

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?).



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December 30, 2019

Angela Marlaud

Office of Professional Competence

State Bar of California

180 Howard Street

San Francisco, California 94105-1639

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

Dear Ms. Marlaud:

The Orange County Bar Association (OCBA) respectfully submits the following comments concerning Proposed Formal Opinion Interim No. 14-0002.

Founded over 100 years ago, the OCBA has over 9,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, of differing ethnic backgrounds and political leanings, has approved these comments prepared by the Professionalism and Ethics Committee.

We agree with majority of the opinion's conclusion and find the opinion well-organized and for the most part clearly stated, providing valuable guidance for attorneys facing the ethical dilemmas described in the opinion.

We also have comments and suggestions that we believe could strengthen the opinion and provide even more clarity for practitioners confronted with these dilemmas, which we address below:

- The framed "Issues" on the first page could be stated in the singular as "Issue." Additionally, the Issue's reference to a "client whose case is being funded" could be restated as "a client who is receiving funding," because the former characterization does not properly address consumer litigation funding (Scenario 1) which, as stated elsewhere in the draft opinion, is not to fund the case but instead "typically for personal use" and "to pay his living expenses while his lawsuit is ongoing."
- Query whether the draft opinion should address the dynamics resulting from (1) the increase in portfolio funding,¹ (2) the funder paying the lawyer directly and/or (3) the funder and the lawyer being in contractual privity with each other. Footnote 1 on the first page

¹ According to a recent article published by Law360, 47% of the \$2.3 billion invested in commercial litigation funding over the last 12 months "went to portfolio arrangements." *Awash in Cash, Litigation Funders Eager To Strike Deals* (Nov. 19, 2019), A. Strickler.

states that the opinion is not addressing portfolio funding and therefore “this opinion is limited to the ethical issues that arise in funding arrangements where the funder provides funds directly to the client.” Consistent with that notion, the following reference at the end of the first sentence within the “Digest” contemplates, like much of the draft opinion, the litigation funder directing payment for legal fees to the client (or plaintiff) and not the lawyer: “advancing significant amounts to the plaintiff to pay litigation expenses or otherwise.” As noted under “Independent Professional Judgment,” when the client acts as the conduit for payment of the lawyer’s charged fees and expenses Rule 1.8.6 is not expressly applicable, although it is certainly a touchstone. This is somewhat similar to the presumption in the draft opinion that there would be no contractual privity between the funder and the lawyer. However, there are increasing instances outside of litigation funding where the funder pays the lawyer directly, as well as instances where the lawyer becomes a party to the funding agreement, sometimes by executing an acknowledgment or rider to such agreement. There are also instances where the funder, like many institutional clients and insurance companies, sends the lawyer written counsel guidelines (as noted at the end of the third paragraph under “Independent Professional Judgment”). Many such guidelines purport to impose a contractual relationship on the lawyer. Taken together, these payment and contractual relationships tend to exacerbate the potential conflicts of interest and disclosure obligations the lawyer may face in such funding arrangements. Therefore, while the opinion does not address portfolio funding arrangements, it could address the increasingly common situations in commercial funding where the funder remits payment directly to the lawyer and where the lawyer becomes a party to the funding agreement.

- The final sentence of the “Digest” should more properly state that the lawyer’s disclosure of information to the funder “might” effect a waiver, instead of “will effect a waiver of the attorney-client privilege or work product protection . . .”
- While the draft opinion mentions the non-recourse aspect of litigation funding, that key factor is not emphasized when discussing how “the client might be able to get a bank loan at a lower rate” in Scenario 1. The opinion notes that litigation funding will often come with higher interest, but the key distinction is that the client will only need to pay that interest if he recovers sufficient litigation proceeds, whereas the principal and (lower rate) interest associated with a bank loan will be recourse regardless of the outcome of the litigation.
- The last sentence in the second paragraph under “Introduction: Litigation Funding and its Antecedents” could be clarified with respect to how litigation funding promotes not only access to justice but also “diversifies thinking about litigation strategy.”
- Our most substantive comment relates to the last two sentences of the first paragraph under “Duty of Competence, Duty to Advise and Duty to Communicate,” which could be read to suggest a lawyer has a duty to suggest the client consider litigation funding and, if so, “[s]uch advice would likely need to include a discussion of the pros and cons of obtaining litigation funding and alternatives, if any.” We are not aware of any authority presently suggesting a lawyer need keep abreast of litigation funding, much less owe a duty to advise a client of the pros and cons of such financing. COPRAC may wish to

