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Other People's Money: The Ethics of Litigation Funding

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by Douglas R. Richmond*

I. INTRODUCTION

Litigation can be expensive, sometimes incredibly expensive. There are investigators to employ, expert witnesses to compensate, court reporters to pay, documents to photocopy or electronically image, travel expenses, demonstrative evidence to create, and so on. An attorney's time itself is valuable. A party's time is also valuable, and plaintiffs who are disabled as a result of injuries they have sustained may need money to live on.[1] As a result, a wealthy litigant, who can outspend a poorer litigant, is generally at an advantage and may be able to obtain a favorable settlement through attrition.[2]

This litigation reality is perceived to be a problem by some commentators because justice ought not follow wealth.[3] The equalizer in the civil justice system, of course, is the contingent fee method of attorney compensation. While contingent fees address attorney compensation issues, they do not aid a plaintiff's attorney when it comes to funding

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1. *See In re* K.A.H., 967 P.2d 91, 93 (Alaska 1998) (observing that plaintiffs in personal injury cases may be "unable to survive prolonged litigation without financial assistance").

2. *See id.* at 93 (noting somewhat caustically that defendants who are "aware of the economic pressure burdening unaided plaintiffs have every incentive to prolong the litigation with frivolous motions and discovery").

3. *See* Susan Lorde Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85, 85 (2002) (observing that "the idea that 'wealth [should not have] the monopoly of justice against poverty' has been embraced as a basic principle in the legal system of the United States") (quoting eighteenth century scholar) (footnote omitted).

litigation expenses, nor do they help a plaintiff with the costs of daily living.[4] Litigation funding companies fill this void.[5] Litigation funding companies may loan money to plaintiffs for living expenses or to attorneys to fund case expenses.[6] For example, a litigation funding company may agree to loan a plaintiff $10,000 in exchange for the first $25,000 of any settlement or judgment received within a specified time. Alternatively, a litigation funding company might advance money for expenses to an attorney. Upon recovery the attorney will repay the amount funded plus a fee equal to one dollar for every dollar of funding provided. Thus, a litigation funding company that advances $50,000 to a successful attorney will recoup its investment plus a $50,000 fee. All such loans or advances, whether to plaintiffs or attorneys, are nonrecourse. The litigation funding company's recovery is limited to any settlement or judgment obtained, and the company may not seek repayment from the plaintiff's or attorney's other assets.[7]

Litigation funding has emerged as a new financial services industry. Litigation funding companies are best thought of as specialized investors or lenders for several reasons.

First, with respect to plaintiffs, most traditional lenders are unwilling to lend money with only a potential litigation recovery as collateral because such loans are deemed to be too risky.[8] There is no way to value a plaintiff's claim or lawsuit in the same way that a business can be valued. Additionally, loan officers are usually incapable of assessing

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4. *See* James E. Moliterno, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223, 223 (2003) ("Black letter lawyer ethics law prohibits lawyers . . . from providing most forms of financial assistance to litigation clients.") (footnote omitted).

5. Martin, *supra* note 3, at 85.

6. *See, e.g., Funding Solutions for Plaintiffs and Their Attorneys*, Oasis Legal Finance, *available at* http://www.oasislegal.com (last visited June 25, 2004) (offering funding for plaintiffs and plaintiffs' attorneys); *Program Description*, Capital Transaction Group, Inc., *available at* http://www.captran.com (last visited June 21, 2004) (explaining briefly, litigation funding programs for litigants and for attorneys).

7. *See, e.g., FAQs*, Legal Advances, *available at* http://www.legaladvances.com/lawsuit-funding-faq.htm (last visited June 25, 2004) (stating that funding is nonrecourse); *Attorney Funding*, Accident-Lawsuit-Financing.com, *available at* http://accident-lawsuit-financing.com/attorney_funding.htm (last visited June 21, 2004) ("If you do not win the case, the Funds do not have to be repaid!"); *Frequently Asked Questions*, Case Funding Network, L.P., *available at* http://casefunding.com (last visited Jan. 17, 2004) ("If the case is ultimately lost, CFN loses as well and you . . . owe CFN nothing."); *Frequently Asked Questions*, Capital Transaction Group, Inc., *available at* http://www.captran.com/faq.asp (last visited June 21, 2004) (explaining nonrecourse nature of litigation funding arrangement).

8. Martin, *supra* note 3, at 85.

the value of a claim or suit. Such evaluations are the domain of experienced trial lawyers and insurance claim adjusters.

Second, regarding financing plaintiffs' attorneys, although some traditional lenders are willing to do so,[9] many are unwilling to provide funding because of associated economic or financial risks and uncertainties. Additionally, the lender may have no means of valuing a particular attorney's varied cases. Unlike attorneys who derive the majority of their income from hourly billing or flat fees, plaintiffs' attorneys dependent upon contingent fees have no accounts receivable, and therefore cannot tap into many lending resources.[10] In the same vein, it is difficult for a lender to be properly secured when lending to lawyers who derive their income from contingent fees because security interests in their anticipated recoveries are not easily enforceable. Banks that are willing to extend credit to plaintiffs' attorneys often have burdensome application, documentation, reporting, and oversight requirements.

Third, the potential profits for a litigation funding company are handsome. The key to success for funding companies is to employ people with the claim and case evaluation expertise that traditional lenders typically lack or to develop systems or methodologies that are reasonable substitutes for such expertise.

The emergence of litigation funding as a new financial services industry has been marked by judicial distrust.[11] The practice evokes concerns about champerty and maintenance, legal doctrines seldom seen in recent years.[12] Critics of the practice are concerned that litigation financiers will potentially manipulate the parties to whom they make loans[13] or will act in ways that impair the professional judgment of the

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9. Paul Bond, Comment, *Making Champerty Work: An Invitation to State Action,* 150 U. PA. L. REV. 1297, 1330 (2002) ("Currently, many small plaintiffs' firms finance their operations through bank loans.").

10. *See generally* Mike France, *The Litigation Machine,* BUS. WK. ONLINE, Jan. 29, 2001, *at* http://businessweek.com/2001/01_05/b3717001.htm

> ("Plaintiffs' attorneys invest all their time and money in a case up front and then may have to wait years for a payoff. It can be a scary, boom-bust, oil-wildcatter kind of business. Lawyers usually drill a lot of dry holes and try to tide themselves over with a few gushers.").

11. *See* Gary Young, *Two Setbacks for Lawsuit Financing But The Practice Is Still Alive And Well,* NAT'L L.J., July 28, 2003, at A1 (stating that "[t]he business of litigation finance is battered but upright after taking a beating in two courtrooms in the last year," and reporting on decisions in Ohio and North Carolina).

12. *See, e.g.,* Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 219 (Ohio 2003) (holding that litigation funding transactions constituted champerty and maintenance, and were, therefore, void and unenforceable).

13. *See id.* at 221.

attorneys to whom they advance expenses.[14] Lawyers who may need to finance litigation through a litigation funding company, or who must counsel a client who wants to borrow against an anticipated settlement or judgment, must therefore, consider the professional responsibility ramifications of their decisions or advice.

This Article advocates the position that litigation funding as it is commonly employed is ethical. Litigation funding companies do not, by their ordinary practices, create serious professional responsibility problems for attorneys. Any potential professional responsibility traps that litigation funding creates can be easily avoided by carefully drafting the funding agreement.

Looking ahead, Section II discusses the doctrines of champerty, maintenance, barratry, and usury in connection with litigation funding. These doctrines bear on lawyers' professional responsibility because both the Model Rules of Professional Conduct[15] and the Model Code of Professional Responsibility[16] provide that it is professional misconduct for lawyers to engage in conduct that is "prejudicial to the administration of justice,"[17] and engaging in unlawful conduct is just such an example of professional misconduct. Additionally, the application of these doctrines may implicate attorneys' duties of competence, communication, and confidentiality. Section III discusses ethics rules that arguably might apply in the litigation funding context, unrelated to concerns about the legal doctrines discussed in Section II. Again, the conclusion is always the same: with respect to lawyers, litigation funding is ethical.

II. CHAMPERTY, MAINTENANCE, BARRATRY, AND USURY

A. *Champerty, Maintenance, and Barratry*

The doctrines of "champerty," "maintenance," and "barratry" originated in medieval England when claims and rights were not freely assignable.[18] At common law, champerty refers to an agreement by which someone having no interest in the subject of an action "undertakes to

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14. It is professional misconduct for a lawyer to "permit a person who . . . pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." MODEL RULES OF PROF'L CONDUCT R. 5.4(c) (2004).

15. MODEL RULES OF PROF'L CONDUCT (2004) [hereinafter MODEL RULES].

16. MODEL CODE OF PROF'L RESPONSIBILITY (1980) [hereinafter MODEL CODE].

17. MODEL RULES, *supra* note 15, at R. 8.4(d); MODEL CODE, *supra* note 16, at DR 1-102(A)(5).

18. Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 273 (S.C. 2000).

carry on the suit at his own expense, or to aid in so doing, in consideration of receiving, in the event of success, some part of the land, property, or money recovered or deriving some benefit therefrom."[19] A person who engages in champerty is called a "champertor," and an agreement amounting to champerty is described as "champertous." Champerty is a form of maintenance, which is defined as "officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it."[20] Barratry is "the crime or offense of frequently stirring up suits and quarrels between individuals."[21] Simply summarized, "maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty."[22]

The doctrines of champerty and maintenance qualify as obscure, and barratry is seldom seen.[23] Several jurisdictions have done away with the doctrines entirely,[24] reasoning that "other well-developed principles of law can more effectively accomplish the goals of preventing speculation in groundless lawsuits and the filing of frivolous suits" than can these dated doctrines.[25] Where recognized, champerty and maintenance typically serve as contract defenses.[26] Offending contracts are void and unenforceable.[27]

The fact that a litigant can void a champertous contract is usually of no consequence to its adversary because the doctrines of champerty and maintenance do not bear on the litigant's right to prosecute the associated action.[28] Furthermore, a defendant who is being sued by a plaintiff whose lawsuit is financed by a third-party lacks standing to

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19. 14 C.J.S. *Champerty and Maintenance* § 2.a (1991) (footnote omitted).

