



## ATTORNEY'S REPORT

Summer 2012

### LITIGATION FINANCING

## Putting Money on the Case

It's a harsh reality of the U.S. system of justice: It often takes cold, hard cash for clients to have their day in court.

If you are a personal injury attorney or plaintiff's attorney - or for that matter, are involved in any type of contingent fee case - you know what it's like putting up the money to fight your client's case. The cost of discovery and trial of a personal injury or other lawsuit can be substantial.

But the ability to cover litigation costs or lawsuit expenses may ultimately allow you to hold out for the largest, most appropriate settlement you can negotiate for your client.

### Financing Assistance for Lawsuits

A new and growing class of specialty financial institutions has emerged that finances proposed or ongoing lawsuits for clients or their lawyers. A 2010 *New York Times* article pegged the total sum invested in such lawsuits at more than \$1 billion.

Many of these lenders market direct-to-public, offering clients pre-settlement funding loans ranging from \$500 up to hundreds of thousands of dollars. This can be a blessing for plaintiffs stretched thin by medical bills and facing protracted unemployment. Other lenders provide post-settlement or appellate funding to get clients back on their feet while awaiting a cash settlement.

And some lenders market directly to lawyers - preferably those handling class actions, medical malpractice, or other complex and expensive litigation. Try searching for "lawsuit funding" or a similar term to find lenders who specialize in this type of funding.

### Questions to Ask

Lawyers who utilize this type of financing - or have clients considering such a move - should make sure

they understand all of the terms of the loan. Start by asking these questions:

**What are the rates?** Legal financing can be expensive. Lawsuit funding is non-recourse, meaning that if the client does not win, the loan doesn't have to be repaid. Given this, lenders must offset their potential for losses with higher interest rates. These rates are often not published, but anecdotal evidence suggests that they can range from 15 percent to 24 percent.

### Does non-recourse really mean non-recourse?

Although lenders may advertise that their loans are non-recourse, many that seek lawyer and law firm borrowers actually require their loans to be repaid, regardless of the outcome of the case.

**Are they ethical?** With echoes of champerty and maintenance still ringing, some jurisdictions continue to uphold rules against lending in support of pending lawsuits. Yet, others are warming to the practice, seeing it as a step toward providing access for clients who could not otherwise adequately pursue their case. Bar associations in several states (including New York and New Jersey) have agreed that pre-settlement funding is indeed ethical and that attorneys may refer their clients to funding firms.

**Is privilege affected?** Some courts have ruled that materials provided to lenders during the loan evaluation process are no longer privileged and are thus discoverable by the opposing party.

**Can interest costs be passed on?** Some courts have refused to allow attorneys who incurred the litigation financing to pass interest costs on to clients as expenses of the litigation - particularly when the expense wasn't explained to and approved by the client.

## LITIGATION FINANCING

### Putting Money on the Case, Cont'd.

#### Your Duties

The New York City Bar Association recently released a Formal Opinion stating that when clients enter into agreements for litigation financing, attorneys must be aware of the ethical issues that may arise as a result and advise their clients accordingly. According to the opinion, these duties include:

- 1) **Legality** – Advise the client on the legality of the agreement and refrain from entering into an unlawful transaction.
- 2) **Costs vs. benefit** – Advise the client to consider the costs and benefits of litigation funding, in addition to possible alternatives.
- 3) **Conflicts of interest** – Avoid accepting a referral fee from any litigation funding company you have referred a client to.
- 4) **Privilege and confidentiality** – Do not disclose confidential information to a funding company without the client's consent.
- 5) **Influence** – Do not allow the funding company to influence your professional judgment in determining the course of litigation.

#### Caveat Emptor

Although lawsuit funding may make the difference between winning and losing a case, it demands that lawyer and client enter any arrangement with eyes wide open.

*Do you have questions about litigation financing? Our accounting professionals can help you "run the numbers." Contact our office at 314.862.2070 for details.*

#### Improve Your Cash Flow

One of the most overlooked sources of financing for attorneys is simply better management of existing cash flow. In fact, you may be able to do without loans or other sources of capital by tightening up on collecting the money that's already owed to you:

**Get it up front.** Require some payment in advance from every client. Also get in the habit of reviewing your trust balances and asking that retainers be replenished as needed.

**Keep a handle on WIP.** Review your work in progress (WIP) report periodically to make sure that bills are being sent regularly. Divide your WIP that's more than 180 days old by your total WIP — the result should be between 20 percent and 40 percent. If it's over 40 percent, consider making some changes in your billing process.

**Get bills out quickly.** For example, you might want to divide your clients in half and bill twice monthly. Or, bill one-fourth of the alphabet each week.

**Ask for early payment.** Extend a discount for prompt payment (usually within ten days of invoice). Just make it clear that the discount is given in exchange for the client forfeiting the right to extend the payment due date out the customary 30 days.

**Make it easy for clients to pay.** The American Bar Association long ago established the propriety of attorneys accepting credit card payments. While transaction charges are incurred, they may be outweighed by the benefit of significantly accelerating your accounts receivable. And new technology makes it easier than ever to provide clients with additional financing options. For example, the little device known as Square can turn a smartphone or iPad into a credit card point-of-sale terminal - allowing you to take credit card payments at the client's office, at the courthouse, etc.

## NONPROFIT BOARDS

### What to Consider Before Serving

Being asked to serve on the board of a local nonprofit can certainly be an honor - and a potential win-win for all involved. The organization gets a director with a solid mixture of business knowledge and legal expertise. And you get the chance to make a difference in your community while interacting regularly with potential clients and referral sources.

