by LISA MILLER

Perils of Third-Party Funding

If counsel discloses work product to a third-party financier who has no interest in maintaining confidentiality, work-product protection may be waived

A CONSORTIUM of lenders, including New York-based Counsel Financial (backed by Citigroup) recently financed New York's Ground Zero workers' litigation to the tune of about $35 million. The action settled for approximately $680-710 million; the consortium reportedly cleared $11 million.[1] The potential upside in this type of third-party litigation funding is staggering. But at what cost to the attorney-client relationship?[2] Trial lawyers face myriad ethics issues when representing clients; one of the most important is counsel's promise to protect client interests with undivided loyalty. The attorney-client relationship is thus a fiduciary relationship of the highest degree.[3] This relationship may be jeopardized when a third party—which is otherwise a complete stranger to the matter—finances litigation. Third-party litigation funding is solely a financial product that allows an entity to pay the upfront trial costs of a plaintiff or a class of plaintiffs. Funding is nonrecourse; unsuccessful litigants owe nothing to these financiers.[4]

Trial funding by third parties need not inherently create conflicts, but the financier must understand that its involvement is strictly monetary. The investment must not carry with it any degree of strategic control. Counsel must make clear to all involved that the attorney's undivided loyalty is to the client, not the third-party funder.[5] No privileged information can be independently divulged nor can the third party influence the litigation or negotiation strategy: this is strictly within the purview of the client.[6] In many outside funding situations, no conflict is likely to arise.

For example, in family law, third-party family members or close friends sometimes pay

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the legal bills of a loved one. While the attorney must ensure that the lender understands his or her role is strictly providing financial support, in a setting where financing is based on an ongoing personal relationship, the lender usually shares a common interest with the client. When the third party financing a lawsuit is making business decisions based on financial gain, however, the interests of the funder and the client, and at times, counsel, can be at odds.

Litigation funding, although not completely a new concept, is paradoxically both on the upswing and still largely unknown. Also, while third-party funding is increasingly available to litigators, funding issues remain largely opaque. To make smart ethics calls and avoid unexpected ethics pitfalls in the context of trial finance, advocates should familiarize themselves with the substance and procedures involved.

While litigation funding is financing by third parties who offer cash, usually in exchange for a return on successful resolution,[7] this is not the only approach. Another option is online crowdfunding.[8] Plaintiffs receive donations from individuals, or offer rewards ($2 for each $1 contributed, for example). The individual online funders expect a return on their investments upon successful completion of the litigation. Thus, these are not simply donations to cover trial costs, e.g., litigation funding appeals through popular crowdfunding sites that include GoFundMe, KickStarter, or IndieGoGo.[9]

Considering the ethical disparity triggered by the distance between professional funders and retained counsel, the question arises whether plaintiffs' counsel may ethically use these options, and if so, how. Also, what would be the appropriate context for representing clients who are contemplating or have already secured this financing on their own?

Most third-party funding agreements implicate some common deal identifiers: 1) a direct contract relationship exists between the funder and the original party to the case or with the advocate, 2) the case continues with the original party to the matter in place, and 3) because no assignment of the underlying claim occurs, financial backers are not parties.[10] Considering these basic qualifiers, the touchstone of the initial analysis is the legality of the transaction itself. Rights to recover money via a judicial proceeding are generally transferable—a thing in action is presumptively assignable, with the exception of most personal causes of action.[11] Prohibition of the common-law concepts of maintenance (intermeddling of a disinterested party to encourage a lawsuit) and champerty (the maintenance of a person in a lawsuit on condition that in some way the action is to be shared with the maintainer) are unknown to the laws of California.[12] Based on these concepts, counsel may legally use third-party financing and represent clients engaged in third-party funding relationships. However, advocates may be on slippery ethical ground as they must consider more than legality—they and their clients need to be sensitive to obvious as well as subtle ethics issues.[13]