20. *Id.* at § 2.b.

21. *Id.* at § 2.c.

22. *In re* Primus, 436 U.S. 412, 424 n.15 (1978).

23. *But see* Citibank v. Hauff, 668 N.W.2d 528, 537 (S.D. 2003) (discussing South Dakota statutory action for civil barratry).

24. *See, e.g.,* Landi v. Arkules, 835 P.2d 458, 464 n.1 (Ariz. Ct. App. 1992); Saladini v. Righellis, 687 N.E.2d 1224, 1226-27 (Mass. 1997); Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 277 (S.C. 2000).

25. *Osprey, Inc.,* 532 S.E.2d at 277.

26. *See, e.g.,* Sneed v. Ford Motor Co., 735 So. 2d 306, 314-15 (Miss. 1999); Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 219-21 (Ohio 2003); McKellips v. Mackintosh, 475 N.W.2d 926, 929 (S.D. 1991).

27. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 455 S.E.2d 655, 657 (N.C. 1995); *Rancman,* 789 N.E.2d at 221; *McKellips,* 475 N.W.2d at 929.

28. *See Sneed,* 735 So. 2d at 315 ("If we had determined the agreement . . . to be champertous, then it would have been a void contract . . . . But that would not have had any bearing on the rights of the Plaintiffs to continue the prosecution of their action.").

challenge the associated agreement.[29] Accordingly, a defendant generally cannot seek to void a litigation funding agreement in the name of champerty or maintenance and in this way defeat the plaintiff's suit.[30] In a few jurisdictions, however, a defendant who is sued by a champertous plaintiff can derive some advantage by asserting that the plaintiff lacks standing or is not a real party in interest, such that the action should be dismissed.[31] Whatever the defensive effects of champerty and maintenance, the doctrines are rarely viable offensive weapons.[32] They are generally not actionable as torts.[33]

Three final points bear mentioning. First, if an agreement is champertous, it necessarily constitutes maintenance because champerty is a form of maintenance.[34] The terms champerty and maintenance are essentially interchangeable.[35] Second, courts are reluctant to deem agreements champertous or to conclude that they constitute maintenance.[36] Third, although champerty was originally prohibited, at least in part, to "prevent attorneys from stirring up litigation or from becoming involved in a lawsuit solely for personal economic benefit,"[37]

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29. Killian v. Millard, 279 Cal. Rptr. 877, 879 (Cal. Ct. App. 1991).

30. *See id.* at 879-80.

31. *See, e.g.,* Hall v. State, 655 A.2d 827, 829-31 (Del. Super. Ct. 1994) (discussing plaintiff's lack of standing as a defense); Clark v. Cambria County Bd. of Assessment Appeals, 747 A.2d 1242, 1246 (Pa. Commw. Ct. 2000) (discussing "real party in interest" and standing).

32. *But see* Toste Farm Corp. v. Hadbury, Inc., 798 A.2d 901, 906 (R.I. 2002) (explaining that "maintenance remains a recognized cause of action in Rhode Island").

33. *See, e.g.,* Tosi v. Jones, 685 N.E.2d 580, 583 (Ohio Ct. App. 1996) (concluding that Ohio has never recognized champerty and maintenance as common law torts).

34. *See Sneed,* 735 So. 2d at 309 (quoting State *ex rel.* Carr v. Cabana Terrace, Inc., 153 So. 2d 257, 259 (Miss. 1963) (explaining that champerty "is a species of maintenance" and that courts use the terms "champerty" and "maintenance" almost interchangeably)).

35. *Id.*

36. *See, e.g.,* Reichhart v. City of New Haven, 674 N.E.2d 27, 32 n.3 (Ind. Ct. App. 1997) (rejecting champerty and maintenance arguments because of alleged champertor's interest in the subject of the litigation); *Sneed,* 735 So. 2d at 314-15 (rejecting defendant's argument because plaintiffs did not bring action because of inducement by or assistance from alleged champertors); Schnabel v. Taft Broad. Co., 525 S.W.2d 819, 823-25 (Mo. Ct. App. 1975); Schwartz v. Eliades, 939 P.2d 1034, 1036-38 (Nev. 1997) (determining that agreement was not champertous because the alleged champertor had an interest in the subject of the action); Reinhardt v. Kelly, 917 P.2d 963, 967 (N.M. Ct. App. 1996) (holding that plaintiff's agreement with a co-plaintiff was not champertous because the plaintiff had an interest in the lawsuit); Bluebird Partners, L.P. v. First Fid. Bank, 731 N.E.2d 581, 586-87 (N.Y. 2000); Beatley v. Schwartz, No. 03AP-911, 2004 WL 1244360, at *5 (Ohio Ct. App. June 8, 2004) (rejecting champerty and maintenance arguments because tenants had interest in guarantors' action).

37. Green v. Gremaux, 945 P.2d 903, 907 (Mont. 1997).

attorney contingent fee agreements are generally not champertous.[38] The overarching principle, with respect to the last two points, is that champerty and maintenance require the presence of "officious intermeddlers" or disinterested people dedicated to "stirring up strife." These descriptions fit few alleged champertors and certainly do not fit most attorneys working for contingent fees.[39]

1. Litigation Funding Meets Champerty and Maintenance in Ohio. Litigation funding ran afoul of the champerty and maintenance doctrines in 2003 when the Ohio Supreme Court decided *Rancman v. Interim Settlement Funding Corp.*[40] Roberta Rancman was injured in an automobile accident. In March 1998 she sued State Farm Insurance Company ("State Farm") for uninsured motorist benefits. Unwilling to wait until her case was resolved to collect the insurance benefits, Rancman contacted Interim Settlement Funding Corporation ("Interim") about an advance of funds to be secured by her pending suit. In April 1999 Interim's president, on behalf of an affiliated company, Future Settlement Funding ("FSF"), advanced $6000 to Rancman in exchange for the first $16,800 she would recover if the case was resolved within twelve months, $22,200 if the case was resolved within eighteen months, or $27,600 if the case was resolved within twenty-four months. Rancman had no obligation to repay the advance if her case was unsuccessful. In September 1999 Interim advanced an additional $1000 to Rancman, secured by the next $2800 she expected to recover.

38. *See* 14 C.J.S. *Champerty and Maintenance* § 11.a (1991) (discussing champerty). Attorneys contingent fee agreements typically are not champertous and do not constitute maintenance because they obligate the client to pay litigation expenses. *See Schnabel*, 525 S.W.2d at 825 (explaining that attorney contingent fee agreements could not be considered champertous because there was no allegation that the attorney "undertook to pay or protect the client from payment of the costs and expenses of litigation, an essential element of champerty properly pleaded").

39. *See, e.g.*, Accrued Fin. Serv., Inc. v. Prime Retail, Inc., 298 F.3d 291, 298 (4th Cir. 2002) (applying Maryland law and voiding syndication agreements that were "nothing more than arrangements through which to intermeddle and stir up litigation for the purpose of making a profit"); Kraft v. Mason, 668 So. 2d 679, 682 (Fla. Dist. Ct. App. 1996) (stating that "officious intermeddling is a necessary element of champerty"); *Schnabel*, 525 S.W.2d at 823 (noting that "officious intermeddling" is an element of maintenance); Oliver v. Bynum, 592 S.E.2d 707, 711 (N.C. Ct. App. 2004) (quoting Wright v. Commercial Union Ins. Co., 305 S.E.2d 190, 192-93 (N.C. Ct. App. 1983) (concluding that attorney engaged in champerty and maintenance because he acted for the purpose of "'stirring up strife and continuing litigation'")); Mitchell v. Amerada Hess Corp., 638 P.2d 441, 444 (Okla. 1981) (requiring proof of "officious intermeddling" for champerty); *Osprey, Inc.*, 532 S.E.2d at 276 (noting that before abolishing champerty as a defense, a champertor is defined as "an officious intermeddler who intend[s] to stir up strife" through a lawsuit).

40. 789 N.E.2d 217 (Ohio 2003).

Interim's advance, like the earlier FSF advance, was made nonrecourse.[41]

Rancman settled her suit against State Farm within twelve months for $100,000. She subsequently refused to honor her contracts with either FSF or Interim. Instead, she tendered the return of the sums advanced, together with interest, at an annual rate of eight percent.[42] In December 1999 Rancman sued to rescind her agreements with FSF and Interim and sought a declaratory judgment, alleging that defendants' agreements were "unfair, deceptive and unconscionable sales practices."[43]

Rancman prevailed in magistrate court with the magistrate concluding that the advances were loans that violated Ohio's usury laws and the state's Small Loan Act.[44] The trial court of common pleas adopted the magistrate's findings and ordered that the advances be repaid as Rancman had offered. The case then proceeded to the Ohio Court of Appeals, which concluded that the advances were loans, and because neither FSF nor Interim were licensed to make loans as required by the Small Loan Act, their agreements with Rancman were void. The Ohio Court of Appeals held that FSF and Interim had no right to recover any principal, interest, or other charges on their loans, and reversed the court of common pleas order requiring Rancman to repay the advances plus interest. Interim and FSF then appealed to the Ohio Supreme Court.[45]

Before the supreme court, Rancman argued that FSF's and Interim's advances were impermissible loans because the companies incurred virtually no risk[46] and because their potential profits exceeded Ohio's legally permissible interest rate. FSF and Interim contended that their advances were investments, not loans, and that the law does not limit returns on investments.[47] The supreme court reasoned that it was

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41. *Id.* at 218-19.

42. *Id.*

43. *Id.*

44. OHIO REV. CODE ANN. §§ 1321.01 to 1321.99 (West 2004).

45. *Rancman*, 789 N.E.2d at 219.

