Ethics review for litigation finance

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Curtis Smolar

Former commercial litigator for 20 years

- Built personal firm from scratch
- Represented Paypal & Ebay
- Partner, Fox Rothschild (AmLaw 100)
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Current: General Counsel, Legalist

- Litigation finance company
- Mid-size commercial claims and mass torts
- Funding ranges from $100K - $10M

CHAMPERTY/BARRATRY/
MAINTENANCE/USURY

FEE SPLITTING

PROTECTING PRIVILEGED
INFORMATION

CONFLICTS OF INTEREST

CONTROL OF CLAIMS

Ethics Review

Champerty/Barratry/Maintenance

"The consistent trend across the country is toward limiting, not expanding, champerty's reach."

- Del Webb Communities, Inc. v. Partington
652 F.3d 1145, 1156 (9th Cir. 2011)

Maintenance is helping someone else maintain a lawsuit, generally by providing financial assistance.
Champerty is maintenance for profit.
Barratry is serial maintenance.
Many states have abolished the concepts, and other states have severely limited its applications.

Charge Injection Technologies vs. Dupont

DuPont moved to dismiss CIT's lawsuit by asserting that the agreement between CIT and litigation funder Burford Capital violates maintenance and champerty.

Delaware Superior Court held that Burford was not an officious intermeddler and, therefore, its agreement with CIT did not constitute maintenance.

Charge Injection Technologies, Inc. v. E.I. DuPont de Nemours & Company

California has never adopted the common law doctrine of champerty and maintenance.

Estate of Cohen, 66 Cal.App.2d 450, 458 [152 P.2d 485];
Muller v. Muller, 206 Cal.App.2d 731, 733 [23 Cal.Rptr. 900];
Cain v. Burns, 131 Cal.App.2d 439, 443 [280 P.2d 888].

Usury

Generally, courts have considered contingent fee agreements, whether with a lawyer or litigation funder to be investments and not loans because there is no absolute obligation to repay.

9, Williston on Contracts § 20:18 (4th ed.)

There is a recent shift in usury laws held to apply in consumer funding contexts, where cash advances are given to unsophisticated consumers, but no such regulation applies to the commercial funding context.

Consumer Financial Protection Bureau et al v. RD Legal Funding LLC

Kelly, Grossman & Flanagan v Quick Cash

Contingent litigation finance agreements containing an element of risk do not fall under usury.

Kelly, Grossman & Flanagan attempted to have their law firm advance declared usurious under New York penal code, after having their contingency fees advanced.

The court found that the relevant financial transactions were not loans, and thus New York's prohibition against usury was not triggered.

Kelly, Grossman & Flanagan LLP v. Quick Cash, Inc., No, 04283-2011, 2012 WL 1087341 (Suffolk Co. 2012),

Attorney Fee-Splitting

Receiving a litigation finance advance does not fall under attorney fee-splitting provisions if structured properly as an advance on fees.

Lawsuit Funding LLC v Lessof - 2013 NY Slip Op 33066f

Hamilton Capital VII, LLC v Khorrami, LLP

"[T]he case law cited by defendants does not support the proposition that a credit facility secured by a law firm's accounts receivable constitutes impermissible fee sharing with a non-lawyer."

New York Supreme Court ruled that an advance on fees does not constitute impermissible fee sharing with a non-lawyer.

Privileged information

Work product doctrine	Attorney-client privilege
Widely upheld to apply in a litigation funding context	Does not apply in a litigation funding context

Attorney Work Product Doctrine

Work product doctrine protects from discovery "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." Fed. R. Civ. P. 26(b)(3)(a)

Work product is the strongest protection for information shared with litigation funders.
Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 736 (N.D. Ill. 2014)

Miller UK Ltd. v. Caterpillar, Inc.

Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 736 (N.D. Ill. 2014) is the seminal case that defines how to protect your client's privileged information in a litigation funding context.

Litigation funding documents are not relevant under Rule 26.

Litigation funders are not covered under attorney-client privilege.

Information shared with funders is covered under work-product doctrine.

