

HEADLINE: Proposed Formal Opinion Interim No. 14-0002 (Alternative Litigation Funding)

SUBHEAD: The State Bar seeks public comment on Proposed Formal Opinion Interim No. 14-0002 (Alternative Litigation Funding).

Deadline: January 17, 2020

Background

The State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) is charged with the task of issuing advisory opinions on the ethical propriety of hypothetical attorney conduct. In accordance with State Bar policy and procedure, the Committee shall publish proposed formal opinions for public comment (See, State Bar Board of Trustee Resolutions July 1979 and December 2004. See also, Board of Trustee Resolution November 2016).

On May 10, 2018, the California Supreme Court issued [an order](#) approving 69 new Rules of Professional Conduct, which will go into effect on November 1, 2018. Information about the new rules is available at the [State Bar website](#). Proposed Formal Opinion Interim No. 14-0002 interprets the new Rules of Professional Conduct.

Discussion/Proposal

Proposed Formal Opinion Interim No. 14-0002 considers: What ethical obligations arise when a lawyer represents a client whose case is being funded by a third-party litigation funder?

The opinion interprets rules 1.1, 1.4, 1.6, 1.7, and 1.8.6 of the Rules of Professional Conduct of the State Bar of California; and Business and Professions Code sections 6068(a) and 6106.

The opinion digest states: Two types of third-party litigation funding have emerged over the last several years: consumer litigation funding, which provides funds to a plaintiff with personal injury claims, typically for personal use rather than to fund their case, and commercial litigation funding, which typically involves advancing significant amounts to the plaintiff to pay litigation expenses or otherwise. Both types of funding are non-recourse. This opinion addresses the ethical issues that arise for lawyers whose clients enter into such funding arrangements. The principal ethical issues are maintaining independent professional judgment and complying with the lawyer's duty of confidentiality. If the lawyer has a material interest in the client obtaining funding, the lawyer must disclose that interest and seek the client's informed written consent prior to advising on the subject. In commercial funding arrangements, the funding agreement will likely be negotiated. If the client asks the lawyer to represent him or her in such negotiations, the lawyer should consider whether he has the experience or learning required as

well as whether the lawyer has any personal interest that creates a conflict. If so, the lawyer must address those by a written disclosure that describes the relevant circumstances and material risks and then obtain the client's written consent. If the funder seeks client confidential information, the lawyer must advise the client of the risks of disclosure and obtain the client's informed consent to disclose confidential information to the funder. The lawyer should also take appropriate steps to limit the risks to the client that the disclosure of such information will effect a waiver of attorney-client privilege or work product protection which may include having the funder sign a non-disclosure agreement, appropriate labeling of shared materials as confidential or taking other steps to maintain the confidentiality of the shared materials.

At its September 6, 2019 meeting and in accordance with its Rules of Procedure, the State Bar Standing Committee on Professional Responsibility and Conduct tentatively approved Proposed Formal Opinion Interim No. 14-0002 for a 90-day public comment distribution.

Any fiscal/personnel impact

None

Background material

Proposed Formal Opinion Interim No. 14-0002

Source

State Bar Standing Committee on Professional Responsibility and Conduct

Deadline

January 17, 2020

Direct comments to

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**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 14-0002
ALTERNATIVE LITIGATION FUNDING**

ISSUES: What ethical obligations arise when a lawyer represents a client whose case is being funded by a third-party litigation funder?