Ethical Implications

Counsel's ethical obligations to clients may never be infringed based on divergent financial interests triggered by third-party funding. Advocates' obligations in the context of third parties funding litigation generally focus on maintaining independent control of the litigation, avoiding conflicts, and preventing inadvertent waiver of privilege.[14] For example, in the context of providing financing, funders may require that counsel report case developments. When third-party funders require that the advocate seek consent from the financier regarding file strategy, this may suggest that funders are seeking to influence the progress of the file. The input on strategy by third-party funders results from the fact that, generally, funders take "first resolution dollars," i.e., traditional priority of repayment is the funder gets paid first from recovery, before counsel and client.[15] For example, in a $50 million case, funded at $10 million, a defendant may offer to settle in the range of $12-15 million. Under the terms of most funding agreements, funders would likely push for acceptance, and they will recover $10 million, plus additional sums as stated in the contract. The plaintiff will resist taking the offer since the plaintiff in this scenario, after funder repayment, receives almost nothing on a $50 million action, thereby setting up a conflict of interest.[16]

The conflict becomes clearer when considering the divergent loyalties and obligations of each side. Counsel's ethical obligations require that he or she act in the best interest of the client and in conformity with the client's directives. Alternatively, third-party funders are primarily ethically obligated to bring in the best possible return for investors. None of the third-party funders' fiduciary duties extend to counsel's client, before or after contracts are signed and funds are advanced. Therefore, advocates (and their clients) must be sensitive to and resist pressure from trial financiers regarding trial strategy or resolution decisions. Third-party funders' advocacy regarding trial strategy—informed by loyalty to the financial backers—must never be allowed to compromise counsel's loyalty to the client.[17]

As a corollary, if a trial file attached to a third-party funding agreement is over-leveraged, counsel's worries regarding repayment may affect advocacy decisions, even absent blatant funder demands. If the file's financing commitments become sufficiently unbalanced, the advocate may feel compelled to unreasonably risk trial to attempt generating a verdict large enough to cover all third-party payment obligations and to provide a satisfying return for counsel and client. When reasonable settlement options are rejected on this basis, it harms the client's interests. This type of conflict can undermine counsel's duty of undivided loyalty to the client.

As well, counsel may refer clients to funders, but counsel must refuse referral fees that extinguish independence of judgment regarding whether financing is in the client's interest. An advocate's consideration of financial commitments on a client's matter must never compromise candid advice regarding financing terms.

Conflict rules may prohibit an attorney, or a company the attorney substantially owns, from financing clients whom the attorney, or the attorney's firm, represent. Likewise, if counsel signs the finance agreement, the client may later direct counsel not to pay the funder, thus arguably rendering counsel and client adverse, which in turn likely violates California Rule of Professional Conduct 3-300 (avoiding interests adverse to a client). Third-party financing may cause counsel to inadvertently compromise the client's confidences, even without direct counsel-client conflict. These ethics challenges may arise in the discovery process. If so, this could place counsel in conflict with Rule of Professional Conduct 3-310(F) (avoiding representation of adverse parties) and Business and Professions Code 6068(e) (protecting client confidences), a difficult ethical gauntlet for counsel.

Privilege and Discovery

Privilege may accidentally be compromised and therefore lost in the ordinary course of litigation if an outside funder reads the file when considering a finance contract. As part of the negotiation regarding funding, most funders demand case data. Funders sometimes seek access to information before and after committing funds, which may require updates and sometimes direct file access as preconditions of financing or continued financing.[18] Counsel's discussions with potential funders could unintentionally waive attorney-client privilege, implicating discovery conflicts and maybe trial results.[19] This analysis creates ethics pressure points on clients.[20]

One possible hot-spot is the potential for outside financing to raise additional conflicts, despite client authorization. A paradigm may be created in which clients believe they must choose between revealing confidential information that they are uncomfortable disclosing to third parties and losing the funding for

MCLE Test No. 266

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1. Third-party funders' receiving case data as part of the negotiation regarding funding has no effect on discovery of privileged material.
True.
False.

2. A fundamental ethical conflict that arises in the presence of third-party funding is independent judgment regarding control of the litigation.
True.
False.