December 30, 2019

Page | 3

soften such suggestion so there is no implication that a lawyer owes such duties, unless of course the lawyer engages in such advice, negotiation and related tasks.

- The first sentence under “Independent Professional Judgment” could include “the client’s” where it states “the lawyer’s own interest without [insert “the client’s”] informed written consent.”
- Footnote 8’s reference to a judicial standing order requiring litigants to disclose any litigation funder may be better placed adjacent to, or as a part of, footnote 10 listing the cases where courts have addressed disclosure of communications with funders and the impact of the attorney-client privilege and work product doctrine.
- The fourth paragraph under “Application to Hypothetical Scenarios” (Scenario 1) states that a \$500 referral fee “presents a significant risk that Lawyer’s ability to provide independent advice to Client will be materially limited.” While that may be the case in some situations, it might not be if the lawyer makes a great deal of money. Perhaps “could present a risk” would work better. Alternatively, the amount of the referral fee could go unstated, leaving the reader to assume materiality under the facts of Scenario 1.
- The quote on the waiver of work product taken from the Federal Evidence treatise in the second paragraph under “Impact on Attorney’s Duty of Confidentiality” could be replaced with a California citation (e.g., *Laguna Beach County Water Dist. v. Superior Court* (2004) 124 Cal.App.4th 1453, 1459 “Thus, work product protection ‘is not waived except by a disclosure wholly inconsistent with the purpose of the privilege, which is to safeguard the attorney’s work product and trial preparation. [Citations.]’ [Citation.]” or “Moreover, disclosure operates as a waiver only when otherwise protected information is divulged to a third party ‘who has no interest in maintaining the confidentiality ... of a significant part of the work product.’ [Citations.]”).
- With respect to the same waiver concern, in the family law context an adversary has the right to assess one’s ability to fund the action and, in fact, “the court shall make findings . . . whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties.” Cal. Family Law Code Section 2030(a)(2). Such a scenario could result in the funded party having to divulge otherwise confidential communications with his or her funder.
- Footnote 11 on page 10 cites a string of out-of-state cases addressing the common interest doctrine as a bar to waiver. There would seem to be California authorities that could be cited in addition to, and not necessarily in lieu of, such authorities.

Thank you for considering our comments.

Sincerely,



Deirdre Kelly
2019 President
The Orange County Bar Association



Angela Marlaud
Office of Professional Competence
State Bar of California
180 Howard Street
San Francisco, CA 94105
E-mail: angela.marlaud@calbar.ca.gov

January 10, 2020

MS Marlaud:

My name is Eric Schuller and I am the President of The Alliance for Responsible Consumer Legal Funding (ARC), the leading trade association for the Consumer Legal Funding Industry.

I am writing to you regarding the proposed Formal Opinion No 14-0002 on Alternative Litigation Funding.

In reading Scenario 1, which pertains to our industry, I feel that the opinion follows many of the guidelines and best practices we insist our members follow.

Regarding the issue of a consumer understanding the terms and conditions of the agreement, we work with members of the industry to ensure the following is adhered to.

A contract shall be written in a clear and coherent manner using words with common, everyday meanings to enable the average consumer who makes a reasonable effort under ordinary circumstances to read and understand the terms of the contract without having to obtain the assistance of a professional.

