

ETHICAL CONSIDERATIONS FOR ATTORNEYS SEEKING THIRD-PARTY LITIGATION FUNDING

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INTRODUCTION

Legalist, Inc. (with its affiliates, “Legalist”¹) has prepared the following brief summary of certain ethical issues to be considered by attorneys seeking to obtain third-party litigation funding (or “TPLG”), for specific matters or a portfolio of cases, after issuance last year of the American Bar Association’s “Best Practices for Third-Party Litigation Funding” (the “Report”)².

Specifically, the Report highlights four areas of focus for attorneys in connection with TPLF arrangements:

- Fee Splitting
- Referral Fees
- Confidentiality
- Potential Conflicts

¹Please visit www.legalist.com/disclaimer for more information regarding this publication.

²Available at <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf>.

FEE SPLITTING

First, the Report explains that, although rules vary across the country, the majority position is that TPLG does not constitute impermissible fee splitting under Model Rule of Professional Conduct (“MRPC”) 5.4(a).³ Consistent with this position, an effort is underway to amend MRPC 5.4(a) “to provide that sharing fees with a funder is not covered by the Rule so long as the lawyer remains independent and the client remains in charge of the lawsuit.”⁴

Until such time as the Rule is amended, the Report recommends two approaches to avoiding the fee-splitting issue:

1. Include, in any TPLG agreement “an express provision that the funder has no right to control litigation strategy or settlement decisions”;⁵ or
2. Where practicable, “the inclusion of multiple matters in the funded portfolio . . . to ensure that the funder’s investment return will not be tied to any particular client matter.”

Note that, in addition to offering portfolio funding, Legalist invests only pursuant to TPLG agreements that express no-right-to-control provisions.

³A lawyer or law firm shall not share legal fees with a nonlawyer”

⁴Report at 5.

⁵Id.; see also id. at 11 (“The arrangement should be structured so that the client retains control of the litigation, and not the funder (or lawyer, if the lawyer is receiving the funding).”).

REFERRAL FEES

Second, the Report states unequivocally that “referral fees should not be paid by attorneys to funders” and “attorneys should not accept referral fees from funders.”

Simply put: Legalist neither pays to, nor accepts from, attorneys in which it invests any referral fee.

CONFIDENTIALITY

Third, the Report acknowledges that “the current trend in the case law favors continuing to protect material disclosed to funders.”⁶ This is true of both confidential information (subject to prior client consent⁷) and privileged or otherwise protected material.⁸

The Report acknowledges the legitimate need of TPLF providers to obtain relevant, up-to-date information, noting “that funders have been the target of fraudulent schemes.”⁹ In terms of best practice, the Report recommends that a TPLF “agreement between the party and the funder contain[] provisions addressing confidentiality and/or non-disclosure.”¹⁰ In support of this recommendation, the Report cites the District of Delaware’s 2011 decision in *Xerox Corp. v. Google, Inc.*, finding no waiver of privilege when documents were shared with a litigation funder.¹¹

Consistent with the Report’s recommendations, Legalist’s TPLF agreements contain robust confidentiality, non-disclosure, and common-interest provisions in favor of the attorneys we fund (and their clients).

⁶*Id.* at 5.

⁷See also *id.* at 17 (“In general, the lawyer may not reveal confidential information about the representation to the financing entity, without the client’s informed consent.”).

⁸See generally MRCP 1.6.

⁹Report at 16.

¹⁰*Id.* at 18; see also *id.* at 22 (“The strength and applicability of the privilege may be evidenced or increased by . . . an existing agreement between the party and the funder that contains provisions addressing confidentiality and/or non-disclosure.”).

¹¹801 F. Supp. 2d 293, 303-04 (D. Del. 2011).

POTENTIAL CONFLICTS

Last, the Report highlights the potential for conflicts of interest to arise out of an attorney's TPLF relationship.¹² As detailed in MRCP 1.7(a):

[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if ...here is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer.

Given this potential, the Report recommends that (as with concerns regarding fee splitting) TPLF agreements "be drafted to assure that . . . the lawyer retains independent professional judgment."¹³ Put differently, an attorney must ensure, in entering into a TPLF agreement, that the attorney retains and protects his or her ability to exercise independent professional judgment."¹⁴

To avoid even the appearance of such potential conflicts of interest, Legalist's TPLF agreements recognize and memorialize an attorney's independent, primary obligations to his or her clients.

¹²Report at 6.

¹³Id. at 12-13.

¹⁴Id. at 11 n.5.



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