DIGEST: Two types of third-party litigation funding have emerged over the last several years: consumer litigation funding, which provides funds to a plaintiff with personal injury claims, typically for personal use rather than to fund their case, and commercial litigation funding, which typically involves advancing significant amounts to the plaintiff to pay litigation expenses or otherwise. Both types of funding are non-recourse. This opinion addresses the ethical issues that arise for lawyers whose clients enter into such funding arrangements. The principal ethical issues are maintaining independent professional judgment and complying with the lawyer's duty of confidentiality. If the lawyer has a material interest in the client obtaining funding, the lawyer must disclose that interest and seek the client's informed written consent prior to advising on the subject. In commercial funding arrangements, the funding agreement will likely be negotiated. If the client asks the lawyer to represent him or her in such negotiations, the lawyer should consider whether he has the experience or learning required as well as whether the lawyer has any personal interest that creates a conflict. If so, the lawyer must address those by a written disclosure that describes the relevant circumstances and material risks and then obtain the client's written consent. If the funder seeks client confidential information, the lawyer must advise the client of the risks of disclosure and obtain the client's informed consent to disclose confidential information to the funder. The lawyer should also take appropriate steps to limit the risks to the client that the disclosure of such information will effect a waiver of attorney-client privilege or work product protection which may include having the funder sign a non-disclosure agreement, appropriate labeling of shared materials as confidential or taking other steps to maintain the confidentiality of the shared materials.^{1/}

^{1/} Within commercial funding, there are also arrangements where the lawyer or law firm is funded rather than the client, often in the form of portfolio funding for a group of cases. The discussion in this opinion is limited to the ethical issues that arise in funding arrangements where the funder provides funds directly to the client.

AUTHORITIES

INTERPRETED: Rules 1.1, 1.4, 1.6, 1.7(b), and 1.8.6 of the Rules of Professional Conduct of the State Bar of California.^{2/}

STATEMENT OF FACTS

Scenario 1: Lawyer represents Client with personal injury claim who is in need of money for living expenses. Lawyer advises Client that she may qualify for litigation funding and provides Client with a list of funders that Lawyer's clients have used. The funder has an arrangement by which it pays the attorney \$500 for each referral. At Client's request, Lawyer reviews the agreement and explains its terms carefully, emphasizing that the interest rate on the loan is high, there is also a large administrative fee, and the client might be able to get a bank loan at a lower rate. Despite this advice, Client enters into the funding agreement.

Scenario 2: Client, a company asserting a patent claim, is interested in litigation funding to avoid tying up its cash in legal fees. Lawyer has extensive experience with third-party funding and recommends a funder with which the firm has worked previously. Prior to agreeing to fund the case, Funder asks for a memo assessing the strengths of Client's case. Lawyer tells Funder that Lawyer will seek Client's consent to share this information. Lawyer advises Client there is some risk that sharing the memo could waive applicable privileges, that the risk is lessened if the information is communicated under a non-disclosure agreement ("NDA"), and that Client must also consider that Funder will probably not fund the case without receiving Lawyer's assessment of the strength of the claims. Client authorizes Lawyer to share the memo. Because of prior good experience with Lawyer, Funder agrees to fund Client's case. Lawyer is able to negotiate a better than standard deal for client because of Lawyer's relationship with the funder. Under the terms of the deal, Funder funds a portion of Lawyer's fees (the Lawyer is on a partial contingency) and pays litigation expenses. Funder has the right to cease funding if it disagrees with the direction of the litigation. The funding agreement also gives funder the right to review and approve any change in counsel, which approval will not be unreasonably withheld. Over the course of the litigation, funder's employees communicate regularly with Lawyer. Client does not actively participate in the litigation, instead leaving the case to its counsel to handle because Client is busy running its business.

^{2/} Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California in effect as of November 1, 2018.

INTRODUCTION: LITIGATION FUNDING AND ITS ANTECEDANTS

In this opinion, we consider the ethical issues an attorney may face when representing a client that has entered into a contract with a litigation funder. Litigation funding is the practice where a third party unrelated to the lawsuit provides funds to a plaintiff involved in the litigation in return for a portion of any financial recovery.