In the opinion you have a valid concern in having a third party, i.e. a Funding Company, having the ability to make decisions in the underlying legal claim. ARC works with the industry to ensure the following statement is placed in every contract given to a consumer.

The company has no right to make any decisions regarding the conduct of the legal claim or any settlement or resolution thereof and that the right to make such decisions remains solely with the consumer and his or her attorney.



The opinion brings up other concerns such as a commission or referral fee to the consumers attorney, along with companies providing legal advice to the consumers. As a matter course in our best practices we have a prohibition on the following.

- *Pay or offer to pay commissions, referral fees, or any other form of consideration to any attorney, law firm, health care provider, health care facility, or an employee of a law firm, health care provider, or health care facility for referring a consumer to the company.*
- *Accept any commissions, referral fees, or any other form of consideration from any attorney, law firm, health care provider, health care facility, or an employee of a law firm, health care provider, or health care facility.*
- *Provide legal advice to the consumer regarding the funding or the underlying legal claim.*

A concern that we did not see addressed in your opinion, was the issue of attorneys having a financial interest in a funding company that provides funds to their client. We feel that there is a real conflict of interest when an attorney is representing a client and profiting from providing funds for living expenses as well. The Bar may want to address this issue. We have enclosed some potential language below for your consideration.

An attorney or law firm retained by a consumer shall not have a financial interest in a company offering litigation funding to the consumer and shall not receive a referral fee or other consideration from such company, its employees, or its affiliates.

If at any time we can lend our expertise on this topic to the Bar feel free to reach out to me.

My contact information is below:

Eric Schuller
eschuller@arclegalfunding.org
815-341-9564 Cell
571-969-2720 Main Number

Sincerely,

Eric Schuller

Eric Schuller
President

January 10, 2020

Angela Marlaud
Office of Professional Competence
State Bar of California
180 Howard Street
San Francisco, CA 94105

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

Dear Ms. Marlaud:

On behalf of the California Lawyers Association Ethics Committee and in response to the State Bar of California's request for public comment, we respectfully submit this letter addressing Proposed Opinion 14-0002. The Committee appreciates the opportunity to comment on Proposed Formal Opinion No. 14-0002.

As is acknowledged in the proposed opinion, there is a lack of guidance in California regarding a lawyer's ethical duties when clients use litigation funding companies, and this proposed opinion could play a helpful role in informing lawyers about ethical considerations in this relatively new funding arena. To enhance the clarity of the Proposed Opinion, the Committee offers the following comments. We have numbered our comments for ease of reference.

1. In the Digest, the Committee suggests moving the reference to Footnote 1 to follow the first sentence of the Digest, as the footnote clarifies the statement made in the first Digest sentence.
2. The Authorities Interpreted should include rule 1.7(d). Consideration should be given to including rule 2.1 to address the duty to render candid advice. If included, a brief discussion of rule 2.1 should be added to the section on pages 4-5 titled "Duty of Competence, Duty to Advise and Duty to Communicate" as it appears to have been intended by the title of the section. If, however, the intent was simply to include the duty to provide competent advice as required by rule 1.1, then we recommend striking the phrase "Duty to Advise" from the title of that section.
3. The Statement of Facts assigns a gender to the lawyer, and other parts of the opinion assign a gender to the relevant parties. In light of the Supreme Court's

preference for gender neutrality, the Committee recommends that “client” or “lawyer” be substituted for the pronouns “he,” “him,” “she,” and “her” where appropriate. Also, the Committee recommends the opinion be consistent in using capitalization in references to the “Funder.”

4. The Statement of Facts for Scenario 1 includes that the Funder pays the attorney \$500 for a referral. This complicates the factual scenario and requires a discussion on page 7 of the proposed opinion about compliance with rule 1.7(b), which is addressed separately below. Issues involving lawyer’s receipt of referral commissions from non-legal service providers was also previously addressed in Formal Opinion 1999-154. The Committee suggests removing this fact and discussion to focus the opinion on the ethical duties specific to litigation funding. The Committee also suggests clarifying in the Statement of Facts that the Funder makes payments to the client, which is assumed later in the Discussion.

