Litigation Finance Ethics: Paying Interest

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Abstract

Over the last two decades, a shift in legal ethics has given rise to an expanding industry that specializes in lending money for the purpose of financing litigation. Plaintiffs and their attorneys now have a number of possible financing options that can provide the resources necessary to pursue their claims more fully. However, financing comes at a cost, and the question of who pays the cost implicates several ethical issues for attorneys. This article analyzes the propriety of attorneys borrowing funds for financing litigation and passing the funding expenses—origination costs and loan interest—through to their clients. It begins by tracing the evolution of the relevant legal ethics rules over the past century and reviewing the requirements that jurisdictions have imposed on attorneys seeking to pass litigation finance costs through, continues with an analysis of the leading case on point, and concludes with ethical guidance based on a recent case that illustrates the obstacles that attorneys can encounter when seeking to pass litigation financing costs through to clients.

Table of Contents

I. A Century of Evolution in Legal Ethics ............................................ 7
   A. The Threshold Issue: Whether Attorneys Can Advance
      Litigation Expenses ....................................................................... 9
   B. A Step Further: The Propriety of Attorneys Charging Clients
      Interest ........................................................................................... 13
   C. Another Piece of the Puzzle: The Propriety of Borrowing
      Funds for Litigation Expenses ...................................................... 15
      1. Avoiding Conflicts of Interest.................................................. 16
      2. Maintaining Professional Independence .................................. 17
      3. Maintaining Client Confidentiality .......................................... 19

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Much has been written about the subject of how attorneys fund litigation.\textsuperscript{1} Traditionally, plaintiffs have either paid their attorneys an hourly rate or have relied on contingent fee agreements.\textsuperscript{2} The evolution of society, technology, and law, however, has eroded the effectiveness of the traditional model. Society now embraces the use of mass-marketed products that give rise to large-scale, expensive products liability cases, such as the myriad multi-plaintiff personal injury cases against pharmaceutical companies that have become increasingly commonplace in recent decades. Technology has advanced such that potential plaintiffs have near-instantaneous access to information, which is a two-way street that plaintiffs’ attorneys likewise use to reach scores of potential clients. And the legal field has responded in kind, first with the creation and development of Rule 23 of the Federal Rules of Civil Procedure—the “class action” rule—in the middle of the 20th century\textsuperscript{3} and more recently with the development of multidistrict litigation and the corresponding creation of the federal United States Judicial Panel on Multidistrict Litigation.\textsuperscript{4} Much has changed as our legal system


\textsuperscript{2} GARBER, supra note 1, at 23; Stephen C. Yeazell, Re-Financing Civil Litigation, 51 DEPAUL L. REV. 183 (2001).


\textsuperscript{4} http://www.jpml.uscourts.gov/.
has evolved, even just since the end of the Second World War. The stakes are certainly higher, with settlements that aggregate in the millions, sometimes even billions, of dollars. But, for plaintiffs and their attorneys, getting there often is no easy task.

The road to success in plaintiffs’ litigation is paved with financial obstacles. Plaintiffs’ firms often face defendants with deep pockets who can weather the time and expense inherent in hiring seasoned counsel and enduring extensive discovery. Meanwhile, plaintiffs’ firms encounter their own expenses—expenses that can quickly soar into the hundreds of thousands of dollars, particularly when expert testimony is required and in cases in which there are numerous plaintiffs, where just the cost of basic expenses, such as printing and postage, can exceed six figures. And the more complicated the subject matter of the suit, the higher the expense, as it becomes necessary to bring in expert witnesses and additional counsel.

Outside of the legal field, businesses usually have a number of possible options for obtaining financing, from offering securities—stocks and bonds—to borrowing funds from banks and other institutional lenders. Law firms do not have the same freedom. Under the current ethical rules, non-attorneys are prohibited from taking ownership interests in law firms, eliminating the use of securities as a funding option. While attorneys can borrow funds, it often must be from a non-traditional lender because a potential litigation victory falls outside the scope

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7. Appelbaum, Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts, supra note 1. In particularly large cases, such as the Vioxx and Zyprexa MDL products liability lawsuits, the sheer number of plaintiffs—in Vioxx, over 57,000 people filed claims—incredibly elevates the cost of even basic communication with clients. See Stephanie Saul, Pfizer in $894 Million Drug Settlement, N.Y. Times, Oct. 18, 2008, at B2; Alex Berenson, 33 States to Get $62 Million in Zyprexa Case Settlement; N.Y. Times, Oct. 7, 2008, at B7. A recent study by the Federal Judicial Center suggests that the median amount of costs for a plaintiff in a federal civil case with at least some discovery is $15,000, and, near the top five percent of the cases in terms of expenses, costs alone approach $1 million. Judicial Conference Advisory Committee on Civil Rules & Committee on Rules of Practice and Procedure, Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation (2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf.
of what is normally considered acceptable collateral.\textsuperscript{10} As a result, even when attorneys are able to obtain financing, it is usually at a comparably higher rate than business loans in other industries.\textsuperscript{11} Thus, the options are limited, and inadequate funding may be the death knell to a successful case, leading to premature settlements or other mediocre results for plaintiffs.\textsuperscript{12}

Over the last two decades, a new sector of the financing industry has arisen to fill the gap in litigation financing left by traditional lenders, and attorneys now have access to a number of lenders that specialize in providing funding for litigation.\textsuperscript{13} The numbers are astounding, with in excess of a billion dollars estimated to be invested “in lawsuits at any given time.”\textsuperscript{14} In New York alone, “over the last decade, more than 250 law firms borrowed on pending cases, often repeatedly.”\textsuperscript{15}

Lending to plaintiffs’ firms should be distinguished from two other forms of lending that also fall under the umbrella of “litigation financing”: consumer loans directly to individual plaintiffs and loans to business to fund commercial lawsuits.\textsuperscript{16} The scope of this article is limited to lending to plaintiffs’ firms. Nevertheless, two business litigation funding companies have recently gone public, which is useful for illustrating both the overall size of the industry and typical investment criteria because their records are now available to the public. The companies, Juridica Investments and Burford Capital,\textsuperscript{17} generated more than $300 million in their initial public offerings, which, as of last year, represented a total of $163 million invested across some thirty-two cases.\textsuperscript{18} The firms prefer

\begin{thebibliography}{99}
\bibitem{10} Garber, supra note 1, at 13; Martin, supra note 1, at 85; Richmond, supra note 1, at 650; Appelbaum, Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts, supra note 1; \textit{e.g.}, Counsel Financial, Services, http://www.counselfin.com/services/ (last visited February 4, 2011).

\bibitem{11} Id.; Garber, supra note 1, at 34 (“[P]roviding [litigation financing] to the disadvantaged party could avert settlements that reflect primarily bargaining power rather than legal merit.”); Martin, supra note 1, at 85 (“If a plaintiff has a good case but no financial resources to pursue it . . . a plaintiff may have no choice but to forgo the suit or to accept a defendant’s low settlement offer.”); Richmond, supra note 1, at 649 (“[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.”).

\bibitem{12} Martin, supra note 1, at 85; Appelbaum, Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts, supra note 1; Posting of David Ward to The Legal Infrastructure of Business (Nov. 20, 2010, 17:47 EST).

\bibitem{13} Appelbaum, Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts, supra note 1.

\bibitem{14} Id.

\bibitem{15} Garber, supra note 1, at 1.

\bibitem{16} Id. at 15-16.


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to avoid “suits that address novel legal issues or have a good chance of being reversed on appeal,” which makes sense from a business perspective given that the ability of their clients to repay may be largely contingent on a positive legal outcome, and they tend to invest in commercial litigation, such as “cases involving property damage, insurance subrogation, shareholder disputes, and contract claims.” Ideal investments are cases that are likely to settle, because they have a substantially more certain outcome, as one industry insider has noted: “It’s very hard to predict a jury outcome. It adds an element of unpredictability.”

