the individual is only required to repay the advance and remit the contractual fees if he or she receives proceeds in the underlying civil case. A typical condition of the advance is that the individual is represented by a lawyer on a contingency-fee basis.⁴

Rancman v. Interim Settlement Funding Corp.

Consideration of non-recourse civil litigation advance contracts in Ohio must begin with *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St.3d 121, 2003-Ohio-2721, 789 N.E.2d 217. Rancman was a personal injury plaintiff who contracted with two ALF providers for non-recourse advances secured by her pending civil claim. The providers advanced \$6,000 and \$1,000 to Rancman, who ultimately settled her case for \$100,000. Rancman refused to honor the repayment terms of her contracts with the ALF providers and instead repaid the advances at eight percent interest.⁵ She then sued the funding providers, requesting rescission of the contracts and a declaratory judgment that the providers' sales practices were "unfair, deceptive, and unconscionable." *Id.* at ¶ 5.

The trial court in *Rancman* determined that the two advances from the ALF providers constituted usurious loans that violated R.C. Chapter 1321, Ohio's Small Loan Act. *Id.* The court of appeals found the loans to be void under R.C. 1321.02 because the ALF providers had not acquired the statutorily-required licenses for lenders. *Id.* At trial and before the court of appeals, the ALF providers argued that the advances to Rancman were investments, not loans. *Id.*⁶

⁴For a detailed explanation of consumer legal funding transactions, see Garber at 9-13. The summary provided herein is based upon this material.

⁵ The \$6,000 advance was provided in exchange for the first \$16,800 recovered if the case was disposed in 12 months, \$22,200 if disposed in 18 months, and \$27,600 if disposed in 24 months. The \$1,000 advance was secured by the next \$2,800 Rancman received. If Rancman lost the case, the contracts did not require repayment of the \$7,000 advance.

⁶ The standard position of ALF providers is that non-recourse civil litigation advances are investments, not loans. A Colorado trial court, however, recently determined that the advances are loans subject to state consumer protection laws. See *Oasis Legal Fin. Group v. Suthers*, Dist. Ct., City and Cty. Of Denver, Colo. 10CV8380 (Sept. 28, 2011).

The Supreme Court of Ohio never reached the question of whether Rancman's civil litigation advances were loans or investments. Instead, the Court analyzed the funding contracts under the common law doctrines of champerty and maintenance. *Id.* at ¶ 9-19. The Court defined maintenance as "assistance to a litigant in pursuing or defending a lawsuit provided by someone who does not have a bona fide interest in the case" and champerty as "a form of maintenance in which a nonparty undertakes to further another's interest in a suit in exchange for a part of the litigated matter if a favorable result ensues." *Id.* at ¶ 10. Finding that the "ancient practices of champerty and maintenance have been vilified in Ohio since the early years of our statehood," the Court condemned Rancman's funding contracts on several grounds. *Id.* at ¶ 11. The Court was critical of the ALF providers' attempt to profit from Rancman's case and their purchased interests in the litigation. The Court also denounced the disincentive to settle caused by the funding contracts and characterized civil litigation advances as speculative investments in lawsuits. *Id.* at ¶ 14-18. Champertors and maintainers were historically lawyers, and the Court recognized that the Code of Professional Responsibility (now the Rules of Professional Conduct) regulates the advance of expenses to clients and acquisition of proprietary interests in litigation. *Id.* at ¶12, citing former DR 5-103 (now Prof.Cond.R. 1.8). Nevertheless, the Court found that the ethics rules did not eliminate champerty and maintenance from the common law. *Id.* The Court ultimately held that "[e]xcept as otherwise permitted by legislative enactment or the Code of Professional Responsibility, a contract making the repayment of funds advanced to a party to a pending case contingent upon the outcome of that case is void as champerty and maintenance." *Id.* at ¶ 19.