3. If counsel realizes that the third-party funding contract is usurious, counsel must immediately secure written waivers from the client in order to save the deal.
True.
False.

4. Monetary advances that are actually loans, which litigants must repay , constitute usury per se.
True.
False.

5. Third-party funding agreements can be structured so they are outside usury laws.
True.
False.

6. If class counsel discusses the ethics issues in a third-party funding arrangement with the lead plaintiff, counsel's ethical obligations to the class are satisfied.
True.
False.

7. Third-party funders and the lawyers they are backing share a community of interest, with similar goals and motivations.
True.
False.

8. Class counsel are under no ethical obligation to disclose to anyone the involvement of a third-party funding agreement.
True.
False.

9. When privilege logs are needed in the context of discovery, they should note specific, applicable privileges, and not "common interest."
True.
False.

10. Courts are never permitted to seek disclosure of the existence of a funding agreement.
True.
False.

11. Plaintiff's counsel can never be compelled to turn over third-party funding agreements to the defense.
True.
False.

12. The involvement of third-party financiers with potential lead class counsel could raise questions about that law firm's resources to meet the demands of representing the class.
True.
False.

13. Material transferred between counsel for the company and an investor or potential investor in that company is not always protected by the joint defense doctrine.
True.
False.

14. The common interest doctrine insulates from discovery material shared between lawyers who are negotiating adversaries in the course of representing their respective clients.
True.
False.

15. If negotiations with third-party funders are purely financial, the common interest doctrine may not protect the sharing of privileged material from discovery.
True.
False.

16. Paying the lender a portion of attorney fees could be considered prohibited fee-sharing.
True.
False.

17. Counsel may waive work-product protection by disclosing counsel's work product to a third party—including, potentially, prospective funders—who have no interest in maintaining confidentiality.
True.
False.

18. California advocates seeking third-party funding for litigation in California must be careful to avoid accidental champerty.
True.
False.

19. Disclosures to third-party funders might be protected under Evidence Code §912.
True.
False.

20. Counsel's discussions with potential funders can create ethics pressures for clients.
True.
False.

MCLE Answer Sheet #266

PERILS OF THIRD-PARTY FUNDING

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Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1.	☐ True	☐ False
2.	☐ True	☐ False
3.	☐ True	☐ False
4.	☐ True	☐ False
5.	☐ True	☐ False
6.	☐ True	☐ False
7.	☐ True	☐ False
8.	☐ True	☐ False
9.	☐ True	☐ False
10.	☐ True	☐ False
11.	☐ True	☐ False
12.	☐ True	☐ False
13.	☐ True	☐ False
14.	☐ True	☐ False
15.	☐ True	☐ False
16.	☐ True	☐ False
17.	☐ True	☐ False
18.	☐ True	☐ False
19.	☐ True	☐ False
20.	☐ True	☐ False

their litigation, and possibly their ability to press forward in litigation. Clients in this posture could feel unable to rely on existing counsel due to counsel's obvious bias and seek a legal opinion with another advocate who does not fully understand the history and nuances of the client's matter.

Once clients commit to securing funding, the financiers' confidentiality protocols should be carefully examined. Counsel should assist the parties to the transaction in defining the limits of disclosures and the legal and financial obligations to defend against intrusion into the client's confidential information. Counsel should consider demanding contract terms that include recourse for the funder's breach of counsel's obligations to safeguard client confidences.

A subsidiary issue concerns the potential for and consequences of waiver of privilege. Counsel should secure the client's written informed consent prior to cooperating with third-party funders' demands for disclosures prior to signing financing contracts. Disclosures to financiers should be no broader than necessary to outline the operative facts, issues, and procedural posture of the case, in counsel's judgment. Even if an advocate balances preserving confidences with the client's desire to finance the file, this does not address all the issues regarding breaking open privilege via disclosures to financial partners.

