The Legal Intelligencer

# Alternative Litigation Financing Is Becoming More Common

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## Alternative litigation financing is becoming more common.

**My client wants to utilize an alternative litigation financing organization while his case is pending. Although I have recommended against it, the client insists. What ethical issues are involved?**

A finance company lending clients money with a lien while a case is pending creates many potential problems. It can create divisions between the lawyer and the client. Most lawyers recognize that these lending programs have very prohibitive interest rates. On the other hand, clients sometimes need money and this is the only way they can get it.

The lawyer also has an obligation in these matters. The lawyer has to let the loan company know when the case is settled or resolved. A lawyer can be held responsible if he or she distributes the settlement without paying the loan back.

There is an interesting article by Jihyun Yoo in the Georgetown Journal of Legal Ethics, Volume 27, No. 3, titled "Protecting Confidential Information Disclosed to Alternative Litigation and Finance Entities." Yoo noted that alternative litigation financing will often require access to information to evaluate the case and whether a loan should be made. Yoo was concerned about the information provided to the loan company, noting the work product doctrine, but suggested the confidential information prepared not for litigation but used for this loan might not be protected information any longer.

Yoo also had concerns about whether the attorney-client privilege could be protected by reviewing confidential information to the third party, noting a recent case where the court held the work-product doctrine would protect the information provided to the finance company. "In affording the documents protection, the district court emphasized that the disclosure to third parties did not create a waiver because it was disclosed subject to nondisclosure agreements," Yoo wrote.

Yoo then wrote about the attorney-client privilege, noting that because the lending company is outside the attorney-client relationship, there would apparently be no privilege. The article then discussed the common-interest doctrine under the attorney-client privilege. That privilege, like a joint-defense privilege, is in essence an exception to the general rule of waiver of attorney-client privilege when information is given to a third party. Yoo noted that the common-interest doctrine "only protects an already existing privilege and does not render otherwise nonprivileged documents protected." Yoo reviewed several cases where there was no attorney-client privilege granted to material given to the finance company.

Yoo concluded with a reference to the American Bar Association's Commission on Ethics 20/20, which said alternative lending financing faces confidentiality challenges. Yoo suggested that disclosure to an alternative lending financing entity should not be a waiver of work-product privilege, also suggesting that communications with the alternative lending facility entity should be protected under the common-interest exception of the attorney-client privilege.

The article is very interesting and should be read, because it appears that alternative lending financing during litigation is being utilized more and more by clients and lawyers, partly because of general economic problems. But every lawyer should be aware of the issues of confidentiality. The article makes very good points about protections on the work-product and the common-law interest doctrine of attorney-client privilege. But whether Pennsylvania courts will agree with these theories remains to be seen.

Anytime a lawyer is providing information to an alternative lending financing company for the purpose of getting money for a client or the lawyer during pending litigation, the lawyer must carefully try to structure it to ensure that confidentiality applies. Otherwise, the breach of the attorney-client privilege could have disastrous consequences.

It is a sad day that lenders are financing litigation indirectly. This is a relatively new development and traditionally would have been barred by old common-law torts, such as barratry and champerty. Although not desired, sometimes these alternative financing methods are necessary in an era where money is tight, economic conditions are bad and the legal profession is not overflowing with money to finance cases.

But there is a certain sadness to this procedure, as it is a another crack in the professionalism of the practice of law and a step closer to law being purely a business. Every lawyer must remember their ethical obligations and the fact they are professionals first and businesspeople second.

## Lawyers should avoid being overzealous.

**I am dealing with a lawyer on the other side of litigation who calls himself extremely zealous. There is no issue he does not fight, there is no motion he does not file, and he treats me as if I was a mortal enemy. Is this kind of conduct acceptable and ethical?**

No, this conduct is not acceptable. Zealousness was a word that came out of the old disciplinary rules, but the term has been removed from the Rules of Professional Conduct.

Obviously, in an adversarial system, all lawyers are supposed to represent their clients vigorously. But there are limits. Rule 1.3 involves diligence. Lawyers cannot delay cases for the benefit of their clients. Rules 3.3 and 3.4 deal with fairness to opposing counsel and to the court system. False evidence or improper arguments are prohibited.

The distortion of what it means to be zealous is the product of a modern age where lawyers tend to emphasize a particular type of law and spend their careers in that particular area. As a result, trial lawyers who are practicing in just one area often get a one-sided view of the profession.

In days past, when lawyers tried everything and were involved with multiple issues and multiple types of cases, lawyers had a much broader viewpoint. Lawyers served as assistant district attorneys and then were private defense counsel and sometimes went back and became district attorneys or prosecutors again. Lawyers would routinely represent plaintiffs and then defend defendants in civil cases.

This type of broad practice and experience helped lawyers see beyond the ends of their noses and recognize the broader issues involved. Further, it brought lawyers in contact with other types of lawyers so there was no stereotyping. The traditional career prosecutor stereotype of defense lawyers as someone from the dark side and plaintiffs lawyers' negative view of insurance defense lawyers are really modern problems caused by this world of specialization.

As a result, many lawyers will push the envelope. It is not uncommon for lawyers to start to assert personal opinions in closing speeches. While this is prohibited under existing case law and Rules 3.3

and 3.4, it is not uncommon for lawyers to be inflammatory in their statements and also derogatory toward their opposing counsel. This can backfire, particularly if opposing counsel is liked by the fact finder or the jury.

In reality, the best lawyers are not zealous. The best lawyers are those who are extremely knowledgeable, not only on the facts of a particular case but also on the law. Further, the best lawyers are those who have had experience in advocating, such as in trial or appellate work. Just like in sports, if one is inexperienced on the playing field, breaking the rules or cheating is often a favored tactic, particularly if one becomes frustrated.

So depending on how one defines overzealousness, the conduct can be unethical. A good lawyer doesn't focus on being overzealous or a bulldog or a pit bull. An excellent lawyer, as noted above, is one who is knowledgeable on the law and the facts and has the skills. It is also one who understands that a trial or an argument is not about yelling at or demeaning or misleading opposing counsel. A trial is about marshaling facts and the law in a positive, logical, ethical manner, in the true spirit of advocacy.