The type of third-party litigation funding addressed by this opinion is a relatively recent development in the United States, although more common and accepted elsewhere.^{3/} The ethics and social utility of this type of litigation funding is the subject of debate. Some have raised concerns that litigation funding will lead to frivolous lawsuits or that vulnerable clients may be forced to accept unfair deals.^{4/} Others argue litigation funding in the United States promotes access to justice and/or diversifies thinking about litigation.^{5/}

Other arrangements by which an individual or entity other than the client pays the client's legal fees, such as contingency fee arrangements and liability insurance, are well established in the United States. These arrangements also present ethical issues. For example, in a contingency fee arrangement, the lawyer has a personal financial interest in the outcome of the case that could lead to a conflict of interest between the lawyer and client. They have been authorized and widely accepted because such arrangements are perceived to serve an important policy function of providing access to the legal system to those without substantial resources to pursue a claim. Cal. State Bar Formal Opn. No. 1987-94 ("[I]n California, our Legislature has decreed that contingency fee agreements, which otherwise involve inherent conflicts of interests (as arguably do other forms of attorney compensation) are exempt from the effect of conflict of interest rules because of public policy . . .").

Similarly, the duties of confidentiality and loyalty to a client may conflict with the obligation to report significant developments to a third-party liability insurer under the so-called "tripartite relationship." For example, when an attorney learns facts in confidence that the attorney believes may negatively affect an insured client's eligibility for coverage, a lawyer may not take action detrimental to the interests of the client, which includes the disclosure of information harmful to a client's interests, even in a tripartite relationship. (See, e.g., *Purdy v. Pacific Automobile Ins. Co.* (1984) 157 Cal.App.3d 59, 76 [203 Cal.Rptr. 524]; *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1411-1412 [120 Cal.Rptr.2d 392].)

^{3/} Barker, *Third-Party Litigation Funding in Australia and Europe* (2012) 8 J.L. Econ. & Pol'y 451.

^{4/} See, e.g., Langford, *Betting on the Client: Alternative Litigation Funding Is An Ethically Risky Proposition for Attorneys and Clients* (2015) 49 U.S.F. L.Rev. 237.

^{5/} See, e.g., Steinitz, *Whose Claim Is This Anyway? Third Party Litigation Funding* (2011) 95 Minn. L.Rev. 1268 (hereafter *Whose Claim*); DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup* (2012) 80 Fordham L.Rev. 2791.

The purpose of this opinion is not to enter the normative debate about litigation funding but rather to provide guidance to attorneys as to the ethical issues that arise when dealing with a case that involves third-party funding.

DISCUSSION

Legality

In some states, agreements between a litigant and a stranger to the litigation by which the stranger pursues or assists in pursuing the litigant's claim and in return receives part of any recovery are prohibited under laws against champerty and maintenance. These are legal doctrines dating from the Medieval England that developed to prevent feudal lords from financing other individuals' legal claims against the financier's political or personal enemies.

Courts in states with laws against champerty and maintenance have considered whether litigation funding arrangements violate those laws. See *Charge Injection Technologies, Inc. v. E.I. DuPont De Nemours & Company* (2016) 2016 WL 937400 (finding that litigation funding contract did not violate Delaware's common law prohibition on champerty and maintenance because the funder did not exercise control over litigation); *Maslowski v. Prospect Funding Partners LLC* (2017) 890 N.W.2d 756 (finding that litigation funding agreement was unenforceable by Minnesota law against champerty. California has never recognized prohibitions against champerty or its variants. See, *In re Cohen's Estate* (1944) 66 Cal.App.2d 450 [152 P.2d 485].^{6/} Such laws should not be a barrier to a litigation funder enforcing a litigation funding contract in California.^{7/}

Duty of Competence, Duty to Advise and Duty to Communicate

A lawyer has a duty to provide competent representation which includes possessing the necessary learning and skill required for the representation. Rule 1.1. Competence "requires an attorney to keep abreast of changes in the law and its practice." Cal. State Bar Formal Opn. No. 2015-193. A lawyer also has a duty to communicate with the client about the means by which to accomplish the client's objectives in the representation. Rule 1.4. To the extent the client's ability to accomplish its objectives depends on the client's ability to fund the litigation or fund

^{6/} An arrangement that gives a funder significant control over litigation strategy may implicate the lawyer's duty of independent professional judgment even if it would not run afoul of non-existent prohibitions on champerty or maintenance.