California civil litigators sometimes reference the common interest doctrine when they believe that effective client representation requires sharing with third parties privilege-protected material without waiving confidentiality. In *Citizens for Ceres v. Superior Court*, the California Court of Appeal interpreted Evidence Code Sections 912 and 952, finding that California has no "common interest privilege," but in limited circumstances California law provides for survival of the attorney-client privilege when confidential information is shared with a third party, as long as it is shared with a reasonable expectation that the information disclosed will remain confidential and the disclosure is necessary to accomplish the privilege holder's purpose in seeking legal advice.[21] The doctrine can, therefore, in some circumstances, insulate from discovery material shared between negotiating adversaries. Trial lawyers involved in negotiating third-party funding arrangements arguably function as both transactional attorneys negotiating business commitments and as trial lawyers zealously representing clients in adversarial proceedings. The added wrinkle is that funders are never advocates with a client in the mix.

As background, attorney-client privilege generally falls when lawyers voluntarily disclose confidences to unrelated third parties.[22] The underlying issue is that, during financial negotiations on the file, participants are adverse, rendering disclosures potentially outside attorney-client privilege.[23] In California, evidentiary privileges are purely statutory, and courts cannot recognize new privileges. As a result, the fact that the Evidence Code does not recognize a joint defense privilege for separately represented parties is the final word in California litigation.[24] However, disclosures may be protected under Evidence Code Section 912, which provides some shelter: disclosure does not waive privilege if it is both confidential and reasonably necessary for the accomplishment of the purpose for which counsel was consulted.[25]

Most cases construing Section 912, though, contemplate several attorneys representing multiple clients who are parties to a single action—for example, codefendants pool resources for efficiency or consistency. This is not the case during third-party funding discussions, however, in which parties who claim common interest as a defense to disclosure of privileged material are adversarial. Auspiciously, the common interest necessary for waiver protection—although not obvious in financial negotiations—has recently been recognized among nonlitigants and adverse negotiating parties.[26] Because the funder relationship during negotiations is both adversarial and exclusively financial, the common interest doctrine may not be available.[27] Thus, sharing privileged information is only selectively protected.[28]

Third-party funding is fundamentally a business negotiation, not seeking or providing legal advice, but some courts have recognized that communications between parties to a business negotiation are within the contemplation of the attorney-client privilege.[29] However, while some communications outside litigation may come under the rubric of the common interest doctrine, these types of communication must be shared for a legal rather than business purpose. Entities must share identical, or nearly identical, legal interests for the common interest doctrine to apply and for privileges and protections to kick in.[30]

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Counsel seeking funding and protection from discovery need to structure their approach and communications to establish that the parties share a common interest in the successful prosecution of the matter, rendering the disclosures "reasonably necessary to accomplish the purposes for…consulting counsel."[31] Generally, the purpose of consulting counsel would be successful litigation—the same interest motivating the financiers' participation. For protections to reliably attach, however, the communication must contain legal advice furthering the attorney-client relationship and reasonably necessary to representation.[32] This is a tough needle to thread because legal advice rarely plays a role in communications that are actually conducted under the aegis of arm's-length adversarial financial negotiations.

Contrary to the requirements of California's common interest doctrine, funders are generally neither counsel nor client. Counsel may want to try to cast the advocate's role in the funding negotiation as that of providing legal advice and guidance on the merits of the legal arguments in the client's case.

Arguably, absent legal advice, common-interest analysis might be inapplicable.[33] Consequently, communication among client, counsel, and finance companies may waive privilege, exposing privileged material to discovery. Another analysis is emerging to protect privilege when counsel shares sensitive material as part of trial financing. Courts recognize that the waiver analysis covers work product (*Wells Fargo Bank v. Superior Court*).[34] The trend is to protect financing-related disclosures as protected attorney work product, prepared in anticipation of litigation.[35] Unfortunately, counsel may unexpectedly waive work-product protection by disclosing counsel's work product to a third party with no interest in maintaining confidentiality.[36]

Considering these analyses, are litigation funding arrangements discoverable? In some jurisdictions, courts have compelled disclosure of documents shared with potential third-party investors during discussions about potential financing.[37]

In *Nidec Corp. v. Victor Co.*, a federal court sitting in California held that material transferred between counsel for the company and an investor was not protected by the joint defense doctrine.[38] In *Nidec*, the plaintiff sought access to documents about the defendant's patents, which the defendant had shared with a potential investor. The court did not recognize the existence of any common legal interest; the seller shared privileged legal advice predominantly to further a business interest, not a legal interest, because the investor was unlikely ever to be a defendant.