46. At trial, Rancman introduced the testimony of Interim's president, Richard Ashcroft, who also was an investor in FSF. He testified that Rancman's case was "low risk" from a funding perspective because (1) her attorney was skilled in such cases; (2) Ashcroft had full access to the case file; (3) Rancman was not liable for the accident; (4) her car was seriously damaged in the accident; (5) Rancman suffered what he described as "bright blood" injuries; and (6) Rancman had medical bills of $22,000, and he estimated the value of personal injury cases as being between two and a half to six times the plaintiff's medical bills. Rancman v. Interim Settlement Funding Corp., No. 20523, 2001 WL 1339487, at **2-3 (Ohio Ct. App. Oct. 31, 2001).

47. *Rancman*, 789 N.E.2d at 219.

unnecessary to determine the level of risk required to treat a contingent advance as an investment as compared to a loan because the advances at issue were "void as champerty and maintenance."[48]

The court in *Rancman* considered the advances to be champertous because FSF and Interim sought to profit from Rancman's case.[49] The advances constituted maintenance because FSF and Interim purchased shares of a suit in which they did not have an independent interest and because they gave Rancman a disincentive to settle her case.[50] The court explained Rancman's settlement disincentive as follows:

> The $6,000 advance, for example, gave FSF the right to the first $16,800 of the settlement after fees, expenses, and superior liens, if the . . . case settled within 12 months. If there had not been any superior liens . . . and her attorney charged a 30-percent contingency fee, Rancman would not have received any funds from a settlement of $24,000 or less. This calculation gives Rancman an absolute disincentive to settle for $24,000 or less because she would keep the $6,000 advance regardless of whether she settles with State Farm and would not receive any additional money from a $24,000 settlement.
> Under the same facts, the $1,000 Interim advance would provide a settlement disincentive of an additional $4,000. Thus, with no liens and a 30-percent attorney fee, the $7,000 advanced to Rancman effectively bars her from considering a settlement offer of up to $28,000.
> These advances also affect settlement offers greater than $28,000. Suppose Rancman decides that she will settle for nothing less than $80,000 minus attorney fees. Because of the obligation to repay the advances, she would refuse to settle until State Farm offers $98,000. If the settlement advance agreements are enforced, Rancman must receive an $18,000 premium on a settlement offer to have the same incentive to settle that she would have had if she had not entered into the agreements with FSF and Interim.[51]

The court was equally troubled by the fact that champertors may earn "a handsome profit by speculating in a lawsuit and by potentially manipulating a party to the suit."[52] The FSF agreement recited Rancman's acknowledgement that FSF "may, will, and should make a substantial profit on this agreement."[53] The court thus declared that

48. *Id.*
49. *Id.* at 220.
50. *Id.*
51. *Id.* at 220-21 (footnote omitted).
52. *Id.* at 221.
53. *Id.*

"a lawsuit is not an investment vehicle," and that "[a]n intermeddler is not permitted to gorge upon the fruits of litigation."[54]

The court in *Rancman* held that except "as otherwise permitted by legislative enactment or the Code of Professional Responsibility, a contract making the repayment of funds advanced to a party to a pending case contingent upon the outcome of that case is void as champerty and maintenance."[55] Accordingly, the contracts by which FSF and Interim advanced funds to Rancman were void and unenforceable.[56]

Rancman is unpersuasive for six reasons. First, because FSF and Interim presented the case to the supreme court calling for an interpretation of Ohio's Small Loan Act,[57] and because champerty and maintenance did not form the basis of the lower courts' decisions, the parties did not address the doctrines in their briefs.[58] Once the supreme court decided, however, that the application of those doctrines disposed of the case, the court should have given FSF and Interim the opportunity, in supplemental briefing, to explain why their funding agreements did not constitute champerty or maintenance.[59] Fairness would seem to compel this approach. Moreover, inviting supplemental briefing surely would have aided the supreme court in light of judges' acknowledged dependence on parties' legal arguments when deciding issues.[60]

Second, the fact that the FSF and Interim advances gave Rancman no incentive to settle her case for less than $28,000 forms no basis to void the deals.[61] Rancman may have had many reasons not to settle for less than the $100,000 she ultimately received, the chief one being the true value of her case if it was successfully litigated. Given Rancman's documented medical expenses, Interim's president thought the case might be worth $132,000.[62]

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54. *Id.*
55. *Id.*
56. *Id.*
57. OHIO REV. CODE ANN. §§ 1321.01 to 1321.99.
58. *See Rancman*, 789 N.E.2d at 221 (Christley, J., concurring).
59. *See id.* (Christley, J., concurring) (suggesting this approach).
60. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 29.11, at 29-16 (3d ed. 2001) (stating that "courts must rely on counsel to supply most of the legal argument in litigated cases"); David R. Cohen, *Writing Winning Briefs*, LITIGATION, Summer 2000, at 46, 48 ("Judges can rarely do as much work on the case as the parties can. Judges must rely on the briefs.").
61. *See Rancman*, 789 N.E.2d at 220-21 (explaining settlement disincentive).
62. *See Rancman*, 2001 WL 1339487, at * 3 (explaining that Rancman had "hard meds" of $22,000, and that according to Interim's president a personal injury case could be worth as much as six times the "hard meds").

Third, from a different perspective, what if Rancman was unable to pursue the suit unless she had $7000 for living expenses? Absent the advances, Rancman might have been under such financial pressure that she would have accepted a settlement offer far below the true value of her case.[63] It is understandable that the court in *Rancman* would be concerned about champertors being able to manipulate the parties with whom they contract,[64] but the court should have also been conerned about wealthy defendants or their liability insurers' ability to manipulate poor plaintiffs.[65]

Fourth, although FSF and Interim sought to profit from Rancman's case,[66] the court's associated concern is senseless. Rancman's attorney also sought to profit from her case, and based on a standard thirty-three percent contingency fee, he stood to profit more than FSF and Interim. Attorney contingent fee agreements are not champertous.[67] If the court's concern was the amount of the funding companies' profit, its concern was misplaced. Even if Rancman made a bad bargain, freedom of contract allowed her to do so.[68]

The court also failed to consider the risk that litigation funding companies face. For example, had Rancman been able to borrow $7000 from a bank, then lost her case at trial, she still would have had to repay the bank at the interest rate to which she agreed. In contrast, she would not be obligated to pay FSF and Interim because their advances were nonrecourse. The determination of which arrangement is better for a particular plaintiff, given the difference in repayment terms, depends on the plaintiff, the case, the terms of the subject litigation funding agreement, and any number of other facts. Although it is true that Rancman's case was low risk from FSF's and Interim's perspectives, the holding in *Rancman* is not limited to cases in which litigation financiers face little risk. Of course, as a practical matter it would be impossible to limit the holding in *Rancman* to low risk cases because (a) case

63. Inasmuch as FSF and Interim were "providers of funds of last resort," it seems obvious that Rancman was unable to meet her financial needs by borrowing from a traditional lender. *See id.* at *1.

64. *See Rancman,* 789 N.E.2d at 221 (expressing this concern).

65. As the North Carolina State Bar has observed, "a [plaintiff's] assignment of the proceeds of a personal injury recovery to a lender . . . may be the only way for an indigent [plaintiff] to obtain the funds necessary for living expenses during the pendency of the . . . lawsuit." N.C. State Bar, 2000 Formal Ethics Op. 4, at 1 (Jan. 18, 2001), *available at* http://www.ncbar.com/eth_op (last visited Sept. 16, 2003).

66. *Rancman,* 789 N.E.2d at 220.

67. 14 C.J.S. *Champerty and Maintenance* § 11.a (1991).

68. *See* Christeson v. Burba, 714 S.W.2d 183, 195 (Mo. Ct. App. 1986) ("The general rule of freedom of contract includes the freedom to make a bad bargain.").

characterization or categorization is an incredibly fact-specific, subjective exercise; and (b) even cases reasonably described as low risk can still be lost.

Fifth, in holding that speculating is prohibited in Ohio lawsuits, the court in *Rancman* essentially branded FSF and Interim "intermeddlers."[69] But the court's rationale for doing so is unclear. Rancman approached the funding companies; they did not solicit her business. The record was clear that FSF and Interim did not instigate the litigation; Rancman contacted them after her suit had been on file for approximately one month. There was no evidence that FSF or Interim ever concerned themselves with the details of the litigation, or attempted to impose their views about strategy or tactics on Rancman or her lawyer.[70] Consequently, it was unreasonable for the Ohio Supreme Court to view FSF and Interim as meddling in Rancman's lawsuit, and thus, void their agreements on the basis that the agreements constituted champerty and maintenance.[71]

Finally, it is important to note that the holding in *Rancman* is limited to litigation funding provided to parties.[72] The case does not impact a litigation funding company's advances to lawyers.[73]

2. Analyzing the Professional Responsibility Issues. Litigation funding agreements like those in *Rancman* are not champertous. Litigation funding companies that advance money to plaintiffs do not instigate litigation, nor do they carry on suits at their own expense.

Two valid points can be made to refute courts' concerns that litigation funding will fuel frivolous litigation.[74] First, funding companies have

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69. *See Rancman,* 789 N.E.2d at 221 ("Speculating in lawsuits is prohibited by Ohio law. An intermeddler is not permitted to gorge upon the fruits of litigation.").

70. *See id.* at 218-19 (discussing underlying personal injury case and relationship among Rancman, Interim, and FSF).

71. *See* Kraft v. Mason, 668 So. 2d 679, 683 (Fla. Dist. Ct. App. 1996) (stating that an alleged champertor was not an officious intermeddler when: (1) she did not instigate litigation but was instead approached by a litigant once his suit was on file; (2) she did not concern herself with the litigation; (3) she did not impose her views on the attorneys or litigants after loaning them money).

72. *Rancman,* 789 N.E.2d at 221 (stating that "a contract making the repayment of funds advanced to *a party* to a pending case contingent upon the outcome of that case is void as champerty and maintenance") (emphasis added).

73. *See id.* (discussing a contract involving "funds advanced to *a party* to a pending case") (emphasis added).