^{7/} See also, Los Angeles County Bar Assn. Formal Opinion No. 500 (1999) [explaining that doctrines of champerty and maintenance have not been recognized by California courts and the concerns those doctrines are addressed by other protections including sanctions for frivolous lawsuits and malicious prosecution actions].

the client's personal expenses while proceeding with the litigation, the lawyer's representation of the client may involve advising the client as to whether litigation funding would assist in accomplishing the client's goals. Such advice would likely need to include a discussion of the pros and cons of obtaining litigation funding and alternatives, if any.

Furthermore, a lawyer representing a client in a matter funded by a litigation funder has an obligation to understand how the funding agreement impacts the litigation and advise the client. If the client asks the lawyer to advise on or negotiate a litigation funding contract, the lawyer must either have the expertise to do so, obtain such experience, or decline to provide the requested advice regarding litigation funding. See rule 1.1(c). But regardless of whether the attorney is advising her client on the funding contract, she must understand how the terms of the funding agreement impact decisions in the litigation.

Independent Professional Judgment

Rule 1.7 prohibits a lawyer from representing a client if there is a significant risk that the representation will be materially limited by the lawyer's relationships with a third person or the lawyer's own interest without informed written consent. Rule 1.7(b). The lawyer must also reasonably believe that he can provide competent and diligent representation notwithstanding the potential conflict or relationship with a third person. Rule 1.7(d).

Rule 1.8.6 prohibits a lawyer from entering into an agreement for or accepting compensation for representing a client from one other than the client unless the client gives informed written consent, the lawyer complies with the lawyer's duty of confidentiality, and the payment arrangement will not interfere with the lawyer's independent professional judgment or with the lawyer-client relationship. Although the rule will not apply in an arrangement where the funder pays the client directly and not the lawyer, it is nonetheless instructive. The rule reflects the recognition that the source of the lawyer's payment is likely to have influence over the lawyer. Litigation funding, like a third-party payor, introduces a third party with its own interests into the lawyer-client relationship, posing risks to the lawyer's independent professional judgment and the relationship of confidence between the lawyer and client. The duty of loyalty and independent professional judgment require the lawyer to act in the client's interest at all times and particularly where the client's interest might depart from the funder's.

The lawyer's independent professional judgment may also be impaired if the funding arrangement imposes limitations on the how the case is litigated. Some ethics committees have suggested that there could be circumstances in which a funding agreement imposes such limitations on the attorney's judgment that the lawyer might not be able to competently represent the client. ABA Commission on Ethics 20/20, Informational Report to the House of Delegates 23 (2012); Ohio Sup. Ct. Ethics Opn. No. 2012-3 (lawyer must ensure the alternative litigation funding company providing nonrecourse loan to client "does not attempt to dictate the lawyer's representation of the client"). Others have suggested that such arrangements are permissible with client consent. Assn. of the Bar of the City of N.Y. Com. on Prof. and Jud. Ethics, Formal Opn. No. 2011-02 (client may "agree to permit a financing company to direct strategy or other aspects of a lawsuit" and the lawyer is not prohibited from acceding to the

funder's direction as long as the client consents); cf. ABA Formal Opn. No. 01-421 (lawyer hired by insurer to represent insureds may not comply with insurer's guidelines or directives relating to representation if these would "impair materially the lawyer's independent professional judgment").

COPRAC does not reach a general conclusion that any particular degree of control is per se unethical. However, it is clear that where the funder has some degree of control of the litigation, the lawyer has an obligation to advise the client about the impact of such limitations on the lawyer's representation. Rule 1.4; see also ABA Formal Opn. No. 01-421 (where lawyer represents insured and the insurer imposes limitations on the representation, lawyer must communicate limitations to the client early in the representation).

A lawyer's duties are not dictated by the funding contract but by the lawyer's ethical duties. ABA Formal Opn. No. 96-403 illustrates this principle in the context of an insurance agreement. The opinion considers the ethical obligations of an attorney retained by an insurer to represent the insured pursuant to a contract that gave the insured control over settlement within policy limits where the client objects to the proposed settlement. The ABA opined that the lawyer could not settle against his client's wishes. Instead, the lawyer was obligated to discuss with the client, the client's legal rights, explain the consequences of rejecting the settlement and let the client decide.

