March 2012 *Multnomah Lawyer Ethics Focus*

Show Me the Money:
Conflicts and Confidentiality in Litigation Financing

By Mark J. Fucile
Fucile & Reising LLP

As litigation has grown more expensive, "litigation financing" has evolved considerably. It's nothing new for firms to have lines of credit to fund operations generally. It's also nothing new for clients to use financial tools ranging from credit cards to bank loans to pay for legal services. In recent years, however, specialized litigation finance companies have emerged offering to underwrite specific cases. In some variants, the borrower is the law firm. In others, the borrower is the client. Although both are generally permitted, they can present lawyers and their firms with difficult conflict and confidentiality issues.

Conflicts

Conflicts between the business interest of the lawyer and interest of the client can occur in many ways when litigation financing is involved. The conflicts arise under RPC 1.7(a)(2) and are triggered when the lawyer's professional judgment on behalf of the client may be materially limited by the lawyer's own business interest.

Oregon State Bar Formal Ethics Opinion 2005-133, for example, notes the possible conflict between the lawyer's interest in having the client use litigation financing because it may accelerate payment to the lawyer while creating business obligations that may not be in the client's interest. Oregon State Bar

Formal Ethics Opinion 2005-52, in turn, discusses possible conflicts on settlement when the lawyer is holding funds to which both the client and a creditor claim an interest.

Perhaps the most corrosive potential conflict, however, occurs when the litigation financing company attempts to direct the way the lawyer handles a case on behalf of the client. A New York City Bar ethics opinion from last year (2011-2, available at www.abcny.org) surveys several litigation financing conflicts and zeroes in on this one in particular, noting (at 5) that it "raise[s] the specter that a financing company, armed with information regarding the progress of the case, may seek to direct or otherwise influence the course of the litigation." RPC 1.2(a) addresses this same area by leaving decisions on settlement squarely with the client.

Confidentiality

As part of its consideration of whether to make a loan, a litigation finance company may want access to confidential case strategy and other sensitive material normally shielded from discovery by the attorney-client privilege or the work product rule.

RPC 1.6 sets both a strict and broad duty of confidentiality toward clients. Even if a lawyer has a client's permission to disclose confidential information about the case to a litigation finance company, that doesn't end the problem. Voluntary disclosure of confidential information to a third party normally waives

privilege and, under OEC 511, the scope of the resulting waiver is potentially quite broad.

Oregon recognizes the "common interest doctrine," which as a general proposition preserves privilege when confidential information is shared with another party who has a common interest. The Oregon Court of Appeals discussed the contours of the common interest doctrine two years ago in *Port of Portland v. Oregon Center for Environmental Health*, 238 Or App 404, 243 P3d 102 (2010). The argument as applied to a litigation finance company would be that confidential information is being shared to advance the client's case. However cogent, application of the common interest doctrine in the litigation financing setting is not a foregone conclusion. In *Leader Technologies, Inc. v. Facebook, Inc.*, 719 F Supp2d 373, 375-77 (D Del 2010), for example, the court rejected precisely that argument, determined privilege had been waived and ordered production of the materials that the plaintiff had provided to litigation financing companies.

Summing Up

Litigation financing has evolved into a distinct business in recent years. The ABA's "Ethics 20/20" Commission recently issued a report on litigation financing (available on the ABA's web site at www.americanbar.org). The ABA report did not suggest any new rules at this point, but the topic will likely remain a lively source of debate as the cost of litigation continues to increase.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.