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Legal Capital: Crowdfunding Litigation

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"Crowdfunding" has become an increasingly common tool to finance a wide range of activities ranging from charitable ventures to high tech products. In some crowdfunding campaigns, the funders and the recipients of the proceeds are matched through an on-line platform. In others, the "crowd" may simply be a group of friends or business acquaintances who interact with the recipient directly. RPC 5.4(b) and (d), which are based on their ABA Model Rule counterparts, generally prohibit non-lawyer investors from taking an equity interest in a law firm. By contrast, crowdfunding can generally be used as another form of alternative financing for specific cases. RPC 5.4(a), which again is based on its ABA Model Rule counterpart, also prohibits sharing specific legal fees with non-lawyer investors. Conceptually, therefore, case-specific financing is usually structured as a loan when the incentive is an economic return from private litigation rather than an altruistic donation to a public-interest law firm or similar organization.

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 may similarities with their law firm counterparts. In this column, we'll look at three issues common to

all forms of alternative litigation financing—including crowdfunding: confidentiality; control; and conflicts.

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 the functional equivalent of potential lenders.

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, 409-416, 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. Crowdfunding in particular is often more public than other forms of alternative litigation funding and, therefore, more likely to be discovered by a litigation opponent who has a distinct incentive to challenge any assertions of privilege.

The safest course is to share information that has already been disclosed in public court filings or associated discovery provided to the litigation opponent that is not otherwise subject to a confidentiality agreement or order. 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 the funders—whether the "crowd" is comparatively large or small—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. Structuring the funding as "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 lenders 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 waivable, others are not—with the difference often turning on the fact-specific 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 the funders are proposing to control the litigation generally or settlement in particular, for example, then the lawyer would have a conflict (and likely a nonwaivable one given the duties noted above).

Other Issues

Although the three areas surveyed are central concerns for any litigation financing mechanism, they are by no means an exclusive list. Other common issues with crowdfunding include fees charged by on-line platforms (with fees for the financing generally permitted but sharing of legal fees generally prohibited under RPC 5.4(a) discussed earlier) and marketing considerations (principally RPCs 7.1 and 7.2 governing, respectively, truthfulness in marketing communications and advertising specifically) if using a public platform.

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