This opinion stands for the proposition that the contract between the client and a third party relating to the conduct of litigation may be a fact that impacts the advice the lawyer gives his client, but it does not alter the lawyer's ethical obligation to pursue the client's best interest. *Id.* ("Whatever the rights and duties of the insurer and insured under the insurance contract, that contract does not define the ethical responsibilities of the lawyer to his client.") See also, Md. State Bar Ass'n, Comm. on Ethics Opn. No. 00-45 (opining that where the client wishes to terminate a lawyer, the lawyer must abide by the client's wishes regardless of whether the client's terminating the lawyer is a breach of the funding agreement).

Protecting Confidential Information

In order to determine whether to invest in a case, funders will likely require information about the case at the outset. A prospective funder may ask for the attorney's analysis of the merits of the case or other privileged materials. Once a funder has agreed to fund the case, that agreement will likely be memorialized in a contract which may reflect how the funder values the case which is likely to be based on the attorney's analysis. As the case proceeds, there may continue to be communications between the funder and client or between the funder and the client's counsel.^{8/}

^{8/} The Standing Order For All Judges of the Northern District of California, Contents of Joint Case Management Statement requires disclosure of the identity of any person or entity that is funding prosecution of a claim or counterclaim in a proposed class, collective or representative action.

Rule 1.6 prohibits a lawyer from sharing confidential information without the client's informed consent. In order for the client's consent to be informed, the lawyer must inform the client about "the relevant circumstances and the material risks, including any actual and reasonably foreseeable adverse consequences." Such risks include the client's adversary may seek to compel communications between the funder and the client or lawyer and a court may hold that the sharing effected a waiver of otherwise available evidentiary privileges.

Application to Hypothetical Scenarios

Scenario 1

In Scenario 1, Client with a personal injury claim entered into a funding agreement to pay his living expenses while his lawsuit is ongoing. Lawyer recommended that Client explore litigation funding, but also after reviewing the terms of the funding agreement, advises Client accurately about the downsides of the funding including that Client might be able to get a bank loan at a lower rate. Lawyer did not disclose to Client that Lawyer will receive a \$500 referral fee. Did Lawyer meet his ethical duties in each of these steps?

First, there is nothing unethical about a lawyer recommending a client consider litigation funding as long as there is no legal bar to the client entering into such a transaction. This Committee has previously opined that a lawyer may refer a client to a real estate broker to obtain a loan to be used for legal fees. Cal. State Bar Formal Opn. No. 2002-159. Similarly, a lawyer may ethically provide information and introductions to a litigation funder.

In Scenario 1, the Client asked the Lawyer to review the terms of the funding agreement and the Lawyer gave Client an independent and objective assessment. The fact pattern is silent on the Lawyer's experience reviewing litigation funding agreements. The Lawyer must consider whether Lawyer has the skills necessary to advise the client and, if not, either tell Client it is outside the Lawyer's expertise, obtain the necessary understanding of litigation financing in order to adequately advise Client regarding the agreement proposed, or consult with another lawyer he reasonably believe has the requisite expertise. Rule 1.1.

The facts state that Lawyer receives a \$500 payment from the funder if Client enters into the agreement. Lawyer thus has a personal interest in Client entering into the funding agreement that presents a significant risk that Lawyer's ability to provide independent advice to Client will be materially limited. Accordingly, Lawyer must comply with rule 1.7(b). Lawyer must disclose the referral fee to Client (i.e. the relevant circumstances) and all material risks including the fact that Lawyer's personal interest in receiving the fee may interfere with Lawyer's ability to provide independent advice to Client. Furthermore, in providing this information to Client, the

Lawyer must explain the matter to the extent reasonably necessary to permit Client to make an informed decision. Rule 1.4(b).^{9/}

In addition to obtaining informed written consent, rule 1.7(d) requires that Lawyer reasonably believe that Lawyer can provide Client with diligent and competent representation notwithstanding the rule 1.7(b) conflict. In this scenario, Lawyer must reasonably believe that the fee from the funder does not undermine his independent professional judgment in advising the client on whether to obtain funding. There is nothing in the fact pattern that suggests that Lawyer improperly tried to influence the client to enter into a funding agreement. On the contrary, it appears that Lawyer appropriately highlighted the negative consequences.