The increased availability of funding comes at a price, however. Origination costs aside, the interest rates alone on litigation financing loans “generally exceed 15 percent a year” and may average close to twenty percent. And most states allow attorneys to pass these costs through to clients, costs that in some cases “can exceed the benefits of winning” the suit. The expense, coupled with opposition from critics who argue that the financing stirs up litigation, has given rise to substantial opposition to litigation funding, although “the volume of litigation itself is a poor indicator of the social costs of litigation.” In many cases, the value outweighs the cost, and the propriety of litigation funding really boils down to a discussion of compromise, as one industry insider recently noted: “If there’s less money, you’d have less litigation. But then you’d also

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19. Lloyd, supra note 18; see also Garber, supra note 1, at 27 (“Many [litigation financing] companies suggest that they are interested in financing only claims with high probabilities of return.”).

20. Raymond, supra note 18; Lloyd, supra note 18.


23. GARBER, supra note 1, at 13.

24. See Section I.D, infra.


26. Id. The concern over “stirring up” litigation, while historically valid, has been lessened by the availability of sanctions in modern rules of procedure and similar controls:

The risks of system abuse through frivolous claims of aggressive lawyering are adequately guarded against by control systems not present in the heyday of maintenance and champerty law. Among other controls, Federal Rule of Civil Procedure 11 and other litigation abuse sanctions as well as malicious prosecution actions obviate the need for the rules on the abuse-of-system rationale. If anything, furthering the interests of lawyers in the claims of their clients is likely to decrease rather than increase the incidence of frivolous claim bringing.

Moliterno, supra note 1, at 256; see also Garber, supra note 1, at 17.

have less justice.”

In short, there does not seem to be a “compelling moral argument for either banning or allowing [litigation financing].”

The growth of the litigation finance industry has garnered the attention of the ABA, whose Commission on Ethics 20/20 formed a working group “to study the impact [of litigation financing] on legal ethics . . . .” The working group issued a letter November 2010 and a draft white paper October 15, 2011, providing some background information about the industry and requesting comments on a number of related ethical questions, and the Commission on Ethics 20/20 filed a final version of the white paper with the ABA House of Delegates in February 2012. The scope of the white paper is limited to the ethical issues that attorneys face when they or their clients participate in litigation financing, and it largely reaches a similar conclusion to that set forth by the authors herein—that demand for litigation financing, shifts away from older legal doctrines such as champerty, and society’s embracing of credit as a financial tool have paved the way for a litigation financing industry that appears poised to continue to grow, but that attorneys must be careful to ensure that fundamental ethical obligations to their clients are not compromised when litigation financing is used.

This article analyzes the ethical implications of the practice of borrowing funds for litigation expenses, with particular emphasis on the passing through of financing costs to clients. However, as mentioned above, the scope of this article is limited to loans obtained by attorneys—it does not address the related business of third parties lending money to plaintiffs secured by the plaintiffs’ po-

28. Appelbaum, Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts, supra note 1; but see John Beisner et al., U.S. Chamber Institute for Legal Reform, Selling Lawsuits, Selling Trouble 4 (2009), http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/thirdpartylitigationfinancing.pdf (“Proponents of third-party litigation financing argue that the practice promotes access to justice. But this focus on access to justice ignores an obvious point—third-party litigation funding increases a plaintiff’s access to the courts, not to justice.”).

29. Garber, supra note 1, at 5, 19-20.


33. Id. at 39.
Potential awards. Section I traces the evolution of the view of the ABA and state legal ethics committees toward litigation financing, beginning with early 20th century views regarding the propriety of attorneys advancing the costs of litigation to clients, continuing with the shift in the 1960s and 1970s toward allowing attorneys to charge interest on advanced funds, and concluding with a review of the state bar associations’ opinions permitting attorneys to borrow funds for litigation expenses from third-party lenders and pass the costs through to clients. Section II reviews case law relating to the passing through of litigation finance expenses, which, although sparse, is generally consistent with the positions of the ABA and state legal ethics committees that have addressed the issue. Section III discusses the prominent World Trade Center case, which appears to be inconsistent with the trend toward allowing the pass through of litigation financing costs set by the state ethics committees and case precedent and illustrates some of the obstacles that attorneys may face when seeking to pass litigation financing expenses through to clients.

I. A Century of Evolution in Legal Ethics

The approach of state legal ethics committees has been nearly uniform in addressing the propriety of attorneys advancing funds for litigation expenses and charging clients interest on the advances, generally allowing attorneys to pass through the interest and other loan expenses provided that the underlying arrangements comport with the disclosure, confidentiality, conflict-of-interest, and similar ethical rules that apply to attorneys. While the recent inquiry by the ABA and the resulting white paper may influence opinions regarding the practice of litigation financing in the future, the ABA has not yet formally commented on the practice, which limits discussion of the issue primarily to an analysis of the various state and local ethics committees that have opined on it—at least for now. Of the jurisdictions that have addressed the question, the ethics committees’ analysis commonly separates the propriety of advancing funds and the propriety of charging interest on the advanced funds into separate, distinct issues. Attorneys’


35. See, e.g., Ky. Bar Ass’n, Ethics Op. KBA E-420 (2002) (“A number of other jurisdictions have addressed litigation-financing arrangements similar to those described above. Although many have acknowledged the potential problems discussed here, the overwhelming majority has concluded that such arrangements are permissible.”); Utah State Bar Ethics Advisory Op. Comm., Op. 02-01 (2002) (“VARious state bar ethics opinions . . . have invariably concluded that litigation financing arrangements similar to [the arrangement described herein] are permissible . . . . Our research has not disclosed a contrary opinion, and we generally concur with the reasoning and conclusions of these opinions.”).

advancement of litigation expenses has long been permitted, subject to certain limitations, but the propriety of charging clients interest on the advanced funds is a newer issue.

In addition, the relevant ethics opinions are often fact-specific, which, in some cases, limits their applicability. However, when read together, the state opinions constitute a relatively cohesive position of allowing limited advancement of funds for clients’ litigation expenses, although there is some minor variation among the jurisdictions regarding the constraints under which such funds can be advanced. Some jurisdictions have addressed the issue in terms of whether an attorney can pass through loan interest to a client as a litigation expense, but other jurisdictions have limited their analyses to whether the attorney can charge interest on monies he or she advances to the client for litigation expenses, regardless of whether there is an underlying loan. In most instances, the result will be the same under both methods of analysis. However, treating the interest as a pass-through expense may require analysis of whether the attorney exercised due diligence on behalf of the client in shopping for the most favorable loan product, and segregating the underlying loan from the ethical analysis may give rise to situations in which the interest rate that the attorney charges on the advanced funds differs from the interest rate on the underlying loan.

As a final preliminary note to this section, the discussion of the state opinions in this section is directed toward plaintiffs’ firms advancing litigation costs when being compensated on a contingency fee basis. Most of the state opin-

37. See Model Code of Prof’l Responsibility EC 5-8 (1980).
38. See Section I.B, infra.
40. See Section I.D, infra.
43. See, e.g., N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 729 (2000) (“The present inquiry differs . . . in that the inquirer does not intend to borrow the funds that will be advanced to the client. However, this distinction is not necessarily material. A lawyer who advances funds for a client is losing the use of those funds, which has an economic cost. While one lawyer is out of pocket, and the other lawyer is not, in both scenarios a lawyer in a contingency matter has incurred a cost and seeks to pass it on to the client.”); see also id. (“[W]e do not believe that an interest rate exceeding the lawyer’s actual or putative cost of obtaining funds would ever be reasonable . . . .”); State Bar of Ariz., Op. 01-07 (2001) (“[T]he interest charged to the client may not exceed the interest charges actually incurred by the lawyer.”); Ky. Bar Ass’n, Ethics Op. KBA E-420 (2002) (“From the client’s financial perspective, there is no difference between charging the client interest on the lawyer’s money and charging interest on the financial institution’s money—both are expenses occasioned by the litigation.”).
ions have addressed the question in this context. The issue is less likely to arise in non-contingency fee contexts, such as transactional or defense representation, because the financial constraint of having to see the litigation through in order to be paid is not present. Accordingly, there is, at best, “very little” litigation financing available for defense attorneys. Moreover, the rationale behind allowing advancement of litigation expenses—enabling plaintiffs to pursue claims that they otherwise may have to forego—is not relevant in a transactional or defense context.