74. The debate about the so-called "litigation explosion" and frivolous lawsuits is beyond the scope of this Article. For a recent scholarly discussion of these issues, see Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day In Court and Jury Trial Commitments?,*

no incentive to advance money to plaintiffs whose lawsuits might reasonably be described as frivolous because the companies' chance of recovery is low.[75] Litigation funding companies exist to make money, not to throw it away. Second, because the merits of a case exist independent of a plaintiff's ability to afford litigation, prohibiting litigation funding will in some instances discourage meritorious lawsuits.[76]

Similarly, some courts may fear that litigation funding offends public policy because public policy favors settlements,[77] and litigation funding is likely to prolong litigation and discourage settlement. This concern is misplaced. The law favors fair and just settlements, not unfair or unjust settlements brought about by a party's economic desperation or financial inability to litigate meritorious claims. Both the public and the justice system benefit when litigants with legitimate disputes face one another on a level playing field. Litigation funding may even promote settlement and discourage prolonged litigation by forcing a recalcitrant defendant to approach a case reasonably and pragmatically in light of the fact that its adversary has the resources to meaningfully prosecute the matter.[78]

Even if litigation funding agreements like those in *Rancman* are champertous, it does not necessarily follow that they have ethical implications for the attorneys whose clients enter into them. The fact that a client enters into a champertous agreement does not mean that the attorney has engaged in conduct "prejudicial to the administration

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78 N.Y.U. L. REV. 982, 985-96 (2003). For a look at these issues in the popular press, see Stuart Taylor, Jr. & Evan Thomas, *Civil Wars*, NEWSWEEK, Dec. 15, 2003, at 43-53 (reporting a story promoted on the magazine's cover as "*Lawsuit Hell: How Fear of Litigation is Paralyzing Our Professions*").

75. *See* Ronald C. Minkoff & Andrew D. Patrick, *Taming the Champerty Beast: A Proposal for Funding Class Action Plaintiffs*, PROF. LAW., Spring 2004, at 1, 5 (discussing class actions and observing that the concern that litigation funding arrangements "foment meritless litigation is unfounded" because investors in litigation funding companies or syndicates "are unlikely to risk substantial sums on worthless claims").

76. Anthony J. Sebok, *The Continuing Struggle Over Litigation Funding: The Ohio Supreme Court Voids A Sale of An Interest In a Lawsuit, available at* http://writ.news.findlaw.com/sebok/20030616.html (June 16, 2003).

77. *See, e.g.*, City of Orange v. San Diego County Employees Ret. Ass'n, 126 Cal. Rptr. 2d 405, 412-13 (Cal. Ct. App. 2002) (observing that settlements are favored and should be encouraged because they promote peace and good will in the community, reduce the expense and persistency of litigation, and prevent the justice system from becoming overloaded). *See also* Farmer v. Christensen, 581 N.W.2d 807, 813 (Mich. Ct. App. 1998) (stating that Michigan public policy "is to encourage the settlement of lawsuits because it benefits both the parties and the public").

78. *See In re* K.A.H., 967 P.2d 91, 93 (Alaska 1998) (noting that defendants who are "aware of the economic pressure burdening unaided plaintiffs, have every economic incentive to prolong the litigation with frivolous motions and discovery").

of justice" in violation of Rule 8.4(d) or DR 1-102(A)(5).[79] After all, it is the client who entered into the agreement, not the attorney. While an attorney is a client's agent, a client is not an agent for his attorney,[80] and a client's alleged misconduct cannot be imputed to his attorney.[81]

In those states in which litigation funding agreements are void and unenforceable because they are champertous, an attorney who knows that her client has entered into such an agreement has a duty to inform the client that the agreement is probably unenforceable.[82] Similarly, in states in which champerty and maintenance have been abolished, an attorney who learns that her client is considering entering into a litigation funding agreement must inform the client that the agreement may well be enforceable.[83] In jurisdictions in which the law is silent or unsettled, an attorney must inform her client of that fact and of the possible alternative outcomes.[84]

A more interesting scenario is this: In a jurisdiction in which litigation funding agreements with parties are void and unenforceable as being champertous, should an attorney instruct her client to enter into such an agreement? Because champertors are not entitled to restitution,[85] the client would be able to keep the funds advanced by the litigation funding company and fully recover in her lawsuit. Some lawyers might argue this question is easily answered in the affirmative because a plaintiff's attorney is obligated to obtain for her client the maximum legally possible recovery. The client's windfall is a feather in the attorney's cap, and the fact that the funding company's ignorance of the law in the jurisdiction caused it to strike a bad bargain is the company's problem.[86]

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79. MODEL RULES, *supra* note 15, R. 8.4(d); MODEL CODE, *supra* note 16, DR 1-102(A)(5).

80. Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co., 931 S.W.2d 166, 176 (Mo. Ct. App. 1996).

81. *Id.* at 176.

82. *See* MODEL RULES, *supra* note 15, at R. 1.1 (discussing competence); *id.* at R. 1.4(a)(2) (compelling lawyer to reasonably consult with client about the means by which the client's objectives are to be accomplished); MODEL CODE, *supra* note 16, at DR 6-101(A) (governing lawyers' failure to act competently).

83. Interestingly, Rancman's lawyer advised her not to enter into the agreements with the funding companies. *Rancman*, 2001 WL 1339487, at *3.

84. *See* MODEL RULES, *supra* note 15, at R. 1.1 (discussing competence); *id.* at R. 1.4 (discussing duty to communicate); MODEL CODE, *supra* note 16, at DR 6-101(A) (governing lawyers' competence).

85. Schwartz v. Eliades, 939 P.2d 1034, 1037 (Nev. 1997).

86. The problem may be the attorney's if the funding agreement includes a choice of law provision requiring that the agreement be interpreted under the laws of a jurisdiction that does not recognize champerty or maintenance. Similarly, a litigation funding company

The answer to this question has to be "no." Although the lawyer has no duty to protect the funding company's interests, advising a client to enter into a contract with the intent to dishonor it is improper. Such advice involves "dishonesty, fraud, deceit or misrepresentation," and is thus, prohibited.[87] Furthermore, because the advice may negatively affect the image or perception of the legal profession, or cause disrespect for the profession, it is prejudicial to the administration of justice.[88] It is clearly professional misconduct for an attorney to engage in conduct that is prejudicial to the administration of justice.[89] Finally, in those jurisdictions that adhere to the Model Code, such advice constitutes "conduct that adversely reflects on [the attorney's] fitness to practice law,"[90] and it creates an appearance of professional impropriety.[91] None of these violations are excused by a lawyer's desire to obtain the best possible outcome for the client; in the practice of law "the ends do not justify the means."[92]

It is apparent that litigation funding agreements, in which a litigation financier advances funds to an attorney rather than a party, are not champertous. Consider again the example of a funding company that agrees to advance money to an attorney for expenses in a given case, the attorney being obligated upon recovery to repay the amount funded plus a fee equal to one dollar for every dollar of funding provided. In that situation the funding company is not supporting or maintaining litigation in exchange for a portion of the recovery because the attorney could repay the advance from a source other than the judgment. The funding company can further deflect allegations of champerty and maintenance by not funding litigation until the suit has been on file for a reasonable time, such as six months or one year; by agreeing that the company will not attempt to control or influence the attorney's handling

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might employ a forum selection clause compelling its customers to litigate any disputes arising under their agreements in a jurisdiction with law favorable to the company. *See* Ari Dobner, Comment, *Litigation for Sale,* 144 U. PA. L. REV. 1529, 1588-89 (1996) (suggesting the use of a forum selection clause involving New Jersey).

87. MODEL RULES, *supra* note 15, at R. 8.4(c); MODEL CODE, *supra* note 16, at DR 1-102(A)(4).

88. *See* Attorney Grievance Comm'n v. Richardson, 712 A.2d 525, 532 (Md. 1998) (explaining "that conduct that impacts on the image or the perception of the courts or the legal profession . . . and that engenders disrespect for the courts and for the legal profession may be prejudicial to the administration of justice").

89. MODEL RULES, *supra* note 15, at R. 8.4(d); MODEL CODE, *supra* note 16, at DR 1-102(A)(5).

90. MODEL CODE, *supra* note 16, at DR 1-102(A)(6).

91. *See id.* Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety").

92. *In re* Hager, 812 A.2d 904, 914 (D.C. 2002).

of the case; and by making the attorney agree not to pass along any portion of the funding company's fee to his client. A funding company that allows a reasonable time to pass before advancing funds is not instigating litigation; a funding company that exercises no control over an attorney's handling of a case is not an "officious intermeddler;" and a funding company that prohibits an attorney from passing portions of the fee along to the client has not acquired a part of the matter being litigated.

An attorney who wishes to enter into a funding agreement is free to do so, provided he informs his client and the client consents.[93] The attorney must obtain the client's consent before revealing the client's confidences to a litigation funding company,[94] and the attorney must take reasonable steps to safeguard the client's confidences once revealed to a funding company.[95] This latter duty presumably can be accomplished by placing a provision in the funding agreement whereby the funding company promises to maintain confidentiality with respect to information obtained regarding individual cases.[96]

If the client refuses to consent to the attorney's intended means of litigation funding, or if the client refuses to authorize the attorney to disclose to the funding company confidential information it needs to determine whether to fund the case, the attorney must explain to the client the effect this restriction may have on the attorney's ability or willingness to undertake the representation.[97] If the attorney cannot competently represent the client absent the desired funding, or if he is unwilling to do so, the attorney must terminate the representation.

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93. *See* Fla. Bar, Staff Op. 24048, at 3 (July 2, 2002) (on file with the author); Bd. of Prof'l Responsibility of the Supreme Court of Tenn., Advisory Ethics Op. 2001-A-744, at 2-3 (2001) (on file with the author); Utah State Bar Ethics Advisory Op. Comm., Op. No. 02-01, at 1 (Feb. 11, 2002) (on file with the author).

94. State Bar of Ariz., Op. No. 2001-07, at 3 (Sept. 2001) (on file with the author).

95. *Cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-398 (1995) (discussing nonlawyers' access to a lawyer's data base).

96. *See id.* at 367 (suggesting that when contracting with an outside service provider that will have access to confidential client information, "a lawyer might be well-advised to secure from the service provider in writing, along with or apart from any written contract for services . . . a written statement of the service provider's assurance of confidentiality").