Legislative Response to Rancman

After the *Rancman* decision in June 2003, Ohio was purportedly the only state that disallowed non-recourse civil litigation advances. 76 Ohio Report No. 186, Gongwer News Service, Inc. (Sept. 19, 2007) (proponent testimony of Gary Chodes, chief executive officer of Oasis Legal Finance, on H.B. 248, 127th General Assembly). Contemporaneous with *Rancman*, though, regulators were instituting ALF reforms. For example, in June 2004 and February 2005, the New York State Office of the Attorney General reached settlements with ten ALF providers in which the providers agreed to implement new business practices to protect consumers. The agreed changes included mandatory disclosure statements regarding the transaction, a five-day cancellation period, translation of contract terms for non-English speaking consumers, and a notarized

acknowledgment by the consumer's lawyer. New York State Office of the Attorney General, Feb. 28, 2005 Press Release, <http://www.ag.ny.gov/press-release/personal-injury-cash-advance-firms-agree-reforms> (accessed Aug. 27, 2012). Using the New York settlement terms as a guide, the Ohio General Assembly passed legislation governing non-recourse civil litigation advance contracts in 2008. See 77 Ohio Report No. 83, Gongwer News Service, Inc. (Apr. 29, 2008). The result is R.C. 1349.55, entitled "Non-recourse civil litigation advance contracts." As of June 2012, Ohio, Nebraska, and Maine are the only states that have enacted consumer protection laws concerning civil litigation advances. O'Brien, *Baker: Lawsuit Financing Debate Likely to Continue in State Legislatures*, <http://www.legalnewsline.com/spotlight/236576-baker-lawsuit-financing-debate-likely-to-continue-in-state-legislatures> (accessed Sept. 24, 2012).

R.C. 1349.55(A)(1) defines a "non-recourse civil litigation advance" as a "transaction in which a company makes a cash payment to a consumer who has a pending civil claim or action in exchange for the right to receive an amount out of the proceeds of any realized settlement, judgment, award, or verdict the consumer may receive in the civil lawsuit." R.C. 1349.55(B) sets forth a number of required components of contracts for non-recourse civil litigation advances including disclosures of the amount of the advance, fees, the amount to be repaid, and the annual rate of return, a five-day cancellation provision, translation of the contract terms, and a statement that the ALF provider agrees it does not have decision-making authority in the underlying civil case. R.C. 1349.55(B)(6) further mandates that the contract contain a written acknowledgment by the consumer's lawyer indicating that the lawyer reviewed the contract and determined that all costs and fees were disclosed, and verifying the lawyer is being paid on a contingency fee basis pursuant to a written agreement, will distribute case proceeds from the lawyer's trust account or a settlement fund, and is following the consumer's written instructions concerning the advance.

The legislative history reveals that the Ohio General Assembly created R.C. 1349.55 to address the Supreme Court's holding in *Rancman*, make non-recourse civil litigation advance contracts legal, and provide consumer protection to customers of ALF providers. Legislative Serv. Comm. Fiscal Note and Local Impact Statement, H.B. 248, 127th General Assembly; 77 Ohio Report No. 83, Gongwer News Service, Inc. (Apr. 29, 2008). Representative Louis Blessing, the sponsor of the bill that enacted R.C. 1349.55, testified that "[a]llowing legal finance providers to operate in Ohio under regulations that

protect the consumer will give plaintiffs in Ohio lawsuits needed financial relief.” *Id.* Given that the Court in *Rancman* stated that non-recourse civil litigation advances could be legalized by “legislative enactment,” this Advisory Opinion assumes that R.C. 1349.55 accomplished this purpose. The Court, however, has not considered a legal challenge to R.C. 1349.55 since its enactment.⁷ If the Court struck down R.C. 1349.55 and the legality of non-recourse civil litigation advances was again called into question, the guidance provided in this Opinion may no longer be applicable.