Counsel must understand the nuances of, and advise clients about, potential discovery consequences of sharing otherwise-protected material disclosed pursuant to purely financial conversations.[39] Once counsel secures the funding contract, splitting fees with non-attorneys may be implicated, depending on the deal's structure, and this may violate Rule 1-320 (financial arrangements with nonlawyers).[40] California Rule of Professional Conduct 1-320(A) generally prohibits members from directly or indirectly sharing legal fees with nonlawyers. Although agreements structured as traditional loans or purchase agreements of claim proceeds are likely consistent with Rule 1-320, paying a lender from attorney fees could be prohibited fee-sharing.[41]

Class Actions

The overall growth in third-party litigation funding extends to class actions. However, based on the unique dynamics of class-action relationships, the ethics analysis is not identical to nonclass relationships. One aspect of class litigation affecting third-party funding analysis is the additional pressure to disclose the fact of funding to the court. Class certification requires court approval and, to some extent, supervision of the development of the matter.[42]

The involvement of third-party financiers with potential lead class counsel may raise questions about the law firm's resources to meet the demands of representing the class. Counsel's motives are then already in conflict with the court's curiosity and potentially with an unknown number of class members. This raises concerns about counsel's avoiding interests adverse to the client, as proscribed by Rule 3-310.[43]

When, early in the process, the court designates lead class counsel, clients are both known and unknown. If a third party has a seat at the table, with a meaningful voice regarding whether to settle and the particular terms, the court will likely seek disclosure of information in this regard. Another ethical concern in this context concerns zealous representation—revealing the need for funding may appear to weaken the firm's ability to effectively represent clients in litigation. This may compromise the firm's ultimate success in the case.

For these reasons, some courts seek disclosure of the existence of a funding agreement, perhaps presaging a trend toward greater transparency. Thus, with whom should class counsel be consulting?[44] The lead plaintiff is a single discussion; at early stages of class litigation, the identities, and even the total number, of clients and potential clients is not solidified. Class members who may want to react to a class counsel's strategy to seek outside funding lack channels to hear this news or be heard in response. The plaintiff's counsel may be ethically obligated to separately disclose the existence of the funding agreement to all known and potential class members as part of the opt-out discussion. Once the funding is widely disclosed, confidentiality may be broken, exposing funding material in discovery. This disclosure would likely occur without input from clients, raising additional ethical concerns.

Further conflict may arise regarding funders who are working to create a business paradigm to secure the best financial return. Unlike ethics requirements for class counsel, funders are not necessarily bound to the best interests of a group of injured individuals. Courts hearing contested lead counsel petitions may require firms to disclose third-party funding.

Another complicated situation arises when multiple counsel from different firms are designated to represent a class, but one of the attorneys is using third-party financing. Although the attorney is fundamentally obligated to represent the class, he or she has brought a nonlawyer participant into the management cadre without approval or consent from co-counsel, potential clients, or perhaps even some of the clients already identified in the class. In this situation, although plaintiffs' lawyers owe a duty of undivided loyalty to class clients, counsel has a financier participating in important analyses who has little focus on what is best for injured parties. Co-counsel and clients may not be aware of the undisclosed divided loyalty that may arise when bankers influence settlement moves. Class counsel cannot realistically secure consent from all class action clients since not all clients have yet been identified at early stages. This raises questions about counsel's effective compliance with ethics obligations under Rule 1-310 (forming a partnership with a nonlawyer).