5. There appear to be several disconnects between the Statement of Facts description of the scenarios and the facts used in the Discussion sections of the scenarios. As an example, the Scenario 2 Statement of Facts states that Lawyer is able to negotiate a better than standard deal for Client because of Lawyer’s relationship with Funder. In the discussion of Scenario 2 on page 8, it is stated that “certain terms of the funding agreement are advantageous to the law firm.” Also, the Scenario 2 facts state only that Lawyer advises Client that the risk of waiving privilege is lessened by use of an NDA, but the later Discussion simply assumes an NDA has been signed. If the latter is intended, the Statement of Facts should explicitly so state.

6. The last sentence of the Statement of Facts of Scenario 2 (“Client does not actively participate in the litigation . . .”) adds another element to this proposed opinion that is not fully explored in the subsequent discussion. The Committee suggests removing this sentence. But if it remains, COPRAC should consider discussing the interaction of rules 1.2 and 1.4 to clarify whether client needs to provide informed consent, or whether there might be decisions that arise during the litigation that only Client has authority to make.

7. The Introduction contains a lengthy description of litigation funding and comparisons to other funding arrangements. The Committee believes this introduction is unnecessary to the opinion, which already is lengthy. One approach could be to divide this opinion into two opinions, one addressing the representation of a client in contracting with a Funder and the other addressing a lawyer’s duties when litigating a case on behalf of a client who is using the services of a Funder. Another approach might be to remove discussions as in the Introduction that are not critical to the opinion, including the discussion of the tripartite relationship, which is a unique relationship in

which the lawyer represents the insured and the insurer, and does not appear to be germane to the subject matter.

8. The last sentence in the Legality section of the Discussion (“Such laws should not be a barrier . . .”) makes it appear that COPRAC has reached a legal conclusion about champerty. The Committee suggests omitting this sentence. The Committee believes footnote 6 is not necessary because the topic of independent professional judgment is discussed separately later, and footnote 7 could be moved to the prior sentence. COPRAC could also consider disposing of this issue more quickly by not describing as fully the concepts of champerty and other state court opinions.

9. We have already made some suggestions with respect to the section titled “Duty of Competence, Duty to Advise and Duty to Communicate.” (See #2, above.) We believe that the citations to the rules should be made to the specific paragraph of the rule that is applicable. For example, the reference to rule 1.4 in the penultimate line on page 4 should be to rule 1.4(a). In the last sentence of the carryover paragraph on page 5, reference is made to “alternatives, if any.” If there is a reasonable alternative, then it should be provided as an example. If, however, there is no reasonable alternative, then that reference should be stricken. We note that ABA Model Rule 1.0(e) (“informed consent”) requires a lawyer to explain to the client any “reasonably available alternatives to the proposed course of conduct.” The Rules Revision Commission, however, did not recommend adoption of that language because it recognized that in some instances there would be no such alternatives. Nevertheless, we believe that if there are reasonably available alternatives, they should be identified to Client and that the opinion could cite the longstanding principle that the ABA Model Rules may serve as a collateral source for guidance on proper professional conduct in California where there is no conflict with California’s public policy. Moreover, we believe that under these facts there are available alternatives, e.g., there might be other sources of financing or Lawyer might be aware of another lawyer willing to accept the case on a contingent basis. COPRAC could consider identifying such alternatives.

10. Tenth, in this same section, there is a misleading partial quotation taken from Cal. State Bar Formal Opn. No. 2015-193. This reference and its placement makes it seem that rule 1.1 requires attorneys to keep abreast of changes in the law. The rule does not expressly require that; rather, in pertinent part, it requires that lawyers apply the learning and skill reasonably necessary for the performance of services. The quoted language should be removed or the sentence rewritten to clarify that the statement reflects a conclusion of Formal Opn. 2015-193, not a black letter requirement of California rule 1.1. Finally, the second paragraph of this section mentions rule 1.1(c) but does not mention that the lawyer under this rule could refer the matter to another lawyer who is believed to be competent. We believe it should.