Rule 26 Findings (Miller UK)

Rule 26 requires that the documents requested be "relevant" to the litigation

The terms of Miller's actual funding agreement would seem to have no apparent relevance to the claims or defenses in this case, as required by Rule 26 as a precondition to discovery

Court held that the deal documents, that is the documents leading up to the litigation finance deal were not relevant and therefore did not have to be disclosed.

Attorney-client Privilege (Miller UK)

Common-interest doctrine is not a separate privilege, but is rather a part of attorney-client privilege.

Common-interest doctrine did not apply to litigation funders because Miller was looking for money from prospective funders, not legal advice or litigation strategies.

A common economic interest is not the same thing as a common legal interest.

Work-Product Doctrine (Miller UK)

The court found that protection was not waived so long as Miller had a reasonable expectation of confidentiality with the funders.

Miller had executed a non-disclosure agreement (NDA) with the funders, hence indicating an expectation of confidentiality.

The judge noted that even absent an NDA, the expectation alone made communications with litigation funders protected under work product.

How to ensure privilege?

Attorney has obligation to protect clients' confidential information.

Business and Professions Code 6068(e)

Mutual Non-Disclosure Agreement (NDA) must be executed prior to diligence conversations.

NDA indicates intent to preserve confidentiality. This will fulfill your requirements under B&P 6068(e).

Conflicts of Interest

There are two kinds of conflicts of interest that may arise in litigation funding.

1. The law firm can take a position contrary to the interest of the client.

2. The litigation funder may fund parties with interests contrary to the client.

Conflicts of Interest

Not a lawyer?

Not governed by the California Bar

Is there an obligation of a litigation finance company to do conflicts check?

No. Litigation finance does not have to run a conflict check.

- Analogous to insurance company. An insurance company does not have to run a conflict check, in fact they can fund both parties to an ongoing litigation. The question is whether or not confidential information is given to other side;
- Can alter this by contract, i.e. request that litigation finance company do conflict checks

Is litigation finance doing business with a client?

State Bar Rule 3-300
Avoiding Interests
Adverse to a Client

A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and
(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and
(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

Concerns About Funder-Attorney Relationship

There is a concern that a funder could influence how litigation counsel gets paid and therefore the attorney would not do what is best for the client, but instead would do what is best for the funder.

While theoretically possible, attorneys generally do not act this way.

Instead lawyers, by doing their job protects from this potential problem.

Concerns About Funder-Attorney Relationship

This is also a concern when an attorney has skin in the game in that it can increase the amount the case needs to settle at so that the attorney makes enough for the claim.

The reality is that these cases are disproportionately cases that do not settle.

The cases that need funding tend to be cases in which a small settlement is possible without funding, but it would be disservice to the client for the case to settle at such a small amount.

Concerns About Funder-Attorney Relationship

Portfolio funding: Another potential source of conflict is the funder's focus on its portfolio of cases versus the plaintiff's focus on its single case. Funders' portfolio concerns may drive them to litigate to create favorable precedent, rather than optimally resolve the case at hand.

While this has been discussed in academic material it is, for the most part, academic.

Litigation Finance companies are in the business of making money not precedent.

Is litigation finance doing business with a client?

This concern arises if the attorney signs the litigation finance agreement on behalf of the client. Generally the attorney and client are not in "business together;" But it can come up if the attorney signs on behalf of the client and does not instruct the client to get another set of eyes to look it over.

Instead, the attorney should suggest that the client obtain independent counsel to review the agreement.

This language is often already in the litigation funding agreement, but the attorney may require a separate agreement by the client so that there is no question that counsel is protected under Rule 3-300 (B).

Control over claim

Another potential conflict issue comes when a litigation funding company is able to exert control over litigation; i.e controlling settlement.

Litigation funders lack the "hammer clause" of insurance company so can't require settlement.

Relationship is not one of a fiduciary.

Funding agreements must be read carefully to avoid ceding control over settlement decisions.

Best Practices

1. Good candidates for litigation finance are cases that you would take on a contingency;
2. Value the case realistically. Look at the actual damages, lost profits, etc.
3. Look to see if you can show the elements of the claim without discovery;
4. Look for cases that don't have a lot of baggage.
5. Look for ways to help your current clients or get new clients by using litigation finance as an incentive.

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