Scenario 2

In Scenario 2, Lawyer advises Client on choice of funder and negotiates the funding contract on behalf of Client. Does Lawyer have a conflict in providing these services? The facts state that the Lawyer has a preexisting relationship with funder, that funder will be partially paying the law firm's fees and that certain terms of the funding agreement are advantageous to the law firm. Under rule 1.7, if any of those circumstances or their combination creates a significant risk that Lawyer's advice on the choice of funder or funding contract terms is materially limited by Lawyer's own interests, Lawyer is required to advise the client of the facts and seek the client's consent. See also, *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 546-47 [28 Cal.Rptr.2d 617] (lawyer must evaluate whether the relationship creates a "situation in which [he or she] might compromise his or her representation in order to advance the attorney's own financial or personal interests"). In addition, Lawyer owes Client a duty to communicate material facts concerning the representation. Rule 1.4. Lawyer's existing relationship with funder is a material fact.

Rule 1.8.1 applies where a lawyer obtains a pecuniary (financial) interest *adverse to the client*. There is nothing adverse to a client about a lawyer getting paid for legal services. See Cal. State Bar Formal Opn. No. 2002-159, n.3 ("Although the lawyer does receive some benefit from the escrow arrangement—she is assured that there are funds available to pay her fees and costs—this is no different from the benefit the lawyer receives by requiring an advance fee and placing it in her trust account. The lawyer, by requiring an advanced fee, does not thereby come within

^{9/} In a prior opinion, this Committee concluded that receiving a referral fee from an insurance agent for referring the client constituted a business transaction with a client requiring the lawyer to comply with rule 1.8.1 (formerly rule 3-300). Cal. State Bar Formal Opn. No. 1995-140. Here, the Committee concludes that compliance with rule 1.7(b), which requires the lawyer to make a written disclosure and obtain the client's written consent, provides sufficient protection for the client and that rule 1.7(b) is a better fit with the circumstances than rule 1.8.1. The Committee notes that when its prior opinion was written, the then-current Rules of Professional Conduct would have only required that the lawyer disclose a financial relationship with a third party but did not require informed written consent. Under those circumstances, requiring compliance with rule 3-300 was the only way to ensure that the lawyer obtain informed written consent.

rule 3-300.”). Thus, the rule does not apply merely because the arrangement permits a lawyer to get paid its fees. On the other hand, if a lawyer owns a share in the litigation funding company, the funding arrangement would constitute a business transaction with the client and the lawyer would be obliged to comply with rule 1.8.1.

Impact on Attorney’s Duty of Confidentiality

According to the facts of Scenario 2, Lawyer shares a legal analysis memo with funder after funder signed an NDA. Lawyer also engages in communications with funder about the progress of the case. These activities implicate Lawyer’s ethical obligation to maintain the confidentiality of information learned in the course of the representation and to apply diligence, learning and skill to avoid adverse consequences, such as a waiver of privileges and protections to which the clients is entitled.

Case law concerning whether funding agreements and communications with funders are privileged is still developing. Most but not all courts that have considered the question have held that work product does not lose its work product status because an attorney or client shares that work product with a funder.^{10/} That is because work-product protection is only subject to waiver based on disclosure to a third party where the disclosure “substantially increase[es] the possibility that an opposing party will obtain the information.” 2 Mueller & Kirkpatrick, *Federal Evidence* (4th ed. 2016) § 5:38. Taking steps to ensure that the funder will keep all information it receives confidential such as by entering into a confidentiality agreement and/or marking documents appropriately will decrease the risk that a court will find that work product is waived. Such steps are therefore consistent with Lawyer’s ethical duty to safeguard confidential information. However, particularly because case law is still developing, Lawyer should also inform Client of the risks of waiver and obtain the Client’s consent.