Guidelines for California class actions offer robust due process protections for class members, which could safeguard the class against possibly troubling third-party litigation financing contracts. If class members have intragroup conflicts of interests, the issues are more complex. Certification of a class encompassing these types of conflicts may trigger designation of subclasses, each with its own class counsel and representative. In a third-party funding context, this type of internal conflict may stimulate separate funding contracts with the attorneys, possibly raising competing approaches to strategy and resolution.[45] Thus, third-party litigation financing, as currently practiced, may have difficulty falling within all of a counsel's ethics obligations in class actions with designated subclasses.

To help the courts efficiently deal with approving class settlements, some plaintiff's lawyers are obtaining experts, sending out releases, and scheduling mediators at somewhat earlier stages than in the past.[46] This suggests more court scrutiny at preliminary procedural stages. With larger expenses earlier in the process, third-party financing will be a larger and more common occurrence. Analogizing to the plaintiffs' bar demands in discovery for disclosure of all insurance policies, the defense bar has argued that it is entitled to see the agreements if third parties are financing plaintiffs in class actions because third-party funding maintaining litigation is the corollary of this entrenched discovery rule.[47] The defense would be looking for language in the agreement that highlights ethics conflicts or other pressures affecting the course of litigation. Indeed, on January 23, 2017, the U.S. District Court for the Northern District of California posted a rule change requiring that plaintiffs in proposed class, representative, and collective actions disclose the identity of third-party funding sources.[48]

Ethical implications in the area of third-party funding are being recognized more slowly than the industry is growing, so counsel must be watchful regarding possible ethics pitfalls. Maintaining independence, avoiding conflicts, and preventing inadvertent waiver of privilege should be at the forefront of counsel's analyses when considering third-party litigation financing. The following activities represent practical approaches to apply when considering third-party funding litigation:

• Discuss with clients, in detail, all of the potential risks and adverse effects of third-party funding.

• Obtain detailed and clear written waivers delineating ethical, strategic, and financial consequences of third-party funding.

• Maintain privilege logs that note specific, applicable privileges (e.g., attorney-client or attorney work product) rather than common interest since the common interest doctrine is not one of California's statutorily decreed privileges.[49] ■

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[1] Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. Times, Nov. 4, 2010, at 1, *available at* http://www.nytimes.com; Jesse Solomon, *9/11 workers approve settlement with New York City*, CNN, Nov. 19, 2010, http://www.cnn.com/2010/US/11/19/ny.911.workers.settlement) [hereinafter Appelbaum]; Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, N.Y. Times, Nov. 19, 2010, at 1, *available at* http://www.nytimes.com.

[2] Client Confidentiality and the Attorney-client Privilege, Third-party Litigation Financing: Commercial Claims as an Asset Class, Practical Law Company, 40, *available at* http://www.parabellumcap.com/docs/faq/Aaron-Katz-and-Steven-Schoenfeld-Practical-Law-Third-Party-Litigation-Funding.pdf (last visited Jan. 25, 2017).

[3] Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 189-190 (1971); Clancy v. State Bar, 71 Cal. 2d 140, 146-148 (1969).

[4] Summary of Findings: Second Annual Litigation Financing Survey (2013), Session 9: Commercial Litigation Funding, Ethics, and Law, A.B.A., *available at* http://www.americanbar.org (last visited Jan. 25, 2017); Emerging Issues in Third-Party Litigation Funding: What Antitrust Lawyers Need to Know, Presentations, Fullbrook Capital Mgmt., LLC, *available at* http://www.fulbrookmanagement.com (last visited Jan. 25, 2017); Appelbaum, *supra* note 1.

[5] Cal. Rules of Prof'l Conduct R. 3-310(C).

[6] Cal. Rules of Prof'l Conduct R. 3-300, 3-100.

[7] Jason Krause, *Third-party financing is growing, and lawyers are big players*, A.B.A.J., Jul. 1, 2016, *available at* http://www.abajournal.com.