Civil Litigation Advances and the Ohio Rules of Professional Conduct

A lawyer has asked the Board to identify the ethical obligations for lawyers whose clients enter into non-recourse civil litigation advance contracts pursuant to R.C. 1349.55. Under the Ohio Rules of Professional Conduct, four of a lawyer’s general duties are of particular importance in a client relationship during which the client seeks a civil litigation advance: candid advice and communication, independent professional judgment, competence, and confidentiality. Some ALF transactions may create conflict of interest problems for lawyers if they are a participant in the transaction itself. This Opinion only addresses non-recourse civil litigation advance contracts between a client and an ALF provider. For guidance on ALF transactions involving lawyers, the following opinions of the Board should be consulted: Ohio Sup. Ct., Bd. of Comm’rs on Grievances and Discipline, Op. 2004-2 (June 3, 2004) (improper for lawyer, upon settlement, to sell or assign a legal fee to a funding provider in exchange for immediate payment at a small discount of the fee); Ohio Sup. Ct., Bd. of Comm’rs on Grievances and Discipline, Op. 2002-2 (Apr. 5, 2002) (lawyers discouraged from facilitating client loans that benefit both a lender and a consulting provider with which the lawyer has a business relationship); Ohio Sup. Ct., Bd. of Comm’rs on Grievances and Discipline, Op. 2001-3 (June 7, 2001) (law firms may obtain loans to advance expenses of litigation and deduct fees and costs of the loan from the client’s settlement); Ohio Sup. Ct., Bd. of Comm’rs on Grievances and Discipline, Op. 94-11 (Oct. 14, 1994) (lawyers cannot agree to pay a financing provider a percentage of their legal fee in exchange for a loan to the client).

⁷ Professor Stephen Gillers has suggested that the Court may see R.C. 1349.55 as “an intrusion on its inherent power to regulate the bar.” Gillers, *Waiting for Good Dough: Litigation Funding Comes to Law*, 43 Akron L.Rev. 677, notes 15 and 101 (2010).

Candid Advice and Communication

Ohio lawyers may encounter clients at various points of connection with ALF providers. A client may see commercials sponsored by these providers on late-night television and seek their lawyer's guidance on obtaining a civil litigation advance to pay medical bills or living expenses during the pendency of their civil case. Some clients may approach an ALF provider on their own, sign a contract, and ask their lawyer to execute the acknowledgment required by R.C. 1349.55(B)(6). Yet another category of clients may want general advice on financing options if they are unable to earn a living due to injuries suffered in an accident and a lengthy settlement negotiation is expected. In all of these situations, the lawyer must function as the client's advisor.

The lawyer's role as advisor is set forth in Prof.Cond.R. 2.1: "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." The Official Comment to Prof.Cond.R. 2.1 provides further insight on the lawyer's obligation to provide complete advice to clients. Comment [1] states that legal advice may involve "unpleasant facts and alternatives," and Comments [2] and [3] indicate that legal advice may require practical considerations such as costs, especially with clients inexperienced in legal matters. Further, Comment [5] allows lawyers to "initiate advice to a client when doing so appears to be in the client's best interest." The language of Rule 2.1 and the comments indicate that technical legal advice alone may provide little benefit to a client focused upon difficulties such as the inability to earn a living after sustaining injuries in an accident.

Related to the lawyer's duty to provide candid advice is the obligation to engage in proper communication with the client. Under Prof.Cond.R. 1.4(a), a lawyer shall promptly inform the client of decisions requiring informed consent, consult with the client on the means to accomplish the client's objectives, keep the client reasonably informed, comply with reasonable requests for information, and consult with the client about limitations on the representation imposed by the Rules of Professional Conduct. A lawyer must also "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Prof.Cond.R. 1.4(b).