A. The Threshold Issue: Whether Attorneys Can Advance Litigation Expenses

Any litigation expense, from filing fees to expert witness expenses, that an attorney pays on behalf of a client is effectively an advance of funds, even when the client promptly reimburses the attorney. Thus, a blanket prohibition on all attorney advances to clients would, from a practical perspective, be too strict. One can imagine the chagrin of a client whose attorney requests that he or she meet him at the courthouse just so the client can write a check to pay a filing fee. Professor Geoffrey Miller convincingly made this point nearly a decade ago:

A rigid rule against lending to clients would . . . be inconsistent with the undeniable fact that lawyers, in effect, provide credit to their clients in most representational settings. For example, unless the client has provided the attorney with an advance retainer, the lawyer will ordinarily bill the client at the end of the month. Even if the client pays on time, the lawyer’s services during the month will be, in effect, advanced to the client between the date of service and the time of payment. Furthermore, clients do not always pay their bills on time. When the client is late with a bill, the lawyer necessarily, although unwillingly, acts as a creditor of the client. These realities of litigation are even more salient when the lawyer is working on a contingent fee. Here, the lawyer effectively loans her services to the client until the case is resolved, subject

44. However, the practice of litigation financing has at least expanded beyond personal injury cases and now includes divorce law. See Binyamin Appelbaum, Betting on Justice; Taking Sides in a Divorce, Chasing Profit, N.Y.TIMES, Dec. 5, 2010, at A1.
45. GARBER, supra note 1, at 7.
46. E.g., MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. 10 (2012) (“[T]hese advances . . . help ensure access to the courts.”); MODEL CODE OF PROF’L RESPONSIBILITY EC 5-8 (1980) (“The advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action.”); Ky. Bar Ass’n, Ethics Op. KBA E-420 (2002) (“This exception to the general prohibition against providing financial support to a client reflects the reality that, without financial assistance to cover litigation costs and expenses, some clients would be unable to pursue their claims.”).
to an understanding that the client will pay for the services if and when the client gets a recovery. From a functional perspective, these realities of client billing place the lawyer and client in something like a debtor-creditor relationship in most litigation settings.48

The issue, then, is not so much whether it is appropriate for an attorney to advance litigation expenses on behalf of a client; rather, it is when it is appropriate for an attorney to do so.

The history of the modern position on advancing litigation expenses on behalf of clients dates back to 1928 when the American Bar Association amended its Canons of Professional Ethics.49 The then-new Canon 42 reflected the concern that allowing attorneys to advance expenses would improperly encourage litigation:50 “A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.”51 This position was a middle ground between two countervailing interests—it preserved the practical aspect of the convenience inherent in allowing attorneys to pay certain expenses as they arose, but it diminished the concern that attorneys would use expense advancement as a tool to spur litigation by requiring clients to reimburse their attorneys for such expenses. Case law of the era likewise supports this position,52 notably including an opinion by Justice Benjamin Cardozo, then serving as Chief Judge of the New York Court of Appeals:53

The law does not say that an attorney is guilty of misconduct by the voluntary advance of the expenses of a lawsuit to a client too poor to pay the cost of justice. It does say that there is misconduct if he makes or promises the payment to discharge an obligation assumed in return for his retainer. He shall not “by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof.”54

48. Id.
49. Id. at 569.
50. Inciting litigation is known as the practice of barratry, which Black’s Law Dictionary defines as “Vexatious incitement to litigation, especially by soliciting potential legal clients.” BLACK’S LAW DICTIONARY 160 (8th ed. 2004).
51. CANONS OF PROF’L ETHICS Canon 42 (1963).
52. E.g., In re Gilman’s Adm’x, 167 N.E. 437, 439 (N.Y. 1929) (collecting cases).
53. Id. at 438.
54. Id. at 440.
In addition, advancing funds to clients “gives the lawyer the conflicting role of a creditor and could induce the lawyer to conduct the litigation so as to protect the lawyer’s interests rather than the client’s.” However, a lawyer operating on a contingent-fee basis already has a substantial financial interest in the litigation by virtue of the fee itself, and there is again a countervailing interest that justifies the potential risk: “Allowing lawyers to advance [litigation] expenses is indistinguishable in substance from allowing contingent fees and has similar justification, notably enabling poor clients to assert their rights.”

The general prohibition against attorneys bearing the ultimate cost of their clients’ litigation expenses affected the jurisprudence of the era relating to fee calculation. The modern rule, which did not go into effect until nearly a half-century later, is incorporated directly into the American Bar Association’s Model Rules of Professional Conduct: “A contingent fee agreement shall be in a writing signed by the client and shall state . . . whether [litigation and other] expenses are to be deducted before or after the contingent fee is calculated.” The Model Rules, however, were not promulgated until 1983, and, in the early and mid-1900s, the propriety of calculating a contingent fee amount before deducting expenses from a client’s award was still being settled.

The concern with deducting expenses before an attorney’s contingent fee is calculated is tied directly to the question of whether it is proper for an attorney to pay litigation expenses on behalf of a client. Contingency fees are based off of the amount recovered. By deducting the expenses from the amount recovered before calculating the fee (i.e., basing the contingent fee off of the net award), the attorney would, in effect, be splitting payment of expenses with his or her client, running afoul of the general prohibition of the time against attorneys paying clients’ litigation expenses—although it bears mentioning that in such case the attorney’s interest is more likely to be aligned with the client’s in ensuring that financing costs are minimized. If, however, the fee is calculated first and the expenses deducted from the remaining portion due to the client (i.e., basing the contingent fee off of the gross award), then the client would be bearing the entire cost of the expenses in compliance with the rule. Of note, the preceding analysis would differ slightly in situations where the court has ordered the opposing party to pay expenses; in such cases the expenses effectively become those of the opposing party and not the client.

Case law of the early and mid-1900s relating to fee calculation illustrates this concern over the propriety of attorneys paying litigation expenses on behalf of clients. In a number of cases, the courts construe retainer agreements that are

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56. Id. (internal citation omitted).
58. Id.
silent or ambiguous as to who pays litigation expenses in favor of the attorneys, such as in the following passage from a 1908 New York appellate court opinion:

The fact that an attorney makes an agreement with a client to render certain legal services for a specified amount does not imply that the attorney is to pay disbursements that may be made, without reimbursement; nor is there any implied promise on the part of the attorney to make such disbursements as may be necessary merely for the compensation agreed to be paid for his legal services. Indeed, the implication is directly to the contrary. The services rendered and the compensation therefor are distinct from the disbursements incurred, and in the absence of any agreement to the contrary the contract to pay a certain sum to an attorney for compensation for his legal services does not impose upon the attorney the burden of assuming the disbursements which are necessarily made in the client’s behalf.

Some cases of the era go even further, holding that the client bears responsibility for expenses but also noting that an agreement under which the contingency fee is calculated on a net award would be champertous. Other cases of the era foreshadow the shift in the law that would eventually occur with the adoption of the ABA’s Model Rules, holding that the order in which the litigation expenses and attorney’s fee should be deducted depends on the language of the contingency agreement.

59. E.g., Manzo v. Dullea, 96 F.2d 135, 137-38 (2d Cir. 1938) (construing a retainer agreement that was silent as to allocation of litigation expenses in favor of the attorney but noting that deducting the expenses before calculating the fee “would . . . have been the correct way had the retainer agreement provided for a contingent fee to be computed only upon the net amount recovered by trial.”); Brown v. Furlong, 127 So. 731, 733 (La. 1930) (reversing a lower court’s decision that split responsibility for litigation expenses between the attorney and the client and holding that the attorney was responsible for the entire amount); Hampton v. Rosenheim, 155 N.Y.S. 361, 362 (N.Y. App. Term 1915) (“In the absence of agreement as to necessary disbursements in conducting the case, it is presumed that they will be ultimately borne by the client.”); see also Richardson v. Lee’s Adm’r, 129 S.W.2d 147 (Ky. Ct. App. 1939); Robertson v. Pettrey, 170 S.E. 901 (1933).