[8] Invest4Justice (https://www.linkedin.com/company/invest4justice-litigation-crowdfunding (last visited Jan. 25, 2017)), LexShares (https://www.lexshares.com/), and EquityNet (https://www.equitynet.com) are a few industry participants. *See also* Samantha Hurst, *Invest4Justice Peer-to-Peer Litigation Crowdfunding; Enabling Equal Access to Justice, Globally*, CrowdFund Insider, Dec. 17, 2014, http://www.crowdfundinsider.com.

[9] GoFundMe (https://www.gofundme.com), for example, is an online platform on which users create Web pages summarizing financial needs and share experiences via Facebook, Twitter, LinkedIn, and e-mail. KickStarter (https://www.kickstarter.com) and IndieGoGo (https://www.indiegogo.com) operate similarly.

[10] This discussion does not apply to insurance policies covering costs of defense.

[11] Civ. Code §§953, 954; Baum v. Duckor, 72 Cal. App. 4th 54, 64-65 (1999). *See also* Murphy v. Allstate, 17 Cal. 3d 937, 942 (1976); Reichert v. General Ins. Co., 68 Cal. 2d. 822, 834 (1968).

[12] Mathewson v. Fitch, 22 Cal. 86, 95 (1863); Civ. Code §§953, 954; *see* In re Cohen's Estate, 66 Cal. App. 2d. 450 (1944).

[13] Los Angeles County Bar Ass'n Prof'l Responsibility & Ethics Comm., Formal Op. No. 500 (1999) (Financing Legal Expenses of Another's Lawsuit) [hereinafter Formal Op. 500]; Cal. Rules of Prof'l Conduct R. 3-310(F); Bus. & Prof. Code §6068(e).

[14] Formal Op. 500, *supra* note 13.

[15] Mick Smith, *Mechanics of Third-Party Funding Agreements: A Funder's Perspective*, in Mechanics of Third-Party Funding Agreements: A Funder's Perspective 19, 23-24 (Lisa Bench Nieuwveld & Victoria Shannon, 2012).

[16] Conference, *Litigation Funding: The Basics and Beyond*, Center on Civil Justice at N.Y.U. Sch. of Law (2015), as reported by David Lat, *5 Ethical Issues with Litigation Finance*, Above the Law (Dec. 2, 2012), *available at* http://abovethelaw.com.

[17] Cal. Rules of Prof'l Conduct R. 3-300; Bus. & Prof. Code §6068(e)(1); Flatt v. Superior Ct. (Daniel), 94 Cal. 4th 275 (1994); Restatement (Third) of Law Governing Lawyers §121, Comment b.

[18] Guide to Litigation Financing, A.B.A., 12, *available at* http://www.americanbar.org (last visited January 25, 2017).

[19] Cal. Rules of Prof'l Conduct R. 3-100, 3-110; Bus. & Prof. Code §6068(e)(1).

[20] Formal Op. 500, *supra* note 13, (citing Bus. & Prof. Code §60608, Evid. Code §§950 *et seq.*, and Code Civ. Proc. §2018. *See also* De Los Santos v. Superior Ct., 27 Cal. 3d 677, 683 (1980); *accord* Hoiles v. Superior Ct., 157 Cal. App. 3d 1192, 1200 (1984).

[21] Citizens for Ceres v. Superior Ct., 217 Cal. App. 4th 889, 914-917 (2013).

[22] Evid. Code §912; *see*, *e.g.*, Weil v. Investment/Indicators, Research & Mgmt., Inc., 647 F. 2d 18 (9th Cir. 1981).

[23] Evid. Code §952 (citing Solon v. Lichtenstein, 39 Cal. 2d 74 (1952)).

[24] Raytheon Co. v. Superior Ct. (Renault & Handley Employees Inv. Co.), 208 Cal. App. 3d 683, 689

(1989).

[25] *Id.*

[26] *See* OXY Res. Cal. LLC v. Superior Ct., 115 Cal. App. 4th 874, 894 (2004); Morvil Tech., LLC v. Ablation Frontiers, Inc., No. 10-CV-2088-BEN (BGS), 2012 WL 760603, at *3 (S.D. Cal. Mar. 8, 2012); BriteSmile, Inc. v. Discus Dental Inc., No. C 02-3220 JSW (JL), 2004 WL 2271589, *1-2 (N.D. Cal. Aug. 10, 2004).