11. The second paragraph of the Independent Professional Judgment section of the Discussion mentions rule 1.8.6; however, neither the Statement of Facts nor the discussion suggest that the Lawyer is being paid directly by the Funder. The Committee suggests moving this concept to a footnote, which would allow the reader to focus more on the requirements of rule 1.7(b). The opinion could mention, and perhaps discuss Comment [4] to rule 1.7 in this context.

12. The Committee suggests removing the reference to the \$500 referral payment to the lawyer in the Statement of Facts, as suggested in #4, above. Removing that reference would obviate the discussion of the interplay of rule 1.7(b) and rule 1.8.1, which is further fleshed out in footnote 9, with which this Committee disagrees. It appears that in that footnote COPRAC is suggesting, based solely on the fact that an express provision similar to 1.7(b) did not exist when Formal Ethics Opn. 1995-140 was issued, that had such a provision existed, the committee as it then existed would have simply chosen rule 1.7(b) rather than rule 1.8.1 as the vehicle to provide client protection.

We do not believe this is a reasonable basis for overruling the conclusions of Formal Opn. 1995-140, which would also require COPRAC to overrule Formal Ethics Opn. 2002-159, which reached the same conclusion as 1995-140. See Formal Opn. 2002-159, at page 2, note 3 ("The situation would be quite different, however, if the broker were to compensate the lawyer for referring clients to the broker. Then, the lawyer would be "soliciting a client's participation in a business transaction in which the lawyer will receive a financial benefit," and the lawyer will be deemed to have entered into a business transaction with her client to which rule 3-300 would apply.") The hallmark of the rigorous protocol of rule 1.8.1 [formerly rule 3-300] is the requirement that the lawyer advise the client to seek the advice of an independent lawyer; it is the "gold standard" that ensures client protection in the context of transactions involving the client. The Committee believes that any reversal of the conclusions of multiple prior COPRAC opinions should squarely address this issue. In summary, the requirements of rule 1.7(b) are different from those of rule 1.8.1, and the Committee believes COPRAC's previous opinions, 2002-159 and 1995-140, do not support that Rule 1.7(b) is the better fit in a referral fee situation.

13. Beginning in the third paragraph of the Independent Professional Judgment section of the Discussion (page 5), there is mention that a Funder might impose limitations on the representation. The Committee believes this section should discuss more fully that the lawyer must determine if the lawyer can provide competent services in such a situation. Specifically, the Committee notes that the duty of competent representation is not waivable by the client. See rule 1.8.8. The Committee is particularly concerned with the parenthetical description of N.Y. City Bar Ethics Opn. 2011-02 to the effect that a "client may 'agree to permit a financing company to direct

strategy or other aspects of the lawsuit' and the lawyer is not prohibited from acceding to the funder's direction as long as the client consents." The opinion needs to emphasize that if the Funder's direction of strategy were to impair the lawyer's ability to provide competent representation, then the client consent would be irrelevant. In summary, there are separate questions here dealing with the duty of competence, on the one hand, and independent professional judgment, on the other hand. Rule 1.1 should also be raised in this context.

14. The Committee also suggests removing the last two paragraphs of this section, because they deal with the unique tripartite relationship. If the discussion remains, COPRAC could consider adding that the legislature has not codified any tripartite relationship involving alternative litigation funding.