61. E.g., In re Lessig’s Estate, 1 N.Y.S.2d 566, 567 (N.Y. Sur. Ct. 1937). Champerty is defined as follows:

An agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant’s claim as consideration for receiving part of any judgment proceeds; specifically, an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim.

BLACK’S LAW DICTIONARY 246 (8th ed. 2004). The relevance of champerty and the related common law doctrines of maintenance and barratry has eroded substantially in modern times, particularly since the doctrines were abolished in Massachusetts in 1997 in the watershed Saladini case. Saladini v. Righellis, 687 N.E.2d 1224 (Mass. 1997). For a thorough history and critique of the doctrines, see Moliterno, supra note 1.
agreement itself. However, with its adoption in 1969 of the Model Code of Professional Responsibility, the ABA also took the position—at least for the interim decade and a half—that, although an attorney can advance litigation expenses, the client must retain ultimate liability for paying them. And, even after the ABA replaced the Model Code with the Model Rules in 1983, some jurisdictions still require the client to bear ultimate responsibility for advanced litigation expenses, and in some cases, the matter may be decided by individual court rules, as is anticipated in the New York disciplinary rule on point:

Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated.

However, most jurisdictions now follow the approach of the Model Rules in allowing advancement of litigation expenses regardless of whether the attorney or the client retains ultimate responsibility for paying them.

B. A Step Further: The Propriety of Attorneys Charging Clients Interest

As the propriety of advancing litigation expenses became settled, a related question arose: whether attorneys could charge interest on the advanced expenses.

62. E.g., Kerzee v. Aultman, 291 S.W. 293, 294 (Tex. Civ. App. 1927) (“As we view the contract, the amount to be divided between appellees and appellant was the amount left after the payment of all legitimate expenses and costs that had been incurred in the litigation.”).

63. MODEL CODE OF PROF’L RESPONSIBILITY EC 5-8 (1980) (“[T]he advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action, but the ultimate liability for such costs and expenses must be that of the client.”).

64. See, e.g., Va. State Bar Ethics Council, Op. 1595 (1994) (“[T]he lawyer may advance or guarantee the expenses of litigation, provided that the client remains ultimately liable for such expenses.”); State Bar of Ariz., Op. 01-07 (“ER 1.8(e) allows a lawyer to advance court costs and litigation expenses if . . . the client is ultimately responsible for their payment, regardless of the outcome of the case . . . .”); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 754 (2002) (“A lawyer may advance or guarantee the expenses of litigation . . . provided the client remains ultimately liable for such expenses.”).


66. See, e.g., The Sup. Ct. of Ohio Bd. of Comm’rs on Grievances and Discipline, Op. 2001-3 (2001) (“[O]hio lawyers are permitted to advance the expenses of litigation and to allow a client’s repayment of expenses to be contingent on the outcome of the matter.”); Ky. Bar Ass’n, Op. KBA E-420 (2002) (“The contingent fee agreement also must clearly state whether contingent fee percentages are computed before or after the deduction of . . . expenses.”); State Bar of Ga., Formal Advisory Op. 05-5 (2005) (“Paragraph (e) of Rule 1.8 eliminates the former requirement that the client remain ultimately liable for financial assistance provided by the lawyer . . . .”).
The ABA originally took the position that providing incentives for clients to pay early—offering discounts for paying early or charging interest for paying late—was improper because it would relegate the attorney-client relationship to a mere business relationship: “[T]he professional relationship between an attorney and his client is highly personal, involving an intimate appreciation of each individual client’s particular problem. Practices which [sic] overlook the personal element in the attorney’s relationship with his client and which [sic] tend toward an undue commercial emphasis are to be condemned.”67 However, even though the ABA had disapproved of charging clients interest directly on unpaid fees, it also suggested that “it would not per se be unethical for [an] attorney to accept . . . a promissory note in the amount of the agreed fee, with interest to accrue from a specified date and the note to mature at an agreed date and with the client having a right of pre-payment without penalty.”68

As the use of credit cards as a form of payment became increasingly widespread among the public in the late 1960s and early 1970s and several state and local bar associations approved of their use for paying legal fees, the ABA shifted its opinion.69 When the ABA approved of credit cards as an acceptable form of payment of legal fees, it also informally overturned its prior opinions70 regarding the propriety of charging clients interest on past due accounts, noting the parallel between the credit card companies’ charging of interest on balances and attorneys charging interest on delinquent accounts:

A necessary corollary to the use of credit cards is the charging of interest on delinquent accounts. It is the Committee’s opinion that it is proper to use a credit card system which involves the charging of interest on delinquent accounts. It is also the Committee’s opinion that a lawyer can charge his client interest providing the client is advised that the lawyer intends to charge interest and agrees to the payment of interest on accounts that are delinquent for more than a stated period of time.71

70. Id.; see also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 00-419 (2000) (“Formal Opinion 338, although not formally withdrawing Informal Opinions 1120 and 1176, had rejected their reasoning that credit cards or other bank-financing arrangements properly could be employed only for ‘facilitating the sales of merchandise and sales of non-professional services,’ and not for legal services. . . .”); Okla. Bar Ass’n Legal Ethics Comm., Op. 286 (1975) (“This language [in Formal Opinion 338] obviously overrules Informal Decision C-741 and sanctions the charging of interest on fees for professional services rendered which are past due.”).
A number of jurisdictions followed the ABA’s lead and likewise took the position that attorneys could properly charge interest on delinquent accounts, and, for several jurisdictions, the ability to charge interest on delinquent accounts served as a stepping stone toward allowing litigation financing loan interest as a pass-through expense.

C. Another Piece of the Puzzle: The Propriety of Borrowing Funds for Litigation Expenses

As with other types of businesses, attorneys can borrow money to maintain and expand their practices, such as “for long-term projects, for capital growth, and for increasing the size of the firm.” It is generally proper for attorneys to use their own assets to secure such loans, including, for example, pledging the firm’s accounts receivable as collateral. The issue becomes more complicated, though, when an attorney borrows funds to finance litigation, which has potential ethical implications relating to the “personal conflicts of interest, client confidentiality, and the lawyer’s independent judgment.” However, a calculated, low risk of compromising the attorney-client relationship may be worth taking if it allows plaintiffs to move forward with their claims, which in many cases they


might not otherwise be able to do. A 2002 Kentucky Bar Association ethics opinion summarizes this point well:

By borrowing money from a lending institution to cover advancements for costs and expenses, the lawyer assumes both a financial obligation and a debt management responsibility in the litigation. If these burdens become too great, particularly if a case becomes protracted, the lawyer’s fidelity to the client could be compromised by the lawyer’s perceived need to conclude the representation on a basis that will allow the loan to be paid and the attendant burdens to be lifted. These same observations might be made of any situation in which the lawyer has advanced costs and expenses to a client from personal funds or where a contingent fee is involved. Although we recognize the potential personal conflicts inherent with advancement of litigation costs and contingent fees, we permit these arrangements—subject to Rule 1.7—because they benefit the client and may provide the only means by which a client can pursue his or her claim.77

State ethics committees generally now allow attorneys to borrow funds for litigation expenses as long as the financing agreements comply with each state’s rules of professional conduct.

