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Seeking Credit:
Litigation Funding Issues

By Mark J. Fucile
Fucile & Reising LLP

Over the past 20 years, litigation funding has emerged as a potentially significant management tool for claimants' firms in a wide spectrum of practice areas ranging from personal injury to intellectual property. It is not hard to divine a primary driver: complex litigation has become increasingly expensive and that trend is unlikely to change anytime soon. Litigation funding differs from traditional bank lines of credit because it is typically tied to a particular case rather than a firm's overall financial operations. Although models vary, one of the most common is a nonrecourse loan from a specialty finance company to a law firm with repayment subject to recovery in a specific contingent fee case.

Oregon does not have a comprehensive ethics opinion on litigation funding for law firms—although Oregon State Bar Formal Opinion 2005-133 addresses third-party financing plans for clients that share many similarities with their law firm counterparts. The ABA, in turn, issued a "white paper" on litigation funding as a part of its recently completed "Ethics 20/20" project containing a useful compendium of ethics opinions and academic articles nationally that is available on the ABA web site.

In this column, we'll look at three central issues that lawyers and their firms should consider on the ethics side when evaluating a potential litigation funding arrangement: confidentiality; control; and conflicts. By focusing on these three, I don't mean to exclude others that may enter the analysis with particular litigation funding plans. But, lawyers will almost always want to view possible litigation funding proposals through the prism of these three key considerations.

Confidentiality

RPC 1.6 states our bedrock duty of confidentiality. It includes, but is broader than, work product protection under ORCP 36B(3) and the attorney-client privilege under OEC 503. Protecting confidentiality can loom large when discussing funding options with a potential lender.

Not surprisingly, most lenders will want to undertake some degree of "due diligence" to understand the economic potential and litigation risks of the case they are considering underwriting. At the same time, lawyers should not assume that the "common interest doctrine" necessarily applies in this context to protect confidential information shared with a potential lender. The Court of Appeals in *Port of Portland v. Oregon Center for Environmental Health*, 238 Or App 404, 243 P3d 102 (2010), noted that the common interest doctrine is a statutory creation in Oregon. OEC 503(2)(c) defines common interest protection as extending narrowly from "the client or the client's lawyer to a lawyer representing another in a matter of common interest[.]" Similarly, in the analogous context of third-party bill audits, the Oregon State Bar concluded in Formal Opinion 2005-

157 that a lawyer would risk waiver of confidentiality and privilege by submitting detailed narrative billing statements to a third-party auditor.

The safest course is to share information that has already been disclosed in public court filings or associated discovery provided to the litigation opponent. This could include, for example, disclosed medical records in a personal injury case. Conversely, it would not include the lawyer's confidential analysis of sensitive legal issues.

Control

RPC 2.1 articulates our fundamental duty to exercise independent professional judgment on behalf of our clients. RPCs 1.8(f) and 5.4(c) echo this general point in the analogous setting of being paid by a third-party. RPC 1.2(a) likewise vests the decision to settle a case solely with the client.

It is not hard to imagine scenarios in which a lender may have a powerful economic incentive to offer the lawyer "direction." One ready example would be a relatively attractive settlement offer received on the eve of an expensive trial when the client, nevertheless, believes that an even better verdict will result. In this example, the lawyer would need to use his or her best professional judgment in advising the client and respect the client's decision. The fact that much of this lending is "nonrecourse" can make it easier as a practical matter for the lawyer to focus solely on the client's interest because if there is no recovery the lender will not be repaid. Lawyers should insist, however, on written language in the financing agreement acknowledging that the lender cannot control the litigation.

Conflicts

RPC 1.7(a)(2) states the general rule that a conflict exists when there is adversity between the financial interests of the lawyer and the client that may materially limit the professional judgment of the lawyer. Although some "material limitation" conflicts are waiveable, others are not—with the difference often turning on the particular circumstances involved.

Litigation funding—at least the nonrecourse variant—does not inherently trigger a conflict any more than a traditional bank line of credit. Nonetheless, lawyers will need to carefully review the specific terms of any proposal. If a finance company is proposing to control the litigation generally or settlement in particular, for example, then the lawyer would have a conflict (and likely a nonwaiveable one given the duties noted above).

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 NWLawyer (formerly 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.