15. The analysis in the first paragraph on page 8 ("In addition to obtaining informed written consent, rule 1.7(d) requires . . .") appears to conflate the separate requirements of paragraphs (b) and (d) of rule 1.7. COPRAC bases its conclusion that rule 1.7(d)(1) is not violated because "[t]here is nothing in the fact pattern that Lawyer tried to influence the client to enter into a funding agreement. On the contrary, it appears that Lawyer appropriately highlighted the negative consequences." However, appropriately highlighting the negative consequences of entering into a funding agreement, including the potential it might have on compromising Lawyer's independent professional judgment, is precisely what Lawyer would be required to do to obtain Client's informed consent to the conflicted representation under paragraph (b) of rule 1.7. Even assuming that Client were to give its informed consent under 1.7(b), however, Lawyer would have to further analyze the situation under rule 1.7(d)(1). This would require Lawyer to ask whether, notwithstanding Client's consent, Lawyer would still be able to provide competent and diligent representation to Client given Lawyer's prior and ongoing relationship with Funder. The paragraph should be revised to reflect the foregoing two-part analysis.

16. The "Impact on Attorney's Duty of Confidentiality" section beginning on page 9 should cite to rule 1.6(a) and the concept of "informed consent." In addition, the last sentence of the first paragraph in this section ("These activities implicate . . .") should include a citation. The ABA Model Rules have Comments [18] and [19] to Rule 1.6 explicitly address this, but California did not adopt those sections. There is no question that this is California law but a citation would be appropriate here.

17. The second paragraph of this section, there is an "and/or" that this Committee suggests changing to "and." Given that the recipient of the client's confidential information would be a nonlawyer, both an NDA and marking of the documents provided would be appropriate. The specific reference to Footnote 10 in the opinion text is to case law, but that footnote also includes law review articles. The text reference and

footnote should be reconciled. Law review articles should be cited only if they provided additional references to case law. Footnotes 10 and 11 provide guidance from other states, and this Committee suggests making it clear there is no California authority on these issues, especially in light of California's unique and rigorous view of the importance of preserving confidentiality. Finally, the Committee suggests providing the context that confidentiality encompasses work product and attorney-client privilege.

18. Some of the opinion's citations are to the rules, but not to the specific paragraphs and comments in these rules. (See #9, above.) The Committee suggests that the proposed opinion be as specific as possible in its citations to the rules as it is the specific rule language that provides the support for COPRAC's conclusions. Further, the analysis should contain more of a one-to-one correspondence of the rule language to the specific facts being analyzed. For example, in the penultimate sentence of the first paragraph of the Scenario 2 analysis on page 8, COPRAC concludes that "Lawyer owes Client a duty to communicate material facts concerning the representation," and cites generally to rule 1.4. However, nowhere in rule 1.4 is there a reference to "material facts," nor is there an explanation of what the referenced facts might be "material" to. Given that the paragraph is applying rule 1.7(b), which requires informed consent, it is possible that the intended reference is to rule 1.0.1(e), which explicitly requires a lawyer "communicate" and "explain" the "relevant circumstances and material risks ... of the proposed course of conduct."

The Committee thanks COPRAC for its work on this important issue and for the opportunity to provide these comments.

Sincerely,

A handwritten signature in dark ink, appearing to read "David Majchrzak", with a stylized, flowing script.

David Majchrzak
Co-Chair
California Lawyers Association Ethics
Committee



Los Angeles County Bar Association

1055 West 7th Street, Suite 2700 | Los Angeles, CA 90017-2553

Telephone: 213.627.2727 | www.lacba.org

January 8, 2020

Angela Marlaud
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Opinion 14-0002

Dear Angela:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association appreciates the opportunity to submit the following comments on proposed Interim Opinion No. 14-0002. While our Committee agrees with many of the points made in the draft opinion, we have some concerns and suggestions, as set forth below:

