Considerations from the ABA’s Best Practices for Litigation Funding

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The exact dollar amount that third-party investors infuse in U.S. lawsuits every year is unknown, but conservative estimates begin around $2.3 billion, with agreement that the industry has room to grow. With the ongoing pandemic stretching litigation timelines and straining budgets, the litigation funding industry remains highly active. Despite the importance of litigation funding to all parties involved (lawyers, plaintiffs, and defendants), regulation varies by state, and litigation funders are largely left to self-regulate.

In the absence of clear direction on this significant issue, the ABA, in August 2020, provided much-needed guidance by adopting Best Practices for Third-Party Litigation Funding. See American Bar Association Best Practices for Third-Party Litigation Funding, (referred to herein as “Best Practices”).

The Best Practices “are written to assist lawyers considering litigation funding . . .” and consist of “issues that should be considered before entering into a litigation funding arrangement.” According to the ABA, “these Best Practices should not be read as recommended standards of professional conduct or as a basis for attorney discipline. . . . Jurisdictions where the attorney practices may have standards that differ (perhaps materially) from these Best Practices, and those standards may establish standards of care or grounds for discipline.”

The Best Practices recommend that litigation funding arrangements be spelled out in writing, in clear, unequivocal terms. The terms of any litigation funding agreement should make clear who is responsible for paying the funder, from what source, and when. The Best Practices also suggest that litigation funding agreements clearly address provisions for termination and/or withdrawal of funding.

The Best Practices highlight the ABA’s concern that clients and lawyers retain independence and control over the course of litigation. Specifically, the Best Practices recommend that:

- Any funding arrangement should ensure that the client retains control of the litigation;
- Lawyers should be cautious in making case-related reports or predictions to litigation funders;
Lawyers should “advise the client that the client is to remain in charge of the lawsuit, as well as explain and take steps to assure that the financing entity will not direct or regulate the lawyer’s professional judgment”;

- Lawyers obtain written affirmation from the funder that no advice, opinions or representations as to the underlying claims have been made by the client or the lawyer; and

- Lawyers “may want to obtain written acknowledgement that the funder will not seek to control the litigation or the expense[.]

The Best Practices do “not take a position” on “whether, when and in how much detail a funding arrangement need be disclosed.” This key issue is treated differently across different jurisdictions and is often litigated. *Compare Impact Engine, Inc. v. Google LLC*, Case No. 3:19-cv-01301-CAB-DEB (C.D. Cal., Oct. 20, 2020) (holding that litigation funding agreements were protected from disclosure because they “were created because of the litigation they will fund” and therefore constituted work product, disclosed only to those with an interest common to the attorney or client) *with Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711 (N.D. Ill. 2014) (holding there was no “common legal interest” between funder and party and that “[a] shared rooting interest in the ‘successful outcome of a case’ . . . is not a common *legal* interest”) (emphasis in original). While disclaiming a position on this issue, the Best Practices nevertheless advise attorneys that they “should assume that the litigation funding arrangement may well be examined by a court or the other party at some point in litigation” and that they “should assume that some level of disclosure may be required at some point."

The Best Practices also caution attorneys on sharing privileged documents with third-party funders. Specifically, they note that:

- Lawyers should educate financing entities as to the attorney-client privilege and, in this context, on “the limitations that must be imposed on the financing entity’s involvement in the litigation. For example, financing companies should not ask for any non-public documents, so that privilege is not an issue[;]” and

- Lawyers “should not provide to a . . . funder any attorney-client or otherwise privileged materials that would risk waiver of any privilege[.]

Specifically, the Best Practices suggest that lawyers:

- Obtain written acknowledgement from funders that no privileged materials have been supplied;

- Supply the funder with public documents only (keeping detailed records of communications on this topic);

- Examine local rules and practices regarding waiver for non-public documents and ensure compliance; and

- Offer no opinion about the underlying claims (for example, in response to questions like “What do you think are the chances that the Judge will do x or y?” or “What are weaknesses
The Best Practices do not carry the weight of law, nor even of recommended standards of professional conduct. Litigants should keep the ABA’s Best Practices in mind, however, as they highlight key issues in “the complex and evolving area of litigation financing” and provide insight to address inherent ethical hazards, but should always research the law in the relevant jurisdiction.

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