To render candid advice and communicate in accordance with Prof.Cond.R. 1.4 and 2.1, a lawyer who is aware that his or her client needs financial assistance due to the injuries sustained in the underlying accident or tort should make the client aware of the options available. It is not improper to present a non-recourse civil litigation advance as one of the possible alternatives. In fact, the Board has already concluded that a lawyer may reference ALF providers as a choice for clients, and the ethics authorities in a number of other states agree. *See* Op. 94-11, *supra*; ABA Commission on Ethics 20/20, Informational Report, at notes 84, 85. However, the lawyer may not blindly refer clients to ALF providers. If a lawyer references a non-recourse civil litigation advance, or has a client inquiring about, or even demanding one, the lawyer must provide sufficient information on the risks and benefits of such an advance. The lawyer should be further prepared to make a recommendation to the client as to whether a non-recourse civil litigation advance is in the client's best interest based upon the facts and circumstances unique to the client's legal matter.

R.C. 1349.55(B)(5) requires non-recourse civil litigation advance contracts to contain a statement in which the client acknowledges that his or her lawyer has not provided tax, benefit planning, or financial advice concerning the transaction. Although the client disclaims this advice in the contract, R.C. 1349.55 requires a written acknowledgment by the lawyer stating that he or she has reviewed the contract and determined that all costs and fees have been disclosed including the annualized rate of return. Given this acknowledgment and the lawyer's ethical duties to advise and communicate, the contract review must incorporate a frank discussion with the client about the contract terms and the true cost of the advance. Because most non-recourse civil litigation advance contracts are structured such that the consumer's financial obligation under the contract increases as the time to recovery increases, the lawyer should make the client aware that the contract may create an incentive for the client to accept a premature or inadequate offer of settlement.

Finally, the Board advises lawyers to be cognizant of their role in the ALF transaction. If a lawyer goes beyond the statutorily-required ALF contract review and the accompanying discussion of the contract terms with the client and becomes an active participant in the transaction itself, the lawyer must consider the applicability of Prof.Cond.R. 1.8. Under Prof.Cond.R. 1.8(a), a lawyer may not enter into a business transaction with a client or acquire a pecuniary interest adverse to a client unless: 1) the transaction terms are fair and reasonable and fully disclosed to the client in writing; 2) the lawyer advises the

client to have independent counsel review the transaction and provides the client an opportunity for such review; and 3) the client consents in writing to the transaction terms and the lawyer's role in the transaction. "Where the lawyer represents the client in negotiations with the ALF supplier, and where the terms of the agreement may affect the rights the lawyer and client have, vis-à-vis one another, in the proceeds of any recovery...[s]uch a case likely involves the lawyer acquiring a 'pecuniary interest adverse to a client,' triggering the requirements of [Prof.Cond.R. 1.8(a)]." ABA Commission on Ethics 20/20, Informational Report, at 18-19.

Independent Professional Judgment

While providing candid advice and communicating with the client in a way that promotes informed decision making, lawyers shall exercise "independent professional judgment." Prof.Cond.R. 2.1. If the client has decided to obtain a non-recourse civil litigation advance, the lawyer must ensure that the ALF provider does not attempt to dictate the lawyer's representation of the client. As noted above, R.C. 1349.55(B)(3) requires non-recourse civil litigation advance contracts to contain a disclaimer stating that the provider does not have a right to make decisions regarding the underlying civil case and that such decisions belong to the consumer and their lawyer. As part of the contract review referenced in the R.C. 1349.55(B)(6) acknowledgment, the lawyer must verify that the disclaimer is present and discuss the language with the client. The lawyer should explain that the Rules of Professional Conduct obligate the lawyer to provide independent professional judgment throughout the representation and that any attempt by the ALF provider to interfere with the lawyer's judgment may require the lawyer to withdraw from the representation. *See* Prof.Cond.R. 1.16(a) (a lawyer shall withdraw if the representation will result in a violation of the Rules of Professional Conduct). Also during the representation, the lawyer is advised to monitor the ALF provider's influence on the client especially in regard to the decision to settle the underlying civil case.

