

Lawyer Group (ABA) To Examine Ethical Pitfalls Raised in Center's "Betting on Justice"

Article By:

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The American Bar Association says it is studying whether third-party investment in lawsuits, in the form of loans to lawyers or financing arrangements with their clients, may run afoul of ethical rules governing attorney conduct.

In November, the Center for Public Integrity in collaboration with *The New York Times* [reported](#) that borrowed money, funneled from banks and hedge funds through specialty financial institutions and then on to lawyers and their clients, can improve plaintiff access to the legal system. However, the \$1 billion practice outlined in "Betting on Justice: Borrowing to Sue" has also fueled abuses, including cases initiated and controlled by investors.

The ABA [launched](#) a working group to "identify and analyze potential pitfalls" arising from litigation financing, according to a Dec. 2 notice released by the organization. The group will examine, among other issues, whether lawyer loans pose a threat to an attorney's professional independence, whether they damage the attorney-client relationship, and whether case disclosure to a lender violates confidentiality and privilege rules.

Philip Schaeffer, general counsel of the law firm White & Case in New York and co-chairman of the working group, said in an interview that it was premature to say what changes may be needed. The group's goal is to balance the need for appropriate funding that can help balance the scales of the civil justice system, while stamping out "pervasive" abuses and conflicts, he said.

"We anticipate that the commission will make recommendations to the ABA House of Delegates to make appropriate changes in professional rules of responsibility to ensure that lawyers comply with their overall ethical obligations to their clients and the courts," Schaffer said.

U.S. lawyers have until Feb. 15, 2011 to submit comments and suggestions to the ABA, he said.

The ABA first took notice of litigation finance – which the group prefers to call "alternative litigation financing"— in August 2009 when it created a special commission to examine broad ethical issues faced by the legal profession over the next decade.

In its new notice, the ABA commission co-led by Schaeffer compiled a list of 13 potential problems

and issues that can arise from a third-party lender financing a lawsuit. These include:

- Entering a financial agreement with a third party lender that requires first dibs on any settlement or judgment may undermine a lawyer's first duty of loyalty to the client, thus compromising the attorney's professional responsibility;
- Financing may breach attorney confidentiality and privilege rules because litigation funders often require an attorney to disclose details about a case that may be privileged.
- Lawyers who direct clients to a financing company so that clients can borrow money may have a conflict if they have a financial interest in the lender, or if they get a kickback for a referral.

Anthony Sebok, a law professor at Cardozo Law School who has written about third-party lawsuit investment, and who recently testified on behalf of the law firm Napoli Bern Ripka in an interest fee dispute involving the 9/11 rescue worker health case, said that he "strongly supports the ABA's participation in an open and frank discussion" of concerns raised by the commission.

Particularly vital, he said, are questions the working group is asking about how a funding recipient may share enough details of a case to satisfy a third-party lender, without that information then subject to discovery in the court case.

For example, a federal judge in Delaware ruled in June that a company suing Facebook for patent infringement had to turn over to Facebook documents that the plaintiff's lawyer had shared with a lender.

Schaeffer said that while the overall goals of the commission are broad, his discussions with attorneys about his work invariably veer to the topic of how lawyers and their clients can ethically pursue litigation financing.

"There's an enormous amount of interest in this," Schaffer said.

Comments submitted to the law group will be posted on the ABA website. The issue of litigation funding will also likely be on the agenda of an ABA meeting in Atlanta on Feb. 10-11, and the earliest that the organization's rulemaking body could take up any proposals would be in the autumn of 2011.

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