[27] Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373 (D. Del. 2010) (citing In re Regents of the Univ. of Cal., 101 F. 3d 1386, 1389 (Fed. Cir. 1996)); *but see* Carlyle Inv. Mgmt. LLC, et al. v. Moonmouth Co. S.A., et al., C.A. No. 7841-VCP 2015 WL 778846. At *9, 17-23 (Del. Ct. Ch.2015).

[28] Evid. Code §§912, 952.

[29] OXY, 115 Cal. App. 4th at 894. S*ee* STI Outdoor v. Superior Ct., 91 Cal. App. 4th 334, 340 (2001).

[30] OXY, 115 Cal. App. 4th at 889.

[31] Citizens for Ceres v. Superior Ct., 217 Cal. App. 4th 889, 901 (2013).

[32] *See* McKesson HBOC v. Superior Ct., 115 Cal. App. 4th 1229, 1239-41 (2004) (construing Code Civ. Proc. §2018(c)).

[33] People v. Shrier, 190 Cal. App. 4th 400, 413 (2010); Continental Cas. Co. v. St. Paul Surplus Lines Ins., 265 F.R.D. 510, 528-29 (E.D. Cal. 2010).

[34] Wells Fargo Bank v. Superior Ct., 22 Cal. 4th 201, 214 (2000).

[35] Code Civ. Proc. §2018.030(a); *see* Coito v. Superior Ct., 54 Cal. 4th 480 (2012).

[36] Wells Fargo, 22 Cal. 4th at 215.

[37] *See* Leader 719 F. Supp.2d at 376 *and* Abrams v. First Tenn. Bank Nat'l Ass'n, No. 3:03-cv-428, 2007 WL 320966, at *1 (E.D. Tenn. Jan. 30, 2007).

[38] Nidec Corp. v. Victor Co., 249 F.R.D. 575, 580 (N.D. Cal. 2007).

[39] *Id.* at 579.

[40] Funding terms vary widely. Although funders label transactions "purchases" or "assignments" of anticipated proceeds termed "assets"—arrangements that fall outside usury laws—they could be loans. When litigants must disgorge the bulk of their recoveries, and the advances are actually loans, this may be usury. Ghirardo v. Antonioli, 8 Cal. 4th 791, 798 (1994). If the funding arrangement is usurious (or otherwise unlawful), the agreement is unenforceable. Counsel should notify the client of the issue and cease participation.

[41] In the Matter of Bragg, 3 Cal. State Bar Ct. Rptr. 615 (Review Dept. 1997); State Bar Formal Op. 1999-154. *See generally* State Bar Formal Op. 1984-79.

[42] Background on California Class Certification, Class Certification in California, 4-5 (Feb. 2010), *available at* http://www.courts.ca.gov. The court's approval is needed for, inter alia, certification, notice, and resolution. 4 Witkin, California Procedure §§267 *et seq.* (5th ed. 2008).

[43] Cal. Rules of Prof'l Conduct R. 3-310.

[44] Cal Pak Delivery, Inc. v. United Parcel Service, Inc., 52 Cal. App. 4th 1 (1st Dist. 1997) (citing Palumbo v. Tele-Commc'ns, Inc., 157 F.R.D. 129, 132-33 (D.D.C. 1994)).

[45] *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 626-27 (1997).

[46] *See, e.g.*, *Class Action Roundtable,* California Lawyer (Nov. 2016), *available at* http://www.callawyer.com.

[47] *Id.*, (Comments by Brad W. Seiling, co-chair of Manatt, Phelps & Phillips' class action defense practice group).

[48] Notice Regarding Civil LR 3-15, U.S. Dist. Ct., N.D. Cal., https://www.cand.uscourts.gov/news/210.

[49] *See* OXY Res. Cal. LLC v. Superior Ct., 115 Cal.App.4th 874, 894 (2004).