1. Avoiding Conflicts of Interest

Under the Model Rules of Professional Conduct and the corresponding state legal ethics rules, attorneys must avoid conflicts of interest in their representation of clients,78 which includes a general prohibition against attorneys “acquir[ing] a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for [the] client.”79 The rule is rooted in the “common law [doctrines of] champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation.”80 The concern is that a client should be able to terminate his or her relationship with the attorney and obtain new counsel: “[W]hen the lawyer acquires an ownership interest in the subject of the represen-

77. Id.
78. See Model Rules of Prof’l Conduct R. 1.8 (2012).
80. Model Rules of Prof’l Conduct R. 1.8(i) cmt. (2012); see also Ky. Bar Ass’n, Ethics Op. KBA E-420 (2002) (“The concern is that if a lawyer acquires a stake in the outcome, his or her ability to exercise independent judgment on behalf of the client may be impaired.”); but see Moliterno, supra note 1 (arguing for the abolition of the doctrines of champerty and maintenance and noting that the conflict of interest at issue in such situations “may be no different from the ordinary economic conflict of interest that lawyers and clients have as a matter of routine”); Garber, supra note 1, at 18-19 (noting that “contingency-fee lawyers have an inherent conflict of interest with their clients even without [litigation financing]”).
tation, it will be more difficult for a client to discharge the lawyer if the client so desires."81

For attorneys seeking to borrow funds to finance litigation costs, the effect of
this rule is a general prohibition against pledging any of the client’s portion of
the potential award or settlement as collateral for the loan—withstanding client
consent—which could also invoke the rules applying to entering into business
transactions with clients.82 From a practical perspective, this rule also ensures
that the client’s potential award is not jeopardized—if the entire award were
used as collateral, then all or part of the client’s potential recovery would be at
risk if the attorney defaulted on the loan. The rule against pledging the any of
the client’s portion of the potential award or settlement as collateral prevents
such a possibility, even where the client might otherwise provide informed consent.
However, some jurisdictions allow an attorney to pledge his or her portion of the
potential award—the portion that is the attorney’s fee—as collateral for such a
loan,85 but other jurisdictions would treat such an arrangement as improper sharing
of fees with a nonlawyer.86 It is important to note the distinction between the award
or settlement in the case and the portion of the award or settlement that the attorney
receives as his or her contingency fee—both the attorney and the client have an
interest in the former, whereas only the attorney has an interest in the latter.87

2. Maintaining Professional Independence

The Model Rules of Professional Conduct and corresponding state legal eth-
ics rules also require lawyers to maintain professional independence.88 The plain

81. MODEL RULES OF PROF’L CONDUCT R. 1.8(i) cmt. (2012); see also Letter from ABA Com-
mission on Ethics 20/20 Working Group on Alternative Litigation Financing to ABA Entities,
Courts, Bar Associations (state, local, specialty, and international), Law Schools, Individuals,
and Entities (Nov. 23, 2010), http://www.americanbar.org/content/dam/aba/migrated/ethics2020/
alfposting.authcheckdam.pdf (“If the client wishes to terminate, or the lawyer wishes to terminate
or withdraw from the engagement, there may be limitations by reason of [a provision in the financ-
ing agreement] requiring that the [lender] play a role or have veto power in the selection of substi-
tute or successor counsel.”).

82. See, e.g., The Sup. Ct. of Ohio Bd. of Comm’rs on Grievances and Discipline, Op. 2001-3
(2001) (“Under the proposed facts, the law firm is not securing the loan with a client’s settlement or
judgment; therefore, the lawyer and the law firm are not obtaining a proprietary interest in any one


client’s funds at risk to obtain a loan.”).


86. See Section I.D, C.3, infra.

client’s funds at risk to obtain a loan. [A l]awyer, however, may put up his own assets, including his
contingent fee in the case, as collateral to secure a loan.”).

text of the applicable Model Rule sets forth a general prohibition on fee sharing with nonlawyers that is designed “to protect the lawyer’s professional independence of judgment," but the rule “also expresses traditional limitations on permitting a third party to direct or regulate the lawyer’s professional judgment in rendering legal services to another.” For attorneys seeking to borrow funds for litigation expenses, the primary effect of this rule is that the attorney cannot allow the lender to influence the attorney’s professional judgment in representing the client: “[T]he lawyer must be careful to make sure that the bank understands that its contractual arrangement can in no way affect or compromise the lawyer’s obligations to his or her individual clients.”

Although it may be an extreme example, in a recent case a Florida state appellate court held that a plaintiff’s private lender’s extensive control over the litigation justified awarding the attorney’s fees to the defendants. The court was careful to note the level of control that the lender exercised:

[The private lender] financed and controlled the litigation. He was to receive 18.33% of any award the plaintiffs received plus reimbursement for the expenses of the case. Additionally, [the lender] had to approve the filing of the lawsuit; controlled the selection of the plaintiffs’ attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel’s bills; and had the ability to veto any settlement agreements. [The lender] even paid $13,000 for the medical expenses of plaintiffs’ main witness.

Because of the lender’s extensive control, the court found that the lender “clearly [had] risen to the level of a party” to the litigation. The court determined that the plaintiffs lacked standing to bring the suit, and, therefore, both the plaintiffs and the lender were liable for the defendants’ attorney’s fees under Florida’s civil theft statute because their suit “lacked substantial legal support.”

The concern over attorneys maintaining independent professional judgment may also preclude an attorney from having a financial interest in the lender. This prohibition can extend beyond merely “own[ing] or control[ing] the lending

89. Model Rules of Prof’l Conduct R. 5.4(a) (2012); see also Garber, supra note 1, at 19.
91. Id.
94. Id. at 693.
95. Id. at 694.
96. Id. at 694-95.
institution” to include “past or on-going business relationship(s) with the lender,” in which case “the lawyer must also be satisfied that his or her representation of the client will not be ‘materially limited’ by the lawyer’s responsibilities to the lender.” Some jurisdictions also treat the prohibition on sharing fees with nonlawyers as barring attorneys from using a potential fee as collateral for a loan, although, as discussed above, other states permit the use of a contingent fee as collateral. It is important to note the distinction between the award or settlement in the case and the portion of the award or settlement that the attorney receives as his or her contingency fee—both the attorney and the client have an interest in the former, whereas only the attorney has an interest in the latter.

3. Maintaining Client Confidentiality

Central to the attorney-client relationship is the attorney’s duty to maintain client confidentiality, which “contributes to the trust that is the hallmark of the client-lawyer relationship.” The ABA succinctly set forth the rationale behind this rule in its comment to Model Rule 1.6:

The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

Accordingly, the attorney must be careful not to breach client confidentiality in his or her relationship with any potential or existing lender, which includes dis-

101. See Section I.D, C.2, supra.
102. See, e.g., N.C. State Bar, 2006 Formal Ethics Op. 12 (2006) (“[A] lawyer may never put a client’s funds at risk to obtain a loan. [A] lawyer, however, may put up his own assets, including his contingent fee in the case, as collateral to secure a loan.”).
103. Model Rules of Prof’l Conduct R. 1.6 cmt. [2] (2012) (“A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.”).
104. Id.
105. Id.
106. E.g., State Bar of Mich. Standing Comm. on Prof’l Ethics, Op. RI-336 (2005) (“The law firm must not reveal a confidence or secret of the client to the lending institution.”); State Bar of Ga., Formal Advisory Op. 05-5 (2005) (“Thus, the lawyer must be careful to make sure that the bank understands that its contractual arrangement can in no way affect or compromise the lawyer’s
closing the “nature and value of a case”—information that could be of interest to a lender by virtue of its interest or potential interest in the security of its loan. The rule is not without an exception, though—an attorney may, in some cases, disclose confidential information when the client provides informed consent. However, the standard for informed consent in such situations can be substantial: “Consent will be informed only if [the] lawyer has had a full and frank discussion with the client concerning the advantages and risks of disclosure, including the risk that disclosure may result in a waiver of the attorney-client privilege.”

The risk of waiving the attorney-client privilege, and, by extension, the privilege provided by the attorney work-product doctrine, is substantial and bears further discussion. The issue recently arose in a patent infringement case against the online social networking behemoth Facebook in the U.S. District Court for the District of Delaware. The plaintiff had shared technical documents with a prospective litigation financier, which a magistrate judge subsequently had ordered the plaintiff to produce over the plaintiff’s objection. The plaintiff asserted that common-interest doctrine applied, in which case the attorney-client priv-
ilege would have extended to the communications between the plaintiff and the 
prospective lender.114 The district court agreed with the magistrate judge, who, 
despite having noted that “the state of the law regarding common interest is un-
settled and that [the case at hand] presented a close question,”115 had taken “into 
consideration that [the plaintiff] had the burden of establishing existence of the 
privilege” as well as “the numerous policy considerations, including the need 
for litigation financing companies and the truth-seeking function of litigation.”116 
The holding of the case may be limited to its facts—the plaintiff was only in ne-
gotiations with the lender and had not actually entered into a loan agreement117—
but the ABA Commission on Ethics 20/20’s Working Group on Alternative Lit-
igation Financing noted that “the common interest exception very likely does not 
allow the lawyer who knows most about the matter to make disclosure to the 
[lender] without losing the benefit of the privilege and work product doctrine.”118 
However, the Commission’s February 2012 report to the ABA House of Dele-
gates seems less certain, stating that “[t]here is a significant unresolved question 
of whether disclosure of privileged communications to [a litigation finance lender] 
waives the privilege.”119 The risk is both substantial and clear: information shared 
with a lender may be subject to discovery on the basis that the attorney-client priv-
ilege has been waived. The extent of the waiver most likely will require a highly 
fact-sensitive inquiry.