97. MODEL RULES, *supra* note 15, at R. 1.4(a)(2) (obligating a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished"); *id.* at R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

B. Usury

"Usury" refers to the "exacting, taking, or receiving of a greater rate of interest than is allowed by law for the use or loan of money."[98] Prohibitions on usury are intended to protect vulnerable borrowers from predatory or unscrupulous lenders.[99] "When usurious interest is part of an agreement, the usury invalidates that part of the agreement which provides for illegal interest, and only the actual debt and legal interest are recoverable" by the lender.[100]

Most states have statutes limiting interest rates and prohibiting usury, although the statutes are typically riddled with exceptions.[101] In Missouri, for example, loans to corporations, general partnerships, limited partnerships, and limited liability companies can be made at any interest rate and subject to any fees to which the parties agree in writing.[102] The same is true for business loans of $5000 or more.[103]

The elements necessary to establish usury vary among the states. Most states agree that (1) there must be an agreement to lend money; (2) the borrower's obligation to repay must be absolute; and (3) the interest charged must be greater than the law allows.[104] Some states add a fourth element and require that the lender have "a corrupt intent to take more than the legal rate [of interest] for the use of the money loaned,"[105] while other states deem the lender's intent to be irrelevant.[106] In the litigation funding context, the second element is most important because an agreement is not usurious if the associated debt is only contingently repayable.[107] If repayment is based upon a contingency, a transaction is more like an investment or a joint undertaking than a loan.[108]

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98. Seaton v. City of Lexington, 97 S.W.3d 72, 76 (Mo. Ct. App. 2002).

99. *See* George v. Capital S. Mortgage Inv., Inc., 961 P.2d 32, 49 (Kan. 1998) (quoting Indian Springs State Bank v. Kelley's Auto Supply, Inc., 675 P.2d 379, 382 (Kan. Ct. App. 1984)).

100. Killion v. Bank Midwest, 886 S.W.2d 29, 33 (Mo. Ct. App. 1994).

101. Martin, *supra* note 3, at 90 (noting categories of exemptions and criticisms of the variations in usury laws).

102. MO. REV. STAT. § 408.035(1) (2000).

103. *Id.* § 408.035(2).

104. *See* Martin, *supra* note 3, at 90-91.

105. Kraft v. Mason, 668 So. 2d 679, 683 (Fla. Dist. Ct. App. 1996).

106. *See, e.g.*, Beltz v. Dings, 6 P.3d 424, 430 (Kan. Ct. App. 2000) ("The trial court is not required to find that [the defendant] intended to commit usury. The trial court must merely find that [he] collected interest at a rate greater than what is authorized by law.").

107. Martin, *supra* note 3, at 91.

108. Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex. 1994).

If a litigation funding company advances funds to a plaintiff on a nonrecourse basis, its agreement to do so should generally not be considered usurious even if, as in *Rancman,* the plaintiff is potentially obligated to pay interest at a rate upwards of one hundred percent.[109] Because the funding company's advance is contingent upon the plaintiff's recovery, the plaintiff's repayment obligation is not absolute, and this key usury element is unsatisfied. The same reasoning holds true if a litigation funding company advances funds to an attorney on a nonrecourse basis.

Opponents of litigation funding will likely argue that the preceding analysis is incorrect because an agreement is still usurious if the purported contingency on which repayment rests is in fact relatively certain to occur.[110] Opponents will point out that litigation funding companies only participate in cases in which they expect the parties they support to prevail. In other words, funding companies' profits do not truly depend upon contingencies; the advances in fact create an absolute obligation to repay, and the agreements are, therefore, usurious.

To be sure, litigation funding companies hope to invest in winning cases rather than losing cases. It is normally wrong, however, to assume that any case will yield a certain recovery. All experienced trial lawyers can relate stories of losing cases they thought were sure winners.[111] Litigation results are not as predictable as some commentators, courts, and attorneys may think. Thus, whether a litigation funding agreement is usurious depends, at best, on the facts of each case.[112]

Additionally, when attorneys contract with litigation funding companies, usury allegations may be off target due to variations in state laws. For example, Missouri permits business loans of $5000 or more to be made at any interest rate and subject to any fees to which the parties may agree in writing,[113] and these terms extend to corporations,

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109. *See Rancman,* 789 N.E.2d at 218-19 (explaining that FSF advanced Rancman $6000 in exchange for the first $16,800 she would recover if the case was resolved within twelve months, $22,000 if resolved within eighteen months, and $27,600 if resolved within twenty-four months, and that Interim advanced her $1000 against the next $2800 she expected to collect).

110. *See* Martin, *supra* note 3, at 91 (quoting RESTATEMENT (FIRST) OF CONTRACTS § 527 cmt. a, app. (1932)).

111. My support for this statement is admittedly anecdotal, inasmuch as I am by training and experience a trial lawyer, and I base it on my experiences and on conversations with other trial lawyers.

112. *See Catalina,* 881 S.W.2d at 296 ("Usury, where not apparent from the face of the instrument, is a question of fact.").

113. MO. REV. STAT. § 408.035(2) (2000).

partnerships, and limited liability corporations.[114] If litigation funding companies' advances to attorneys are loans, they clearly are business loans, and many attorneys practice in partnerships, professional corporations, and limited liability companies. Of course if a funding company's advances are considered investments rather than loans, usury law finds no application at all.

Although this section has demonstrated that litigation funding agreements are not usurious, critics of the practice may contend that a Michigan case, *Lawsuit Financial, L.L.C. v. Curry*,[115] compels a different conclusion. In *Curry*, Mary Curry was awarded a $27 million judgment by a trial court in a personal injury case because defendants admitted liability before trial. She then obtained $177,500 in "non-recourse capital advances" from Lawsuit Financial pursuant to an agreement that included a repayment formula. Applying that formula, Curry was obligated to repay Lawsuit Financial $887,500 if she recovered in her lawsuit.[116]

The trial court subsequently reduced Curry's judgment, which included $20 million in punitive damages and $7 million in compensatory damages. The court struck the punitive damage award and remitted the compensatory damages to just over $4.78 million. Curry then settled the lawsuit for $4.7 million. Once Curry settled, Lawsuit Financial sought payment of the $887,500 it claimed was owed under the agreement. Curry refused to pay, and Lawsuit Financial sued her for breach of contract and conversion.[117]

The trial court found that Lawsuit Financial's agreement with Curry was usurious because Curry's repayment obligation greatly exceeded Michigan's seven percent statutory interest rate on loans. Consequently, the trial court held that Curry was obligated to repay only "the principal balance of the loan, which was $177,500."[118] Lawsuit Financial appealed.[119]

On appeal, Lawsuit Financial argued that its advances were not loans because repayment was contingent upon Curry's recovery.[120] The Michigan Court of Appeals disagreed, noting that the "'hallmark of a loan is the *absolute* right to repayment.'"[121] The court explained:

114. *Id.* § 408.035(1).
115. 683 N.W.2d 233 (Mich. Ct. App. 2004).
116. *Id.* at 234-36.
117. *Id.* at 236, 239.
118. *Id.* at 238.
119. *Id.* at 235.
120. *See id.* at 239.
121. *Id.* (quoting Blackwell Ford, Inc. v. Calhoun, 555 N.W.2d 856, 859 (Mich. Ct. App. 1996)).

> We believe that the transactions at issue here were loans because at the time the advances were made, plaintiff had an absolute right to repayment. In support of its argument that plaintiff did not have an absolute right to repayment, plaintiff directs us to language in the agreements that states that repayment is contingent on defendant Curry's recovery. Despite that language in the agreements, we conclude that the right to repayment was absolute because the parties entered into those agreements long after the defendants in the underlying personal injury suit admitted liability and after the jury returned a verdict of $27 million . . . .[122]

In short, at the time the advances were made to Curry, she was certain to recover damages in some amount.[123] Accordingly, what Lawsuit Financial attempted to characterize as "contingent advances" were in fact loans with an interest rate far exceeding the Michigan legal rate.[124] Thus, the appellate court affirmed the trial court judgment for Curry.[125]

The holding in *Lawsuit Financial* must be limited to its unusual facts. Had defendants in Curry's personal injury case not admitted liability, which would have created some chance of outright reversal on appeal, the funding company's right to repayment would not have been absolute. In that case the funding company's advances would not have been so easily characterized as loans, and usury law would have afforded Curry no relief. Furthermore, Lawsuit Financial advanced funds to Curry postjudgment. If defendants could have admitted liability but continued to litigate damages in the belief that their conduct caused Curry no harm and Lawsuit Financial had advanced funds to Curry prejudgment, there again would have been no absolute right to repayment, and usury would not have been an issue. The lesson for litigation funding companies is simple: Do not advance funds to litigants who have already been awarded judgments in cases in which the defendants have admitted liability.

Parties who contract with litigation funding companies are unlikely to see their agreements scrutinized by courts unless the parties find themselves in litigation with their financiers. On the other hand, attorneys who finance cases through litigation funding companies are subject to considerable scrutiny by virtue of their membership in a self-

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122. *Id.*
123. *Id.*
124. *Id.* at 240.
125. *Id.*

regulating profession.[126] Courts and disciplinary authorities that examine the conduct of attorneys who finance cases through litigation funding companies will likely consider ethical issues other than those linked to the doctrines of champerty, maintenance, barratry, and usury. These include an attorney's independence, conflicts of interest, an attorney's duty of confidentiality, fee splitting, and an attorney's efforts to pass along litigation funding costs to clients.

III. OTHER ETHICS RULES AND ISSUES

A. *Attorney Independence and Conflicts of Interest*

A primary concern with litigation funding is the potential for litigation funding companies to direct or regulate the professional judgment of the attorneys with whom they deal in order to protect the companies' investments. In so doing, the companies may impair the attorney's representation of his client.[127] Courts commonly worry "that an attorney's primary loyalty will, as a practical matter, rest with the person or entity who pays him."[128] Scholars share this concern.[129]

The concern that an attorney's financial relationship with a third party may interfere with the attorney's ability to render independent legal advice is specifically addressed in Model Rule 5.4(c), which states: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."[130] In the few states that still enforce versions of the Model Code, nearly identical language appears in DR 5-107(B).[131] Rule 5.4(c) and DR 5-107(B) typically surface in cases where parents hire an attorney for their children, businesses hire an attorney for their employees, or liability insurers hire an attorney to defend their insureds.[132]

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126. *See* Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation,* 12 GEO. J. LEGAL ETHICS 175, 175 (1999) ("Law is a self-regulating profession.").

