

## ABA Outlines Best Practices for Third-Party Litigation Funding

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In August of 2020, the American Bar Association (ABA) House of Delegates issued "Best Practices for Third-Party Litigation Funding" (the "Report").<sup>[1]</sup> Litigation funding, in any of its various forms, is largely unregulated by statute in most states. Accordingly, litigation funding companies with a national presence must navigate a shifting mosaic of common law, regulator guidance, and bar association opinions in order to operate. Amidst this legal uncertainty, self-policing is necessary to avoid regulatory scrutiny and to dissuade legislators from enacting overly onerous statutory limitations. The Report provides a valuable resource for self-policing of the industry.

Recommendations in the Report, such as those pertaining to documentation and structure of funding agreements, largely adhere to requirements codified in the type of state statutes governing litigation funding that are generally favored by the industry. Such laws typically do not impose fee limitations but focus on clear disclosure of terms, require the agreements to be non-recourse, and prohibit funding companies from influencing decisions relating to the underlying litigation.<sup>[2]</sup>

The ABA advises that its Report should not be read as "recommended standards of professional conduct" but instead "as a shorthand for issues that should be considered before entering into a litigation funding arrangement."<sup>[3]</sup> Considering the variety of forms of both litigation funding and state regulation, rigid best practices standards would be untenable. The Report acknowledges the breadth of transactions that may be considered "litigation funding." Litigation funding commonly involves a litigant obtaining financial assistance from a third-party funder (a "litigation funding company") in exchange for an interest, usually non-recourse, in the potential recovery from the litigation claim. Litigation funding companies may also provide funds directly to a litigant's attorney to cover litigation costs in exchange for a portion of the attorney's share of the recovery. While many companies fund individual litigants, others fund large, complex commercial litigation.<sup>[4]</sup> As discussed below, the Report recommends certain precautions that may not be warranted in many transactions, depending on the jurisdiction and form of litigation funding.

Among the Report's more controversial recommendations, it suggests that attorneys assume "that the litigation funding arrangement may well be examined by a court or the other party at some point in litigation."<sup>[5]</sup> While critics of litigation funding such as the U.S. Chamber of Commerce, a prominent business lobby, have proposed mandatory disclosure of third-party funding agreements in civil litigation, such expansive measures have yet to gain significant traction. Among the states, only Wisconsin has enacted widely applicable mandatory disclosure requirements. Under Wisconsin's Rules of Civil

Procedure, any third-party funding agreement must be disclosed in discovery.[6] However, disclosure of agreements may still be required in certain courts and types of cases. For instance, funding agreements must be disclosed in class action lawsuits based on a Standing Order of all judges in the United States District Court for the Northern District of California.[7] While funders and lawyers should be cognizant of disclosure requirements, they are unlikely to apply in many cases.

The Report addresses attorneys sharing case information with funders and discusses the risk of waiver of attorney-client privilege, and work product protection. Among other measures, the Report recommends that attorney representing the claimant offer no opinion about the underlying claims and only supply the funder with public documents and access to the public file.[8] Information about a case is, of course, invaluable to a funder in determining the likelihood of success on a claim and accurately "underwriting" a litigation funding transaction. Lack of information could in turn limit the availability of funds. While courts have been divided on when privilege is waived,[9] the Report acknowledges that "the current trend in the case law favors continuing to protect material disclosed to funders... generally as work product." [10] Accordingly, recommendations to limit the case information provided to a funder may be overly cautious for transactions in many jurisdictions.

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[1] American Bar Association, "American Bar Association Best Practices for Third-Party Litigation Funding" (August 3-4, 2020), available at <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf>.

[2] Utah Code Ann. §§ 13-57-101 et seq.; Me. Rev. Stat. Ann, tit. 9-A, §§ 12-101 et seq.; 14A Okla. Stat. §§ 3-801 et seq.

[3] "American Bar Association Best Practices for Third-Party Litigation Funding" at 1.

[4] *Id.* at 4.

[5] *Id.* at 11.

[6] Wis. Stat. § 804.01(2)(bg).

[7] Standing Order for all Judges of the Northern District of California, Contents of the Joint Case Management Statement (adopted January 23, 2017), paragraph 19.

[8] "American Bar Association Best Practices for Third-Party Litigation Funding" at 11.

[9] *Xerox Corp. v. Google, Inc.*, 801 F. Supp. 2d 293, 303-04 (D. Del. 2011) (based on common interest coverage, no waiver when documents shared with funder); *Miller UK v. Caterpillar*, 17 F. Supp. 3d 711, 732-33 (N.D. Ill. 2014) (finding shared financial interest was inadequate to establish common interest, so attorney client privilege was deemed waived).

[10] "American Bar Association Best Practices for Third-Party Litigation Funding" at 5.

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