D. Synthesis: Passing Loan Interest Through
as a Litigation Expense

Passing loan interest through to clients as a litigation expense adds a layer of 
complexity to the ethical analysis of borrowing funds for litigation expenses. 
When an attorney pays the interest incurred on a litigation-expense loan out of 
his or her own pocket, only two parties are affected—the lender and the attorney. 
Even though the client may have to reimburse the attorney for the expenses them-
selves, if the client does not have to reimburse the attorney for the interest on the 
loan, then, from the client’s perspective, the situation is the same as if the attor-
ney had simply advanced the expenses out of the attorney’s own funds. However, 
if the client will be or may be responsible for ultimately paying the interest ex-
pense, then the client becomes directly affected by the loan transaction. The fol-
lowing is a summary of additional rules that jurisdictions commonly apply to sit-
uations in which an attorney seeks to pass interest and other litigation financing 
expenses through to a client.

114. Id. at 375.
115. Id. at 376.
116. Id. at 377.
117. Id. at 375-76.
118. Letter from ABA Commission on Ethics 20/20 Working Group on Alternative Litiga-
tion Financing to ABA Entities, Courts, Bar Associations (state, local, specialty, and international), 
Law Schools, Individuals, and Entities (Nov. 23, 2010), http://www.americanbar.org/content/dam/ 
aba/migrated/ethics2020/alfposting.authcheckdam.pdf; see also Garage, supra note 1, at 19.
119. White Paper, supra note 31, at 34.
1. Disclosure, Informed Consent, and Keeping the Client Informed

Nearly every jurisdiction that has addressed the propriety of passing litigation finance expenses through to clients explicitly requires that the attorney fully disclose the arrangement to the client and obtain the client’s consent prior to passing the expense through.120 The degree of disclosure required is substantial—the relevant state ethics opinions and the text of the Model Rules “suggest that much more is required than mere consent and disclosure.”121 The rationale for such a high standard is that by bringing loan interest into the attorney-client relationship as a pass-through expense, the relationship “takes on the characteristics of a business transaction and is subject to the mandates of [the ethical rules governing business transactions with clients].”122 Thus, “[a]t a minimum, the client should be advised of how and when the attorney will finance advances, the name of the lending institution, and the expected costs associated with financing, including rate of interest,”123 but even more may be required:

For consent to be fully informed, the fee agreement must evidence that the client understands and agrees that the lawyer will borrow funds to pay for litigation expenses incurred in the client’s case, that the client will be responsible for the repayment of the interest or fee charged in the event the case is successfully tried (as defined by the financing company), and that the client agrees to the amount and terms of repayment.124


122. Id.; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36 cmt. (2000) (noting that the rules governing business transactions do not apply if the client is merely repaying advancements out his or her recovery, but that they do apply if there is “[a]ny more extensive obligation of the client,” such as paying interest on the advanced funds); MODEL RULES OF PROF’L CONDUCT R. 1.8(a) (2012).


The crux of the requirement is that the client actually be informed, which may require tailoring the disclosure to the experience and sophistication of the client; a number of jurisdictions even specifically require that the attorney orally explain the financing arrangement to the client.\textsuperscript{125}

Most jurisdictions require that the disclosure be made in writing and that the client agree to the arrangement in writing, which, when the attorney’s fee is earned on a contingency basis, will usually be in the contingency agreement itself.\textsuperscript{126} Some jurisdictions even require that the contingency fee agreement specifically disclose the details of the financing arrangement\textsuperscript{127} or that the attorney provide the disclosure “at the outset of the representation.”\textsuperscript{128} Several jurisdictions require that the attorney disclose the details of the financing agreement prior to entering into the agreement with the lender, but, at the latest, the disclosure should be made prior to passing the loan interest through to the client.\textsuperscript{129}


\textsuperscript{127} E.g., The Mo. Bar, Informal Ethics Op. 970066 (1997) (“The financing arrangement should be covered in the written fee agreement.”); Me. Bd. of Overseers of the Bar, Op. 177 (2001) (“The client’s responsibility for interest and other financing costs should be spelled out in the written contingent fee agreement or limited representation agreement.”); The Sup. Ct. of Ohio Bd. of Comm’rs on Grievances and Discipline, Op. 2001-3 (2001) (“The terms of the loan must be disclosed to the client and must be agreed upon by the client in the contingent fee agreement.”); State Bar of Ga., Formal Advisory Op. 05-5 (2005) (“It is the opinion of this Board that Rules 1.5(c) and 1.8(e), taken together, require that the contingent fee contract inform the client whether he is or is not responsible for these expenses, even if there is no recovery.”).


\textsuperscript{129} See, e.g., Ill. State Bar Ass’n, Advisory Op. on Prof’l Ethics 94-06 (1994) (“Any agreement providing for the charging of interest on expenses should be placed in writing prior to the accrual of any such interest and at the earliest opportunity, usually being the execution of a written fee agreement contract.”); Va. State Bar Ethics Council, Op. 1595 (1994) (“There must be an agreement between the firm and client prior to the imposition of an interest charge.”); The Mo. Bar, Informal Ethics Op. 970066 (1997) (“[The client should agree to the terms of the loan before the money is borrowed.”); The Ass’n of the Bar of the City of N.Y. Comm. on Prof’l and Jud. Ethics, Formal Op. 1997-1 (1997) (“[The provision must be clearly explained to the client in advance and agreed upon by the client.”); N.C. State Bar, 2006 Formal Ethics Op. 12 (2006) (“Lawyer may pass along the expense of obtaining litigation financing to the client only if . . .
Under the Model Rules and corresponding state ethics rules, an attorney representing a client on a contingent fee basis must, at the conclusion of the representation, "provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."\textsuperscript{130} Accordingly, a number of jurisdictions explicitly require that the attorney itemize the interest charged on advanced expenses,\textsuperscript{131} which "should be sufficiently detailed so that the client can understand what costs, including loan-related expenses, the client has been charged."\textsuperscript{132}

Some jurisdictions articulate additional disclosure and informed consent requirements before litigation loan expenses can be passed through to clients. In Kentucky, attorneys seeking to pass litigation finance expenses through must have the opportunity to seek independent counsel when deciding whether to consent to the agreement,\textsuperscript{133} which is consistent with the requirements of the Model Rules governing business transactions with clients.\textsuperscript{134} Both Kentucky and Georgia require that attorneys disclose whether the client’s obligation to pay the expenses, which include any loan interest, is contingent on the outcome of the litigation.\textsuperscript{135} And in North Carolina, attorneys “must discuss other financing arrangements, their availability, and the risks and advantages of each” with their clients.\textsuperscript{136}

2. Reasonableness of the Financing Arrangement

In addition to obtaining the client’s informed consent, the terms of the financing arrangement vis-à-vis the client must be “fair, reasonable, customary, and at a lawful [interest] rate.”\textsuperscript{137} This requirement extends to multiple aspects of borrowing funds to finance the litigation. Foremost, the interest rate and loan costs, which might include, for example, loan origination and related fees,
must be fair and reasonable\textsuperscript{138} as well as lawful.\textsuperscript{139} However, the reasonableness requirement extends even further—not only must the terms of the financing arrangement itself be reasonable, but so must the litigation expenses for which the borrowed funds are used,\textsuperscript{140} which is consistent with the ABA’s position that “the reasonableness standard explicitly applicable to fees under Rule 1.5(a) should be applicable to [pass-through expense] charges as well.”\textsuperscript{141} In addition, absent special circumstances, all pass-through expenses, including interest and other loan-related expenses, must be passed through at cost: “[I]t would be improper if the lawyer assessed a surcharge on these disbursements over and above the amount actually incurred unless the lawyer herself incurred additional expenses beyond the actual cost of the disbursed item.”\textsuperscript{142} Some jurisdictions also specifically require that the client have the opportunity to prepay any amounts advanced without penalty, which would allow the client to avoid some or all of the pass-through interest expense.\textsuperscript{143}