127. *See* Minkoff & Patrick, *supra* note 75, at 5 (discussing this concern in connection with class actions).

128. Oliver v. Bd. of Governors, 779 S.W.2d 212, 215 (Ky. 1989).

129. *See* HAZARD & HODES, *supra* note 60, at § 45.8 (discussing Rule 5.4(c) and admonishing lawyers to be sure they are serving their clients and not "currying favor" with non-clients).

130. MODEL RULES, *supra* note 15, at R. 5.4(c).

131. MODEL CODE, *supra* note 16, at DR 5-107(B) ("A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.").

132. HAZARD & HODES, *supra* note 60, at § 45.8 (discussing Rule 5.4(c)).

Although an attorney might violate Rule 5.4(c) and DR 5-107(B) by relying on a litigation funding company to perform certain tasks, which the attorney should perform himself, such as: (1) conducting the factual or legal analysis on which a client's lawsuit might be premised; (2) providing legal advice to the client; (3) drafting pleadings; or (4) initiating the action being funded, the rules by their terms do not appear to apply to typical litigation funding agreements.[133] A litigation funding company that advances funds for case expenses is simply not employing or paying the attorney to render legal services for the attorney's client. It cannot be said that the funding company is employing the attorney when the funding company cannot terminate the attorney's representation of the client. The company certainly is not paying the attorney; it is advancing funds that the attorney has agreed to repay. Furthermore, attorneys can avoid violating Rule 5.4(c) and DR 5-107(B) by insisting that litigation funding companies with which they do business include a clause in their agreements promising that the company will not attempt to direct or regulate the attorney's professional judgment in the funded cases.

Even if an attorney's agreement with a litigation funding company does not run afoul of Rule 5.4(c) or DR 5-107(B), the attorney must still be careful not to violate conflict of interest rules. Under the version of Model Rule 1.7(b) employed in most states,[134] an attorney "shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities . . . to a third person, or by the lawyer's own interests," unless the attorney "reasonably believes" that the client's representation "will not be adversely affected," and "the client consents after consultation."[135] In the few jurisdictions still adhering to the Model Code, an attorney must adhere to DR 5-101-(A),[136] which provides: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his

133. *See In re* Thrasher, 661 N.E.2d 546, 548 (Ind. 1996) (holding that a lawyer violated Indiana Professional Conduct Rule 5.4(c) by allowing an accountant, who referred bankruptcy matters to him, "to conduct the factual and legal analysis underlying the client's bankruptcy, to provide legal advice to the client and to draft the pleading initiating the action in which the [lawyer] eventually appeared as counsel of record").

134. Model Rule 1.7 was dramatically modified in 2002 as a result of the work of the American Bar Association's Commission on Evaluation of the Rules of Professional Conduct, better known as the Ethics 2000 Commission. *See* ABA, CTR. FOR PROF'L RESPONSIBILITY, THE 2002 CHANGES TO THE ABA MODEL RULES OF PROF'L CONDUCT 22-30 (2003).

135. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2001) [hereinafter 2001 MODEL RULES].

136. MODEL CODE, *supra* note 16, at DR 5-101(A).

professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."[137] These rules recognize that an attorney must be able to represent a client "untrammeled by a conflicting loyalty to another"[138] and unimpeded by the attorney's own interests.[139] An attorney can violate Rule 1.7(b) or DR 5-101(A) as a result of the conflict of interest even if the client suffers no actual injury.[140]

Clients can waive conflicts of interest under Model Rule 1.7(b) and DR 5-101(A).[141] A client's consent to an attorney's representation in the face of a possible conflict of interest, however, must be "informed consent."[142] This means that valid consent can come only after the attorney consults with the client about the conflict.[143] To satisfy the consultation requirement, the attorney must communicate information to the client "reasonably sufficient to permit the client to appreciate the significance of the matter in question."[144] Put another way, the attorney must convey to the client "reasonably adequate information about the material risks" of the representation.[145]

The conflict of interest most likely to arise involves the disclosure of client confidences.[146] More particularly, a litigation funding company with which an attorney is dealing may require information necessary for it to decide whether to fund the case. While the attorney may want to reveal the information in order to obtain the funding, the client may consider the information to be confidential. Fortunately, this conflict is easily waived, so long as the attorney takes reasonable steps to

137. *Id.*

138. State *ex rel.* Okla. Bar Ass'n v. Andre, 957 P.2d 545, 547-48 (Okla. 1998) (discussing Rule 1.7(b)).

139. *In re* Discipline of Mattson, 651 N.W.2d 278, 287 (S.D. 2002) (citing the comment to Rule 1.7(b) for the proposition that "[a] lawyer's own interests should not be permitted to have an adverse effect on [the] representation of [a] client").

140. People v. Cozier, 74 P.3d 531, 536 (Colo. 2003) (discussing Rule 1.7(b)); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Wagner, 599 N.W.2d 721, 726 (Iowa 1999) (discussing DR 5-101(A)).

141. *See* 2001 MODEL RULES, *supra* note 135, at R. 1.7(b)(2) (providing for client consent "after consultation"); MODEL CODE, *supra* note 16, at DR 5-101(A) (allowing for client consent "after full disclosure").

142. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 (2000) [hereinafter RESTATEMENT].

143. 2001 MODEL RULES, *supra* note 135, at R. 1.7(b)(2).

144. *Id.* Terminology.

145. RESTATEMENT, *supra* note 142, at § 122(1).

146. *See* Commonwealth v. Downey, 793 N.E.2d 377, 381-82 (Mass. App. Ct. 2003) (explaining that a lawyer's agreement with a third-party to reveal confidential client information without the client's consent creates a conflict of interest under Rule 1.7(b)).

safeguard the client's confidences once revealed to the funding company.[147]

Critics of litigation funding who see it as a settlement disincentive may argue that an attorney's decision to finance case expenses through a litigation funding company will create a conflict of interest between the attorney and the client when (1) the attorney agrees with the funding company not to pass on any portion of its fees to the client, and (2) the client instructs the attorney to accept a settlement offer so low that the attorney will receive little or nothing for his services because of his obligation to repay the funding company. Although contrary to the client's wishes, the attorney's self-interest may cause him to argue against settlement on those terms. Even if this speculative scenario does occur, however, it is no basis to decry litigation funding.

Assume that an attorney enters into a contingent fee agreement with a client. The agreement provides that expenses advanced by the attorney are to be paid first out of any recovery received. As the case progresses, the attorney advances $50,000 in expenses. Ultimately, the plaintiff becomes so exhausted by the litigation that she is unwilling to continue, even if it means foregoing any recovery, and she directs the attorney to settle for $50,000. The attorney does not want to settle for this amount because he will not receive a fee. The case expenses have created a settlement disincentive, the same as if a litigation funding company had advanced them.

Because the decision to settle is solely the client's,[148] settlement disincentives are imbedded in any contingent fee representation.[149] Attorneys who are concerned that their interests may materially limit a client's representation should obtain the client's consent to the representation.[150] Despite the many settlement-related conflicts present in contingent fee representations, no jurisdiction broadly forbids

147. *See supra* notes 96-97 and accompanying text.

148. RESTATEMENT, *supra* note 142, at § 22(1) (stating that "whether and on what terms to settle a claim" is a decision reserved to the client except when the client validly authorizes the lawyer to make that decision); MODEL RULES, *supra* note 15, at R. 1.2(a) ("A lawyer shall abide by a client's decision whether to settle a matter.").

149. *See, e.g.*, Kay v. Home Depot, Inc., 623 So. 2d 764, 765 (Fla. Dist. Ct. App. 1993) (involving client who refused to accept lawyer's recommendations that she settle case). Lawyers are prohibited from drafting contingent fee agreements under which clients surrender the right to control settlement. *See, e.g.*, *In re* Grievance Proceeding, 171 F. Supp. 2d 81, 82-85 (D. Conn. 2001) (finding Rule 1.2(a) violation but declining to impose discipline because lawyer did not attempt to enforce term in agreement and deleted it from subsequent agreements); *In re* Lansky, 678 N.E.2d 1114, 1116 (Ind. 1997) (involving Indiana version of Rule 1.2(a)).

150. *See In re* Hager, 812 A.2d 904, 913 (D.C. 2002) (discussing Rule 1.7 and attorney fees in a class action settlement).

contingent fee agreements in the same way that some courts and commentators seem willing to forbid litigation funding agreements.[151]

It may be that a client and an attorney cannot agree on settlement, to the point that the attorney feels compelled to withdraw from the representation.[152] There also may be cases in which a client fires his attorney because of a disagreement over settlement issues, which is the client's right.[153] Because these conflicts are true in many cases, however, it cannot reasonably be said that litigation funding agreements create new or special conflicts in the settlement context.

Finally, concerning conflicts of interest, it is important to note that Model Rule 1.7 was significantly amended in 2002.[154] Under the latest version of Model Rule 1.7(a), "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."[155] A concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[156] Nonetheless, under new Model Rule 1.7(b), an attorney may represent a client even when there is a significant risk that the representation will be materially limited by the attorney's responsibilities to others or by his personal interest if certain conditions are present: (1) the attorney "reasonably believes" that he will be able to "provide competent and diligent representation to the client";[157] (2) the representation is not "prohibited by law";[158] (3) "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in

151. Lawyers are forbidden from charging contingent fees in criminal cases. MODEL RULES, *supra* note 15, at R. 1.5(d)(2); MODEL CODE, *supra* note 16, at DR 2-106(C). In some jurisdictions lawyers may be prohibited from charging contingent fees in domestic relations cases. *See* MODEL RULES, *supra* note 15, at R. 1.5(d)(1).