Under Scenario 2, Lawyer communicates frequently with the funder about the case. Lawyer has an obligation to consider whether such communications may be discoverable, advise Client as

^{10/} See, e.g., *Miller UK Ltd. v. Caterpillar, Inc.* (N.D. Ill. 2014) 17 F.Supp.3d 711, 738 (rejecting claim of common interest exception to waiver of attorney-client privilege but holding that sharing with funder did not waive work product because disclosure did not substantially increase the likelihood that an adversary would obtain the materials where claimant had oral and written confidentiality agreements with prospective and actual funders); see also *Mondis Technology, Ltd. v. LG Electronics, Inc.* (E.D. Tex. 2011) 2011 WL 1714304 (no waiver of work product protection for documents shared with potential investors subject to non-disclosure agreements). But see *Leader Technologies, Inc. v. Facebook, Inc.* (D. Del. 2010) 719 F.Supp.2d 373, 376-77 (work product protection waived by sharing with funder). See also DeStefano, *Claim Funders and Commercial Claim Holders: A Common Interest or a Common Problem?* (2014) 63 DePaul L.Rev. 305 (favoring common interest attorney-client privilege and work product protection for collaborative work and communications between funders and claim holders); Giesel, *Alternative Litigation Finance and the Work–Product Doctrine* (2012) 47 Wake Forest L.Rev. 1083 (concluding that the involvement of alternative litigation financing entities in litigation should not affect work product privilege and materials evaluating litigation should enjoy protection).

to any risk of discoverability, take steps necessary to minimize the risk and ensure that the client consents to disclosure. The few courts that have considered whether involving a funder in attorney-client privileged communications waives the privilege have split on the issue. Some courts have accepted the argument that such communications are protected from waiver by the common interest exception because the funder and client share a common legal goal.^{11/}

Finally, throughout the litigation, Lawyer must not allow the relationship with funder to impair Lawyer's objectivity and loyalty to Client. The fact pattern notes that Funder is in frequent contact with Lawyer whereas the Client is busy running its business. Lawyer must remain cognizant that the company is the client, not the funder.

CONCLUSION

Opportunities exist to contract with litigation funders. Attorneys who represent clients that consider or take these opportunities must be cognizant of ethical considerations that are implicated. The lawyer is obliged to provide independent judgment not shaded by any conflicting interests of a third party with an interest in the outcome of the litigation. The lawyer must ensure competence in advising on litigation funding including staying abreast of relevant law, such as whether disclosures to funders waive any evidentiary protections. The lawyer must obtain the client's informed consent before providing any client confidential information.

^{11/} Compare *In re International Oil Trading Company, LLC* (S.D. Fl. 2016) 548 B.R. 825 [62 Bankr.Ct.Dec. 145] (communications between funder, claimant and counsel protected by the attorney client privilege and the common interest exception to waiver as well as agency exception); *Devon It Inc. v. IBM Corp.* (E.D. Pa. 2012) 2012 WL 4748160 (attorney-client communications protected under the "common-interest" doctrine, which protects communications between parties with a shared common interest in litigation strategy); *Walker Digital, LLC v. Google, Inc.* (D. Del. 2013) 2013 WL 9600775 (finding that plaintiff and the funder shared a common interest, and both attorney-client privileged communications and work product applied to documents disclosed to the funder) with *Miller UK Ltd. v. Caterpillar, Inc.* (N.D. Ill. 2014) 17 F.Supp.3d 711, 738 (a client's relationship to a litigation funder was merely "a shared rooting interest in the 'successful outcome of a case'" and thus "not a common legal interest"); *Leader Technologies, Inc. v. Facebook, Inc.* (D. Del. 2010) 719 F.Supp.2d 373, 376-77 (magistrate's order finding that common interest exception inapplicable was "not clearly erroneous").