3. Restrictions on the Collateral that Can Be Used to Secure the Loan

As discussed earlier in this Section, jurisdictions differ as to what can be pledged as collateral for a litigation loan.\textsuperscript{144} Several jurisdictions do not allow

\textsuperscript{138.} E.g., \textit{id.}; Ill. State Bar Ass’n, Advisory Op. on Prof’l Ethics 94-06 (1994) (”[T]he rate or amount of interest charged upon advances expenses should likewise be reasonable, as should the costs and expenses upon which interest is charged.”); State Bar of Ariz., Op. 01-07 (2001) (”The lawyer also has an obligation to make sure that the interest charges are commercially reasonable.”); Me. Bd. of Overseers of the Bar, Op. 177 (2001) (”[T]he terms for the loan including costs and rate of interest should be reasonable.”); The Sup. Ct. of Ohio Bd. of Comm’rs on Grievances and Discipline, Op. 2001-3 (2001) (”The terms of the loan, including the amount borrowed, the interest rates, and costs of the loan must be appropriate and reasonable.”); N.C. State Bar, 2006 Formal Ethics Op. 12 (2006) (”[A] lawyer may pass along the expense of obtaining litigation financing to the client only if . . . the financing expense is not clearly excessive under the circumstances . . . .”); see also Va. State Bar Ethics Council, Op. 1595 (1994); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 729 (2000); Ky. Bar Ass’n, Ethics Op. KBA E-420 (2002).


\textsuperscript{143.} E.g., Va. State Bar Ethics Council, Op. 1595 (1994) (”[T]he client must have the unrestricted right to prepay any balance of the costs, without penalty.”); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 729 (2000) (”[A] contingent fee attorney may impose an interest charge on unpaid disbursements as long as . . . the client is billed for the disbursements promptly after they have been incurred so the client may decide whether to pay the disbursements or incur the interest charge . . . .”).

\textsuperscript{144.} See Section I.C.3, supra.
attorneys to pledge their contingent fee\textsuperscript{145} or the settlement or award\textsuperscript{146} itself as collateral for litigation loans, even in cases where the client provides any necessary consent. The rationale for these restrictions is rooted in concerns of maintaining attorneys’ independence of professional judgment:

If a loan is tied, either formally or informally, to a specific case the lender may try to protect its investment by attempting to influence the lawyer’s management of the case. This is always a risk, but it becomes even more so when the lawyer’s prospective fee in a specific case serves as collateral for the loan. The fact that the agreement with the lender might recite a disavowal that the lender would interfere with the lawyer’s independent judgment, or that the client has consented to the loan arrangement, does not alter the economic reality that the lawyer could feel pressured to bring the case to conclusion—thereby turning the unearned fee expectancy into an earned fee—in order to satisfy the claim of a creditor with a security interest in that specific fee. In addition, a secured creditor might deem itself insecure if the lawyer missed one or more monthly interest payments, and might seek to accelerate the loan, bringing even greater pressure on the lawyer to conclude the matter quickly or, perhaps, to relinquish control to another lawyer.\textsuperscript{147}


\textsuperscript{147} Ky. Bar Ass’n, Ethics Op. KBA E-420 (2002). The Utah State Bar has similarly articulated this rationale, specifically in the context of the state’s version of Model Rule 5.4(a), which prohibits the sharing of fees with non-lawyers:

[O]nce a security interest in the recovery of contingent fees from a particular case is granted, Rule 5.4 is implicated. Upon that grant, Lender has an interest in the attorney’s contingent-fee award, which Lender has the right to attach upon a default in payment on the loan. That particularized interest in the contingent fees of a case could compromise the lawyer’s judgment in a number of ways. For example, the lawyer’s judgment may be impaired in drawing up the proposed budget for expenses. He may be influenced in recommending that a client accept a settlement offer because of the impact it may have on the repayment of the debt with Lender. The fact that Lender may agree not to be involved in decisions involving the case or that Client may agree in writing and in advance does not save the proposed arrangement, as Rule 5.4(a) makes no exception for such cases.

Accordingly, we find that an attorney may not finance the costs of a contingent-fee case in which a non-recourse promissory note is secured by the attorney’s interest in the contingent fee.

It is again important to emphasize that the specifics of these restrictions vary among jurisdictions. For example, in North Carolina, attorneys can only secure litigation expense loans with the portion of the potential award that consists of their anticipated contingent fee.\textsuperscript{148} and, in Maine, attorneys can use the potential award as collateral as long as the client provides informed consent.\textsuperscript{149}

II. The \textit{Chittenden} Case

After nearly a century of evolution in legal ethics rules and at the peak of a two-decade trend of state bar associations toward allowing attorneys to pass through litigation financing expenses to clients, the Supreme Court of Louisiana decided the leading case on the matter, \textit{Chittenden v. State Farm Mutual Automobile Insurance Company}.\textsuperscript{150} The result of the case accords with all of the ethics opinions discussed above, and, indeed, the \textit{Chittenden} court summarized the requirements that the state opinions typically set forth: “Several principles may be drawn from these opinions which we cite with approval: (1) the client must agree in writing to such a charge; and, (2) the interest rate must be lawful and reasonable.”\textsuperscript{151} The case is of particular importance because of the dearth of case law addressing the propriety of passing litigation financing expenses through, which is perhaps because the issue, by nature, is more suited to the realm of state ethics committees.

The \textit{Chittenden} case arose out of a dispute that occurred when two personal injury plaintiffs, George and Roberta Chittenden, discharged their attorney and hired new counsel.\textsuperscript{152} The discharged attorney, Darryl Carimi, sought to recover $40,859.25 in interest from the Chittendens on funds that he had borrowed to finance the litigation.\textsuperscript{153} Carimi prevailed at both the district and appellate levels,\textsuperscript{154} and the Supreme Court of Louisiana partially affirmed, allowing Carimi to pass the interest expense through but limiting the amount of interest that he could recover.\textsuperscript{155}

The Supreme Court of Louisiana placed substantial weight on the fact that Carimi had entered into a contingency-fee retainer agreement with George Chittenden that specifically authorized Carimi, at his discretion, to obtain a loan to cover the costs of the litigation.\textsuperscript{156} Thus, Carimi not only disclosed that he would pass through any corresponding interest costs to the Chittendens and ob-

\textsuperscript{150} 788 So.2d 1140 (La. 2001).
\textsuperscript{151} Id. at 1150.
\textsuperscript{152} Id. at 1144.
\textsuperscript{153} Id. The Chittendens had agreed “to pay Carimi $46,162.54 in reimbursement for costs and funds advanced, but they [had] refused to pay the $40,859.25 which represented interest charges.” Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 1153.
\textsuperscript{156} Id. at 1143.
tained written consent to do so, but he also obtained George Chittenden’s contractual obligation to reimburse him for the interest expense.157

In its decision, the court relied heavily on an opinion that it issued more than a decade earlier, *Louisiana State Bar Association v. Edwins*, which dealt with the propriety of advancing recoverable living expenses to clients during litigation.158 *Edwins* provided a framework for the *Chittenden* court’s analysis in two important ways. First, it set the disclosure standard that the court would later use in *Chittenden*: “A client who has retained a lawyer on a contingent fee basis may be billed for [unique litigation expenses] only when the fee agreement explicitly provides such costs will be billed, the agreement includes a detailed and complete explanation of the nature of the [expense], and the client consents.”159 Second, it articulated the rationale behind allowing attorneys to advance living expenses: “The theory behind the policy was that this Court did not want to force impoverished individuals into early settlements because they were unable to wait out the delays of litigation that are necessary to enforce a cause of action.”160