152. *See, e.g., Kay*, 623 So. 2d at 765 (involving a lawyer who withdrew from representation after the client declined to settle, against the lawyer's recommendation).

153. *See In re Lansky*, 678 N.E.2d at 1116 ("A client has the right to discharge a lawyer at any time, with or without cause, subject to liability for payment of the lawyer's services."); *In re* Jones, 859 So. 2d 666, 670 (La. 2003) ("It is well-settled that a client has an absolute right to discharge his or her lawyer at any time."); Rose v. Welch, 115 S.W.3d 478, 485 (Tenn. Ct. App. 2003) (observing that "a client has the right to discharge his or her attorney with or without cause").

154. ABA, CTR. FOR PROF'L RESPONSIBILITY, THE 2002 CHANGES TO THE ABA MODEL RULES OF PROF'L CONDUCT 22-30 (2003).

155. MODEL RULES, *supra* note 15, at R. 1.7(a).

156. *Id.* at R. 1.7(a)(2).

157. *Id.* at R. 1.7(b)(1).

158. *Id.* at R. 1.7(b)(2).

the same litigation or other proceeding before a tribunal";[159] and (4) "each affected client gives informed consent, confirmed in writing."[160]

Nothing in the new rule appears to affect conflict of interest analysis in the litigation funding context. The fact that the new rule requires written consent where the old rule did not is practically meaningless. Prudent attorneys have always insisted upon written consent to guard against later disqualification attempts or malpractice allegations. The pivotal condition is, as it always has been, the first one: the attorney must reasonably believe that he can competently and diligently represent the client despite any divergent interests. For an attorney's belief to be reasonable, he must actually believe the proposition at issue, and it must be the case "that a 'reasonably prudent and competent lawyer' would come to the same belief, given the same information and time for reflection."[161] If the attorney's belief is unreasonable, client consent to the representation is irrelevant.[162]

B. Confidentiality

Litigation funding raises concerns about client confidentiality, regardless of whether the funding is sought by the client or by the attorney. For instance, a litigation funding company may require a client who applies for funding to have his attorney provide the company with otherwise confidential information that will allow the company to decide whether it should fund the case.[163] Assuming the client instructs the attorney to provide the desired information, the attorney must then weigh associated confidentiality and privilege concerns and decide how to respond.

The Philadelphia Bar Association's Professional Guidance Committee (the "Philadelphia Committee") considered this issue in 2000 when it was asked whether it was permissible under the Pennsylvania Rules of Professional Conduct[164] "for an attorney to provide substantive information about a personal injury client's claim to a third-party lender which is considering providing funds to the client during the pendency

159. *Id.* at R. 1.7(b)(3).

160. *Id.* at R. 1.7(b)(4).

161. HAZARD & HODES, *supra* note 60, § 11.20, at 11-60.

162. *See id.* ("Thus, a lawyer who plunges ahead with the representation, oblivious to risks that his performance will be compromised by conflicting loyalties, will ordinarily have violated Rule 1.7, even if the affected clients gave consent.").

163. Lawyers' duty to maintain clients' confidences "is far broader than the protection provided by the attorney-client privilege." HAZARD & HODES, *supra* note 66, § 9.11, at 9-43.

164. PENNSYLVANIA RULES OF PROF'L CONDUCT (1998).

of the personal injury case" on a nonrecourse basis.[165] The Philadelphia Committee determined that the requesting attorney could provide the information to the funding company, "assuming full disclosure [was made] to the client of the advantages and disadvantages of [the] transaction to the client," especially including "the risk of waiver of the attorney-client privilege (and the potential ramifications thereof)."[166] The Philadelphia Committee warily observed:

> The importance of consultation with the client about the possible risk of loss of not only client confidentiality but also of the attorney-client privilege as a result of supplying [case] assessment-type information to the potential lender cannot be underestimated. The [attorney] is well-advised to document carefully the client's assent to the disclosure and, even then, to make it clear to the lender that the disclosures will be restricted as much as possible—perhaps even limited to only that information which would be discoverable without intrusion upon the privilege.[167]

In 2003 the Philadelphia Committee was asked to examine "a proposed agreement between an attorney and a Funding Company whereby the Funding Company would advance loans to the attorney to cover litigation costs."[168] The agreement passed ethical muster, although the opinion was silent about the agreement's terms.[169] Because one provision in the agreement apparently required the attorney to provide certain documentation about the case to the funding company, the Philadelphia Committee conditioned its approval upon the modification of the agreement to provide for the client's specific consent to the attorney supplying the documentation to the funding company.[170]

The Philadelphia Committee's opinions highlight the importance of confidentiality considerations in litigation funding. The gravity of these considerations depends on the facts of the particular case. In any event, it is far from certain that an attorney's disclosure of client confidences to a litigation funding company will waive the attorney-client privilege. Logic and fairness dictate that such disclosures retain their privileged status by virtue of the client's and the funding company's common

165. Philadelphia Bar Ass'n, Prof'l Guidance Comm., Op. No. 99-8, at 1 (Feb. 2000) [hereinafter Philadelphia Bar Op. No. 99-8] (on file with the author).

166. *Id.*

167. *Id.*

168. Philadelphia Bar Ass'n, Prof'l Guidance Comm., Op. No. 2003-15, at 1 (Oct. 2003) (on file with the author).

169. *See id.* at 1-2.

170. *Id.* at 2.

interest in the litigation.[171] What is certain is that the attorney must explain to the client the risk that disclosure to the litigation funding company may waive the attorney-client privilege.[172]

C. Fee Splitting

As a general rule, attorneys may not share fees with laypersons, a practice sometimes called "fee splitting."[173] Rules against fee splitting are intended to protect clients by increasing the likelihood that they will receive competent representation.[174] Unfortunately, Model Rule 5.4(a)[175] and DR 3-102(A),[176] which prohibit fee splitting except in certain narrow exceptions, "sweep much too broadly by banning innovative forms of practice even . . . where the risk that [the] client will be exposed to professional incompetence is negligible."[177]

There may be some concern that litigation funding agreements, in which funding companies advance funds to attorneys for case expenses, constitute fee splitting. Any such concern is unfounded. First, a typical litigation funding agreement does not require the attorney to repay the funding company out of the attorney's contingent fee. Because the attorney can repay the funding company from any source of funds, the attorney is not sharing fees with a layperson.[178]

Second, in typical litigation funding agreements, the amount the attorney is required to pay the funding company is unrelated to the amount of the attorney's fee. In our hypothetical case of an agreement that obligates an attorney to pay upon recovery the amount funded plus a fee equal to one dollar for every dollar of funding provided, the amount

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171. *See generally* EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 196 (4th ed. 2001) (discussing the "common interest privilege," which is in fact "an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party").

172. N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 769, at 3 (Nov. 4, 2003) ("The lawyer should advise the client that disclosures of confidential information to the financing institution might compromise the attorney-client privilege . . . and might therefore cause the information to be available to an adverse party in discovery.") (citation omitted) (on file with the author); Philadelphia Bar Op. No. 99-8, *supra* note 168, at 1.

173. *See* MODEL RULES, *supra* note 15, at R. 5.4(a) (stating that "[a] lawyer or law firm shall not share legal fees with a nonlawyer," subject to certain exceptions); MODEL CODE, *supra* note 16, DR 3-102(A) (same).

174. HAZARD & HODES, *supra* note 60, at § 45.6.

175. *See* MODEL RULES, *supra* note 15, R. 5.4(a).

176. *See* MODEL CODE, *supra* note 16, at DR 3-102(A).

177. HAZARD & HODES, *supra* note 60, at § 45.6 (footnote omitted).

178. *See* Son v. Margolius, Mallios, Davis, Rider & Tomar, 709 A.2d 112, 122 (Md. 1998) (indicating that impermissible fee splitting occurs only where a lawyer "share[s] part of his or her own fee with a non-lawyer").

to be paid to the funding company is in no way measured by the attorney's fee. Indeed, the attorney might be obligated to pay the funding company an amount greater than her fee, and might further be required to pay the funding company in a case in which she receives no fee.

Third, if litigation funding constitutes fee splitting, then an attorney also engages in fee splitting when he borrows from a bank to finance litigation. Of course there is no prohibition against attorneys borrowing from banks to finance their practices. No courts or disciplinary authorities have ever suggested that attorneys who finance aspects of their practices with bank loans "share" or "split" their fees with the banks when they make loan payments. Likewise, rules against fee splitting should not bar attorneys from entering into litigation funding agreements, inasmuch as litigation funding companies are nothing more than specialized lenders or investors.

Fourth, to the extent there are concerns that fee splitting encourages non-lawyers to influence attorneys' professional judgments in the interest of protecting their investments,[179] a reasonable argument can be made that a bank officer may behave similarly if an attorney who borrows from a bank falls behind on her loan payments. Again, no courts or disciplinary authorities have ever banned attorneys from borrowing from traditional lenders to finance their practices. Beyond that, the threat of undue influence purportedly linked to fee splitting should be addressed on a case-by-case basis; it is not a sufficient reason to broadly prohibit litigation funding.

Finally, if prohibitions against fee splitting are intended to protect clients against the risk of incompetent representation attributable to factors other than non-lawyers' influence, they generally have no application to litigation funding. Litigation funding companies do not knowingly advance funds to incompetent attorneys because incompetent attorneys are unlikely to obtain favorable settlements or judgments in their cases, and thus diminish a funding company's chance of a return on its investment. There is no evidence that attorneys who enter into litigation funding agreements represent their clients less effectively as a result.

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179. Bans on fee splitting are intended in part to address the concern that "[a] person entitled to share a lawyer's fees is likely to attempt to influence the lawyer's activities so as to maximize those fees. That could lead to inadequate legal services." RESTATEMENT, *supra* note 142, at § 10 cmt. b.