#### Four Things to Review

But serving on such boards does come with some potential exposure: conflicts of interest, ethical considerations and more. These potential risks increase substantially if you are asked to serve both as a director and as general counsel for the organization - or even just asked to provide a legal opinion while serving as a board member.

Start by reviewing issues related to these four key areas:

1. **Articles of incorporation** – Review the organization's articles of incorporation and bylaws, as well as any state-specific statutes concerning the liability of directors, indemnification, immunity and conflict of interest issues.
2. **Directors & officers (D&O) liability coverage** – If the organization has D&O insurance coverage, find out what the policy limits are and what types of acts are covered or excluded.
3. **State law** – Understand the fiduciary duties imposed upon nonprofit directors (i.e., the duty of care and duty of loyalty). Review applicable state laws regarding immunity for actions taken while serving as a nonprofit director.
4. **Your liability insurance** – It is common for legal malpractice policies to exclude acts by the lawyer as a member of a board of directors, including nonprofit organizations. See if yours excludes pro bono legal services to nonprofit organizations and coverage when you are acting as a board member.

#### Sidestep Conflicts of Interest

*ABA Formal Ethics Opinion 98-410* identifies four possible conflict situations. Although the focus of the opinion is primarily on for-profit organizations, the rationale can apply to nonprofit organizations as well:

- You are asked to opine on board actions in which you participated.
- You are asked to pursue objectives of the organization that you, as a director, opposed.
- You or your law firm are asked to represent the organization in litigation that includes the organization and directors as defendants.
- You are asked as a board member to take action affecting your law practice or firm, such as when the board is determining whether to retain the law firm.

#### Steps to Take

Check your firm's database for potential conflicts of interest (e.g., your firm has been involved in a matter adverse to the nonprofit organization). Prior to your first board meeting, outline in a letter to the organization's executive director and board chair any potential conflicts and how they might preclude you from acting as either the director or a lawyer. The executive director and board chair should acknowledge the letter in writing.

At your first meeting as a new board member, make other board members aware of the potential conflicts. Make sure that the meeting minutes reflect the way the board will handle any conflicts of interest (e.g., you won't participate in board deliberations and actions on issues involving such situations).

Avoid confusion and conflict over lawyer-client privilege by clearly delineating your role as board member/lawyer. When you are speaking to the board as a lawyer, communicate that fact and remind the board of the methods of preserving the lawyer-client privilege. And be sure to request that the minutes reflect when certain communications fall within the attorney-client privilege.

#### Make It a Good Fit

Serving on a nonprofit board can be highly rewarding. Research board opportunities and select an organization that promises to be a good fit.

## NONPROFIT BOARDS

**What to Consider Before Serving, Cont'd.****Get Up to Speed on Disclosures**

Thanks to recent IRS filings, nonprofit organizations have some significant new disclosure responsibilities. In particular, IRS Form 990 was redesigned to enhance transparency and accountability to the IRS and the general public, and to promote compliance with the tax laws that govern nonprofits.

The new form includes probing questions and disclosures about the nonprofit's mission and related accomplishments, financial information, and governance and management policies, to name just a few. These new requirements may create a good bit of new work for nonprofit lawyers as they help organizations develop new policies and draft appropriate disclosures about them.

Small nonprofits also must meet new requirements. Those with revenues below \$25,000 annually used to be exempt from annual filing, but now must file an abbreviated Form 990N. Churches are still exempt from filing Forms 990, 990EZ and 990N.

## Paralegals as Profit Centers

Are your paralegals being utilized effectively?  
Consider these drivers of paralegal profitability:

**They are utilized properly.** Paralegals assigned tasks above or below their skill level can undermine profitability. To help lawyers assign work properly, consider creating paralegal tiers (junior, intermediate, senior) and prepare specific job descriptions/skill requirements for each.

**They are compensated appropriately.** Consider following the "Rule of Three," which the ABA advises for determining the appropriate salary and billable hourly rate for paralegals. In essence, paralegals should generate revenue three times their salary.

**They are provided support.** Just as with attorneys, paralegals are more efficient (and profitable) when they are assigned sufficient support staff and resources.

**Their value is understood.** Provide thorough training and mentoring for new associates so that they fully understand the paralegals' role, capabilities and impact on the firm's workflow and client service.

You can measure the financial impact of your paralegals using David Maister's classic formula for calculating law firm profitability: Net income per partner (NIPP) = (Leverage+1) (Billable rate) (Utilization) (Realization) (Margin).

Analyzing these key ratios can help determine how your paralegals are impacting your firm's bottom line:

**Leverage** – The ratio of paralegals, associates and other non-owner fee earners to partners.

**Billable rate** – The average billable rate of all fee earners.

**Utilization** – The average annual billable hours for fee earners.

**Realization** – The percentage of work billed and collected.

**Margin** – Net income for the firm as a percentage of the gross income.

*Our experienced professionals can help you "run the numbers" and suggest strategies for improving profitability.*

**Mueller Prost PC** is a team of CPAs and business advisors headquartered in St. Louis. From humble beginnings on a ping-pong table in 1983, the corporation has grown into one of the leading CPA and business advisory firms in the area, operating out of two locations with more than 90 staff members. By **Advising with Vision**<sup>®</sup>, we offer clients new and unique ways to look at their businesses. Our forward-thinking CPAs and advisors stand ready to provide depth of expertise, strategies and resources required to help clients set and achieve their goals at every stage of the business lifecycle. As a member of PKF North America (an association of independent CPA firms), our team has the ability to leverage national resources when needed to benefit client engagements.

**The firm offers a full range of professional tax, audit, accounting, litigation support and management advisory services to the legal community.**

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