The lawyer's written acknowledgment is a central part of the consumer protection provisions contained in R.C. 1349.55. The Board has been informed that because the acknowledgment is a statutory requirement, ALF providers often provide a boilerplate acknowledgment for the lawyer to sign. The Board advises lawyers to carefully scrutinize the proposed acknowledgment language, confirm that it complies with R.C. 1349.55(B)(6)(a)-(d), and execute the acknowledgment only if it accurate as to the current representation. If the

boilerplate acknowledgment contains provisions in addition to those set forth in R.C. 1349.55(B), before signing the acknowledgement the lawyer should verify that he or she is not agreeing to forego independent professional judgment or commit other violations of the Rules of Professional Conduct. As part of an effort to secure acknowledgment language that satisfies R.C. 1349.55 and the Rules of Professional Conduct, a lawyer may consider offering an addendum to the ALF provider's standard acknowledgment or draft his or her own acknowledgment for inclusion in the contract.

Competence

Lawyers must provide "competent representation" to clients, which "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Prof.Cond.R. 1.1. Competent representation may be provided through "necessary study" or associating with a lawyer who has expertise in the area in question and includes "adequate preparation." Prof.Cond.R. 1.1, Comments [2] and [5]. Further, lawyers "should consult with the client about the degree of thoroughness and the level of preparation required, as well as the estimated costs under the circumstances." *Id.*

As previously discussed, Prof.Cond.R. 2.1 requires a lawyer to provide candid advice to clients who wish to obtain a non-recourse civil litigation advance. Under Prof.Cond.R. 1.1, the lawyer must also be able to competently advise clients concerning such advances. If the lawyer is not familiar with the advance contracts regulated by R.C. 1349.55, he or she must take steps necessary to ensure the client receives competent legal advice. These steps may include reviewing legal resources to learn more about civil litigation advance contracts⁸, consulting with a lawyer who has experience with consumer litigation funding, or referring the client to another lawyer for advice on the transaction.

⁸ Legal scholars, commentators, and regulators have written extensively on consumer litigation funding, giving lawyers numerous options for study in this area. See, e.g., Garber, *supra*; ABA Commission on Ethics 20/20, Informational Report, *supra*; Hashway, *Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances Within the Protection of Usury Laws*, 17 Roger Williams Univ. L.Rev. 750 (2012); DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup*, 80 Fordham L.Rev. 2791 (2012); Pardau, *Alternative Litigation Financing: Perils and Opportunities*, 12 U.C. Davis Bus.L.J. 65 (2011); Gillers, *supra*.

Confidentiality

One of the hallmarks of the lawyer-client relationship is the duty of confidentiality detailed in Prof.Cond.R. 1.6. Rule 1.6(a) provides that “a lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent * * *.” The confidentiality rule “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” Prof.Cond.R. 1.6, Comment [3]. Although Rule 1.6 contains several exceptions to the general duty of confidentiality, this Advisory Opinion assumes that an exception does not apply.

Upon a consumer’s initial application for a non-recourse civil litigation advance, the ALF provider conducts a case review to determine the potential recovery amount. As part of the case review, the provider typically contacts the consumer’s lawyer and requests documentation that may include the retainer agreement, police or accident reports, proof of insurance, and medical records. Some providers require the consumer’s lawyer to complete a questionnaire regarding the case.⁹

The duty of confidentiality found in Prof.Cond.R. 1.6 encompasses all information related to the representation of a client. Accordingly, a lawyer may not provide any information or documentation concerning a representation to an ALF provider without the client’s informed consent. Because Prof.Cond.R. 1.6 fails to contain an exception for information that is publicly available, the lawyer must obtain informed consent even for records that may be maintained in a repository of public records (such as police or accident reports). Bennett, Cohen & Whittaker, *Annotated Model Rules of Professional Conduct*, 97 (7th Ed. 2011). Additionally, Prof.Cond.R. 1.6 prohibits a lawyer from disclosing a client’s identity unless the disclosure is impliedly authorized or the client consents. *Id.* at 98. Should a lawyer receive a request for information from an ALF provider before the client notifies the lawyer that the client applied for an advance, the lawyer must secure the client’s consent prior to identifying the client to the provider.