D. Passing Along Litigation Funding Costs to the Client

When an attorney finances case expenses through a litigation funding company and is obligated to repay the funds advanced plus a fee, the attorney faces two basic choices: (1) pay the funding company from his own funds or (2) have the client pay the funding company. Clients are routinely obligated in contingent fee agreements to repay their attorneys for the expenses the attorneys advance. Ethics rules expressly permit this practice.[180] But litigation funding presents a new issue in the ability of attorneys to require clients to pay the fees charged by funding companies.

Returning yet again to our example of a litigation funding company that advances $50,000 to a successful plaintiff's attorney and charges a fee equal to one dollar for every dollar of funding provided, can the attorney require the client to pay the $50,000 in expenses plus the $50,000 fee? To answer this question it is necessary to look at the analogous situation of an attorney assessing a client for interest charges incurred by the attorney on a loan obtained to finance the client's case. *Chittenden v. State Farm Mutual Automobile Insurance Co.*[181] is a representative case.

In *Chittenden*, plaintiff George Chittenden retained attorney Darryl Carimi to represent him in connection with a personal injury claim stemming from an automobile accident. Chittenden signed a retainer agreement that authorized Carimi to obtain a loan at his discretion "to '[pay] the costs and expenses necessary to prosecute'" Chittenden's claim.[182] Although the agreement did not provide for a specific interest rate, Chittenden also agreed "'that the full amount of the interest charged on such loans will be reimbursed to [a]ttorneys . . . out of the funds received on [his] claim.'"[183] Over the course of the representation, Carimi advanced a number of expenses on Chittenden's behalf.[184] At the end of each month, Carimi drew on his line of credit at a bank to pay the funds advanced. He then assessed an interest charge to Chittenden's account through his firm.[185]

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180. MODEL RULES, *supra* note 15, at R. 1.8(e)(1) (stating that a lawyer "may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter").

181. 788 So. 2d 1140 (La. 2001).

182. *Id.* at 1143 (quoting retainer agreement).

183. *Id.* (quoting retainer agreement).

184. *Id.* (including medical expenses, court costs, postage, photocopy charges, and Chittenden's living expenses).

185. *Id.*

Chittenden fired Carimi and hired new counsel, who settled his claim for $1.35 million. Carimi then intervened in Chittenden's case to protect his right to recover the fees he claimed were owed. Carimi also sought to recover the expenses he advanced and the interest on the funds drawn from his line of credit. Chittenden agreed to pay Carimi $46,162.54, reflecting the expenses advanced, but he refused to pay the $40,000 in interest that Carimi sought. The trial court held that Carimi was entitled to the interest and a lower appellate court agreed. Chittenden then appealed to the Louisiana Supreme Court.[186]

Chittenden argued that the interest charges on the funds advanced by Carimi violated Louisiana Rule of Professional Conduct ("RPC") 1.8(e),[187] addressing an attorney's ability to advance court costs and expenses, and potentially violated RPC 1.4,[188] governing client communications.[189] Chittenden further argued that the interest charges were impermissible because his retainer agreement with Carimi did not specify an interest rate.[190] The Louisiana Supreme Court rejected Chittenden's arguments.[191]

Louisiana case law and RPC 1.8(e) expressly permit attorneys to advance court costs and expenses.[192] It was "eminently clear" that the retainer agreement authorized Carimi to secure a loan to pay Chittenden's case expenses, and that Chittenden had thus authorized Carimi to draw against Carimi's line of credit to finance the case. Moreover, and in accordance with RPC 1.4, the retainer agreement fully informed Chittenden that Carimi would be borrowing money to finance the case.[193]

With respect to the interest, the retainer agreement "clearly provided" that Chittenden would fully reimburse Carimi for interest out of any recovery.[194] "Thus, once again, the contract between the parties articulated both the expectation that interest would be charged on the loans [that] Carimi made and that Chittenden would ultimately be responsible for the payment of that interest."[195]

Regarding the interest rate, it appeared that Carimi charged Chittenden a rate of twelve percent, which was the interest rate at

186. *Id.*
187. LOUISIANA RULES OF PROF'L CONDUCT § 1.8(e) (1992).
188. *Id.* at § 1.4.
189. *Chittenden*, 788 So. 2d at 1146 & nn. 13, 14.
190. *Id.* at 1146.
191. *Id.* at 1144.
192. *See id.* at 1145-46.
193. *Id.* at 1148.
194. *Id.* at 1149.
195. *Id.* (footnote omitted).

which Carimi borrowed from his bank. This rate was reasonable, especially considering that Chittenden had previously paid twenty percent interest on a loan arranged by another attorney and had once paid twenty-four to thirty-eight percent on a loan from a finance company.[196] Furthermore, there was no evidence of any "hidden, improper motive" on Carimi's part in charging interest on loans that he himself had to repay.[197] Carimi's only error was that because he did not specify in the retainer agreement that the interest would be compounded, Chittenden was only obligated to pay simple interest.[198]

The court's rationale in *Chittenden* would seem to apply equally when an attorney, rather than charging interest on funds that he borrows to pay case expenses, passes along to the client the fees charged by a litigation funding company. So long as the attorney fully informs the client of his intent to charge the fees to the client before entering into an agreement with the funding company, and the client consents to the practice, there is no apparent prohibition. Fees charged by a litigation funding company to an attorney are analogous to the interest charged to Carimi by his bank, and Model Rule 1.8(e)(1) allows an attorney to "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."[199]

The problem facing an attorney who wishes to pass along fees charged by a funding company to clients, and a potential problem that the court in *Chittenden* acknowledged in passing, is the reasonableness of those fees.[200] The court in *Chittenden* approved of Carimi charging twelve percent simple interest, especially because Chittenden had previously borrowed funds at a rate of interest as high as thirty-eight percent.[201] In contrast, a litigation funding company that charges an attorney a fee equal to one dollar for every dollar advanced is charging the equivalent of one hundred percent interest. Therefore, an attorney who passes along such fees to his client is charging his client the equivalent of one hundred percent interest. At some point it would seem that usury would have to concern the attorney, depending on whether a funding company's advances are loans as compared to investments and on the law of the particular jurisdiction.

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196. *Id.* at 1143 n.3, 1149.
197. *Id.* at 1149.
198. *Id.* at 1151.
199. MODEL RULES, *supra* note 15, at R. 1.8(e)(1).
200. *See Chittenden,* 788 So. 2d at 1149 (discussing reasonableness of interest charged by Carimi in light of Chittenden's borrowing history).
201. *Id.* (Chittenden had paid twenty percent interest on a loan arranged by a previous attorney, and twenty-four to thirty-eight percent interest on a loan from a finance company).

Attorneys clearly minimize their professional responsibility risk by not passing the fees charged to them by litigation funding companies to their clients. To avoid allegations of usury, an attorney who desires to pass along the fees charged by a litigation funding company could pass along only part of those fees. Using the example of a funding company that charges a fee of one dollar for every dollar advanced, an attorney who is obligated to pay the funding company a fee of $50,000 might pass along only $10,000 of that fee to the client. The $10,000 charge would be equivalent to twenty percent interest, or roughly the rate of interest charged by some credit card companies. Alternatively, the attorney might pass along to the client a percentage of the litigation funding company's fee that corresponds to the state's statutorily permissible interest rate.

As a practical matter, attorneys often will be unable to charge their litigation funding fees to their clients. Funding agreements commonly include provisions that prohibit the attorneys from passing along to their clients any portion of the funding company's fees.[202] Attorneys are ethically bound to honor their contracts.[203]

IV. CONCLUSION

Litigation is expensive, and plaintiffs may need financial assistance between the event giving rise to the litigation and eventual recovery by way of settlement or judgment. Litigation funding companies will advance money to plaintiffs for living expenses when traditional lenders are unwilling to do so because of the uncertainties inherent in litigation. Funding companies are willing to advance expenses to attorneys when traditional lenders will not, or when traditional lenders will do so only on terms that attorneys consider unacceptable. Litigation funding is, in fact, an important financial services industry.

Unfortunately, litigation funding has been met by judicial hostility. This hostility has been fueled by courts' concerns about champerty, maintenance, and usury. Attorneys whose clients obtain litigation funding must be concerned about related ethics issues, and they must also give careful thought to their professional responsibilities when they themselves enter into agreements with funding companies to finance

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202. *See, e.g.*, Fla. Bar, Staff Op. 24048, at 2 (July 2, 2002) (listing terms of litigation funding agreement being reviewed); Philadelphia Bar Ass'n, Prof'l Guidance Comm., Op. 2003-15, at 1 (Oct. 2003) (discussing terms of funding agreement); Bd. of Prof'l Responsibility of the Supreme Court of Tenn., Advisory Ethics Op. 2001-A-744, at 1 (2001) (identifying terms in funding agreement).

203. *See In re* Warner, 11 P.3d 1160, 1162 (Kan. 2000) (finding ethics violation where lawyer breached agreement to reimburse witness for travel expenses).

case expenses. Despite these concerns, litigation funding poses few serious ethical problems for attorneys. The ethical issues most likely to surface—those related to confidentiality, interference with professional judgment, conflicts of interest, and client communication—are common concerns. Although these issues always merit attorneys' careful attention, they are not unique to litigation funding nor are they especially troubling in this context.

Attorneys who hope to minimize the professional responsibility risks associated with litigation funding would be wise to insist on certain provisions in the funding agreements into which they or their clients enter. First, the funding company should agree that it will neither attempt to direct nor regulate the attorney's judgment in the case being funded. Second, the agreement should provide that the funding company will take all reasonable steps to safeguard the confidentiality of information provided to it by the attorney or the client. Attorneys should decline to do business with litigation funding companies that are unwilling to agree to these conditions, and they should similarly steer their clients away from such companies.

If attorneys finance case expenses through a litigation funding company with the intent to pass along the expenses and any associated fees to their clients, the attorneys must be careful to provide for those fees in their agreements with their clients. They must also carefully scrutinize the amount of any funding fees passed through to the client, given that those fees may be found to be usurious. Attorneys minimize their professional responsibility risk by agreeing not to pass along funding companies' fees to their clients. If a funding agreement prohibits an attorney from passing along to the client any portion of the funding company fees, the attorney must honor the contract.