Marlaud, Angela

From: John Romaker <John.Romaker@blsapc.com>
Sent: Saturday, October 19, 2019 3:33 PM
To: Marlaud, Angela
Subject: Proposed 14-0002

I believe the opinion is much too shallow to provide much help.

The opinion looks primarily at the fact that a third party is paying. It baldly states that a lawyer's duties are not dictated by the contract, but by the lawyer's ethical duties. This true statement (*See, Brown & Romaker, Cumis, Conflicts and the Civil Code: Section 2860* 25 Cal. W. L. Rev 45 (1988) (*cited in Golden Eagle v. Foremost Ins. Co.* (1993) 20 Cal. App. 4th 1327, 1395 for essentially this proposition)) is not very helpful, nor entirely accurate. The terms of the contract create the basis of the conflict of interest in the tri-partite relationship. An insurance contract is a contract of indemnity. As a matter of law the person indemnifying is entitled to control the defense. *See, Cal. Civ. Code section 2778(6)* The indemnifier's right to control the defense is the basis for the attorney's conflict of interest between the indemnified party and the indemnifying party.

In the case of plaintiff funding the contract may still be a contract of indemnity (i.e. indemnity for "costs") CC sec. 2772, 2778(2). So, if the funder agrees to indemnify the plaintiff for costs and fees up to \$200,000, in return for 15% of any recovery, the funder might have a legal right to control the case. If the funder agrees to pay on behalf of the plaintiff all costs and fees up to \$200,000, in return for 15% of any recovery the funder may have a legal right to control the case. This would be true even if the contract is silent about case control. If the funder receives payment from the recovery and exercises control, then a true tri-partite relationship exists. The attorney has two clients just as an insurance defense attorney would. All of the potential ethical problems discussed in the various independent counsel cases could arise under that relationship. However, the threat to the attorney-client privilege would be lessened due to the dual representation issue.

Alternatively the funding agreement could be a mere suretyship. CC sec. 2787. Under a suretyship contract, the funder would merely have to pay the attorney's fees and costs when the client does not. There is no right to control litigation decisions (influence perhaps). Under a traditional suretyship (i.e. guarantor) the potential conflicts are limited. However, the lawyer and the client would have to remain circumspect about the information provided to the guarantor (Non-disclosure agreement may suffice to protect the privileges)

Problems arise because the venture capital model for litigation funding investment creates hybrid agreements. The funders operate in pools. If the client is a business, the purpose of the litigation is profit, and the success of the business for creating that profit is the management of the litigation, then state and federal securities laws could be implicated. *See, A Model Litigation Finance Contract* 99 Iowa L. Rev. 711 (2014). That would require the client to provide full disclosure of all potential risks of the investment, or be guilty of securities fraud. (Now that is an informed consent issue)

The actual contract may create other conflict issues. The funder/investor is likely to want incentives in the contract for early termination (settlement before trial, settlement during trial, judgment, settlement after trial) because the only interest of the funder is return on investment. On the other hand the client may have other strategic goals. (Or worse yet, the funder invests in the litigation because it has its own strategic goals such as a business funding the litigation to obtain a competitive advantage over the defendant. I can't imagine how to difficult it would be to write that disclosure agreement).

If your only goal in writing this proposed opinion is to emphasize that the attorney must obtain written informed consent before accepting third party payment, then perhaps the proposed opinion is good enough. However, if your goal is to provide an exposition of the minefield of ethical problems for attorneys seeking litigation funding, negotiating the funding contract him or herself, acting as an escrow holder for both sides, and performing the contract, then I

believe this opinion is inadequate. (I also think that the obviousness of the attorney's secret profit (\$500) should be stated in more blunt terms. Rather than "lawyer must comply with rule 1.7" I think something along the lines of "failing to disclose a secret profit is both a violation of the disciplinary rule (1.7) and a breach of fiduciary duty. If you think lawyers are either dumb enough or dishonest enough to take the referral fee in secret, then I think you should make it clear that doing so is a really big problem. Is there a J. Doe v. State Bar case that says thou shalt not obtain a secret from your dealings on behalf of a client?).