⁹For general information on the application process, see ABA Commission on Ethics 20/20, Informational Report, at 30 and notes 115-118.

Informed consent is defined as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of action.” Prof.Cond.R. 1.0(f). This language demonstrates that a lawyer must do more than simply obtain permission from the client to release information concerning the representation to an ALF provider or rely on a waiver executed by the client. An explanation of the risks of disclosing information to the provider must be part of the process of obtaining informed consent. One significant risk of providing representation information to an ALF provider is the waiver of attorney-client privilege. *See* ABA Commission on Ethics 20/20, Informational Report, *supra*, at 36. The concepts of privilege and waiver are legal doctrines beyond the scope of the Board’s advisory authority. *See* BCGD Proc.Reg. 20(A)(4); Ohio Sup. Ct., Bd. of Comm’rs on Grievances and Discipline, Op. 2000-1 (June 1, 2000) at 5. Although the Board cannot address the specifics of privilege and waiver, Prof.Cond.R. 1.4 and 2.1 clearly obligate the lawyer to explore the possible waiver of privilege with the client and explain the potential consequences of a waiver before securing an informed consent. For a discussion of attorney-client privilege in the context of ALF, *see* ABA Commission on Ethics 20/20, Informational Report, at 32-35.

The Board recognizes that Prof.Cond.R. 2.3(a) permits a lawyer to “agree to provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.” This provision presumably allows a lawyer to provide a case evaluation to an ALF provider if the lawyer has determined that the evaluation is compatible with the lawyer-client relationship. Rule 2.3 does not give the lawyer an unlimited ability to engage in outside evaluations. Under Prof.Cond.R. 2.3(b), if the evaluation is “likely to affect the client’s interests materially and adversely,” the lawyer must obtain the client’s informed consent before providing the evaluation. Again, there is a significant risk that disclosure of information to an ALF provider about a client representation will constitute a waiver of attorney-client privilege. Like Prof.Cond.R. 1.6, then, Prof.Cond.R. 2.3(b) also requires informed consent prior to participation in a case evaluation for an ALF provider. Prof.Cond.R. 2.3 does not eradicate the confidentiality requirements of Prof.Cond.R. 1.6, and even after providing an evaluation of a case for an ALF provider, the lawyer may not disclose additional client information to the provider or a third party without the client’s informed consent. Prof.Cond.R. 2.3(c).

CONCLUSION: Ohio lawyers may inform clients of the non-recourse civil litigation advances that are offered by alternative litigation finance (ALF) providers and regulated by R.C. 1349.55. If the client pursues such an advance, lawyers must recognize the ethical obligations the transaction creates.

Under Prof.Cond.R. 1.4 and 2.1, the lawyer shall communicate with the client about the transaction and provide candid advice, including a review of the true cost of the advance and the impact it may have on a potential settlement. Pursuant to Prof.Cond.R. 1.1, the lawyer must be able to provide competent advice regarding a civil litigation advance, which may require outside study, consultation with a lawyer with experience in consumer litigation funding, or a referral to another lawyer for an independent review of the contract.

Additional ethical considerations are the duties of independent professional judgment and confidentiality found in Prof.Cond.R. 1.4 and 1.6, respectively. When a client decides to pursue a civil litigation advance, the lawyer shall ensure that his or her independent professional judgment is not influenced by the ALF provider. The lawyer may not reveal the client's identity to an ALF provider or disclose information about the representation without securing the client's informed consent. The process of obtaining informed consent to share information with an ALF provider must include a discussion concerning the potential waiver of attorney-client privilege and the consequences of such a waiver. Like the release of confidential client information to an ALF provider, rendering a case evaluation for an ALF provider pursuant to Prof.Cond.R. 2.3 requires informed consent because the evaluation may materially and adversely affect the client's interests.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.