1. In Scenario 1, the lawyer gets paid \$500 from the funder for making the referral for the loan for personal expenses to the client. We believe this additional fact unnecessarily complicates the hypothetical, which is focused on litigation funding for personal expenses of the client. The lawyer would have to disclose the referral fee the lawyer received to the client as part of the comprehensive disclosure necessary to explain the pros and cons of taking the litigation funding. The acceptance of the referral fee from the funder constitutes a business transaction and should require compliance with rule 1.8.1. While the COPRAC opinion analyzes the referral fee under rule 1.7, we believe the better approach is to consider the propriety of the referral fee under rule 1.8.1.
2. In Scenario 2, the Statement of Facts states that the lawyer is able to negotiate a better than standard deal for the Client because of lawyer's relationship with funder. In the discussion of Scenario 2 on page 8, the opinion provides: "certain terms of the funding agreement are advantageous to the law firm." This statement does not follow from the Statement of Facts. We suggest removing the reference to this fact, which creates confusion rather than providing clarity.


3. In the Introduction on Page 3, the opinion discusses other financing relationships which raise ethical concerns, including contingency agreements and liability insurance. The problems presented by the tripartite relationship among the lawyer, insured and insurance company are different than those presented by a litigation funding scenario. We believe mentioning other potentially difficult financing relationships on page 3 of the opinion makes sense, but the additional analysis of the liability insurance situation is unnecessary to the opinion and distracting to the topic of litigation financing.
4. The beginning of the Discussion section references an entire subsection on the legality of champerty and maintenance, neither of which are recognized under California law. We do not see how this section is necessary or helpful to the analysis of litigation funding.
5. In the "Independent Professional Judgment" subsection of the Discussion Section, there is a paragraph about Rule 1.8.6, but the facts don't suggest that the lawyer is being paid directly by the funder, so this rule is not implicated by the scenario. The proper analysis is under rule 1.7(b), which provides that "[a] lawyer shall not, without informed written consent from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests." The opinion could bring up the discussion in Comment [4] to rule 1.7, which gives lawyers some guidance on determining when consent is required. In the third paragraph of this subsection, the opinion discusses whether the funding arrangement can impose limitations on how the case is litigated. If the funding arrangement does impose limitations on how the case will proceed, the lawyer would need to obtain the client's informed written consent under rule 1.7(b). The reference in this subsection to an ABA opinion regarding an insurance arrangement does not aid in the analysis and should be removed.
6. In the subsection on "Impact on Attorney's Duty of Confidentiality" in the Discussion section, the last sentence of the second paragraph recommends the lawyer get consent. We suggest that the opinion cite the requirements of rule 1.6 at this point in the opinion and highlight that the lawyer needs to obtain the informed written consent of the client. Because California law is unclear as to whether there is a basis for continued protection after disclosure of confidential information to the funder, the lawyer must carefully lay out the risks involved with proceeding with the funding arrangement to comply with the lawyer's duty of competence.
7. Footnote 10 discusses other jurisdictions' case law on work product and litigation funding. Footnote 11 details other jurisdictions' case law on the attorney client privilege. However, we suggest that instead of this reliance on out of state authority, the opinion reference the uncertainty of the application of the attorney client privilege, work product doctrine and common interest doctrine under

California law, especially as it relates to disclosures to the funder necessary under the two funding arrangements in Scenario 1 and Scenario 2.

8. We also note that the opinion does not discuss any issues presented by the funder's lien on the potential recovery. We recognize that the lien issues are outside the scope of the opinion, but since it is such an important topic, the opinion should at least alert the reader to the issues in a footnote.
9. A few miscellaneous stylistic items:
 - a. The opinion is not gender neutral, if that is COPRAC's goal.
 - b. We suggest that footnote 1 be moved to the end of the first sentence of the Digest to provide immediate clarity as to the scope of the opinion.
 - c. The opinion alternatively uses the terms "Funder" and "funder" and we suggest that the term "funder" be consistently used throughout the opinion.

Thank you for the opportunity to comment on the Proposed Formal Opinion.

Sincerely,

A handwritten signature in black ink, appearing to read 'Brandon Niles Krueger', with a long horizontal flourish extending to the right.

Brandon Niles Krueger
Chair
Professional Responsibility and Ethics Committee,
Los Angeles County Bar Association