In its analysis, the *Chittenden* court had to decide whether charging a client interest itself was ethical.161 The court looked to state ethics opinions and its *Edwins* decision and determined that charging interest on advanced funds is permissible as long as the client agrees in writing and the interest rate is reasonable.162 However, the court was careful to note that “Carimi did not advance his personal funds” but rather “[obtained the] loans at a financial institution in which he did not have a financial interest.”163 From the Court’s perspective, had he advanced his own funds, Carimi would have risked “[his own] interest in the litigation [becoming] adverse to that of his client,” which would have created additional disclosure and informed consent requirements.164

Having concluded that Carimi’s passing through of the interest expense comported with the ethical rules, the court then turned its analysis to the interest rate charged on the borrowed funds.165 Carimi “contend[ed] that neither he nor his law firm made money on the interest charges” and that “[the] interest was handled ‘merely as a pass-through transaction.’ ”166 The Chittendens, however, countered that the interest provision in the retainer agreement was unenforceable because it failed to specify what the interest rate would be.167 The court resolved

157. *Id.* at 1148-49.
158. 540 So.2d 294 (La. 1989).
159. *Id.* at 303.
160. *Chittenden*, 788 So.2d at 1145.
161. *Id.* at 1147-50.
162. *Id.* at 1149-50.
163. *Id.* at 1149.
165. *Chittenden*, 788 So.2d at 1150-52.
166. *Id.* at 1146.
167. *Id.* at 1150.
the interest issue by looking to state law, allowing Carimi to pass through the interest expense, but only to the extent permitted under the Louisiana law governing interest rates.\textsuperscript{168} The court also emphasized that, due to the compound interest formula that Carimi used to calculate the pass-through interest, the amount that he charged the Chittendens was actually greater than the amount that he was obligated to pay the bank.\textsuperscript{169} To that end, Carimi had violated the ethical rule against “acquiring a proprietary interest in the litigation,” but the court determined that the issue was moot because the court had already reduced the interest amount to less than the actual amount charged by the bank.\textsuperscript{170}

### III. The World Trade Center Litigation

Despite the virtually unanimous consensus among state legal ethics committees and courts—at least among those that have addressed the issue—that attorneys can pass litigation loan expenses through to clients as long as the disclosure, confidentiality, and similar requirements are satisfied, in the settlement of the high-profile World Trade Center litigation one of the lead plaintiffs’ firms was unsuccessful in passing litigation loan interest through to its clients as an expense. The litigation is unique in a number of respects, which is likely the root of the seemingly anomalous result. More importantly, the litigation (1) provides an example of the complex issues that attorneys may face when seeking to pass litigation financing expenses through to clients and (2) illustrates that, ultimately, courts can have substantial influence over whether attorneys can do so.

#### A. Background

Following the September 11, 2001 terrorist attacks on the World Trade Center buildings in New York City, the city and a number of municipal agencies and private contractors began the clean-up effort, which included sorting through and removing substantial debris from the “Ground Zero” site where the towers collapsed.\textsuperscript{171} Shortly after the attacks, President Bush declared a national emergency, “triggering a federal response that drew several agencies, including the Federal Emergency Management Agency (FEMA), into the rescue and recovery effort,”\textsuperscript{172} which was of incredible scale and put workers at risk of exposure to numerous hazardous materials:

Throughout the recovery effort, the uniqueness of the disaster remained apparent. Beyond the sheer scale of the attack and the collapse of the 110-story Twin Towers, rescue and recovery workers faced over a mil-

\textsuperscript{168} Id. at 1151.
\textsuperscript{169} Id. at 1152.
\textsuperscript{170} Id.
\textsuperscript{172} Id. at 2.
lion tons of debris nearly 12 stories high, fires that smoldered for almost 3 months, and layers of asbestos-laden dust, pulverized concrete, glass fibers, and other hazardous materials.173

Although “insurance coverage is a prerequisite for debris removal and a reimbursable expense under FEMA’s public assistance program,” insurers “were wary of issuing a comprehensive policy due to the uniqueness of the disaster and the potential for unknown liabilities resulting from exposure to hazardous materials at the site.”174 In response, FEMA, with the backing of Congress and the White House, drafted legislation creating an insurance company whose “sole purpose is to provide insurance for New York City and its contractors that participated in debris removal from the WTC site.”175 Congress passed the legislation and the President signed it into law in 2003, creating the World Trade Center Captive Insurance Company, Inc. (the “WTC Captive”) and allocating $1 billion to fund it.176 In 2005, two law firms who “coordinated the plaintiffs’ lawsuits” filed a master complaint in the United States District Court for the Southern District of New York “on behalf of named and unnamed individuals.”177 While the WTC Captive settled a few claims that were not part of the federal litigation,178 it “opted to litigate every claim that [was] filed” in the federal litigation,179 and, by 2008, the WTC Captive’s records indicated that there were over 9,000 “suits by individual plaintiffs against New York City and its contractors alleging they ha[d] been harmed through their work at the WTC site or by exposure to certain materials at or near the site.”180 While a number of the suits were originally filed in state court, “the Second Circuit Court of Appeals ruled in 2005 that the Airline Transportation Safety and System Stabilization Act, passed by Congress after the September 11, 2001, attacks, channeled all related litigation to the U.S. District Court for the Southern District of New York,” and the cases were ultimately removed and consolidated under the supervision of United States District Court Judge Alvin K. Hellerstein.181

In 2010, after more than six years of litigation, the parties reached a settlement agreement that would have provided between $575 million and $657.5 million to what had reached a total of more than 10,000 workers who alleged expo-

173. Id.; see also In re World Trade Center Disaster Site, 414 F.3d 352, 358 (2d. Cir. 2005) (noting the “clouds of dust and mountains of debris” that contained “contaminants such as asbestos, volatile organic compounds, dioxins, PCBs, and heavy metals.”).
175. Id. at 4.
178. Id. at 2.
179. Id. at 6.
180. Id.
181. Id. at 6-7; In re World Trade Center Disaster Site, 414 F.3d 352, 357 (2d. Cir. 2005).
sure to hazardous substances as a result of their assistance with the cleanup.\textsuperscript{182} Under the settlement agreement, which, even when revised exceeded 100 pages, the settlement funds were to be allocated based on a multi-tiered scale tied to the severity of each plaintiff’s injuries, and the agreement provided additional compensation to plaintiffs in certain circumstances, such as when a plaintiff’s injury resulted in permanent disability.\textsuperscript{183} However, Judge Hellerstein rejected the settlement because it “did not provide enough compensation to plaintiffs” and its terms “were too complicated for the plaintiffs to be able to reach an ‘intelligent decision’ on whether to accept it.”\textsuperscript{184} Attorneys on both sides questioned the judge’s authority to reject the settlement, and experts noted that the judge “had waded into untested legal waters” because “such intervention is not the norm in cases that are not a class action.”\textsuperscript{185} Nevertheless, in the following months the parties renegotiated the terms of the settlement to provide the plaintiffs with additional compensation, and, in June 2010, the judge allowed the settlement to move forward.\textsuperscript{186}

\textbf{B. The Issue of Passing Litigation Financing Expenses Through}

During the course of the litigation, Worby Groner Edelman & Napoli Bern LLP (“WGENB”), one of the two firms serving as lead plaintiffs’ counsel in the litigation,\textsuperscript{187} borrowed $35 million from Counsel Financial, a loan that Deutsche Bank subsequently refinanced, to fund the litigation.\textsuperscript{188} WGENB, which repre-

\begin{itemize}
\item \textsuperscript{184} Mireya Navarro, \textit{Judge Rejects Deal on Health Claims of Workers at Ground Zero}, supra note 182.
\item \textsuperscript{185} Mireya Navarro, \textit{Empathetic Judge in 9/11 Suits Seen by Some as Interfering}, N.Y. Times, May 3, 2010, at A17; Mireya Navarro, \textit{Lawyers Defend Ground Zero Settlement}, N.Y. Times, Apr. 02, 2010, at A21; see also Mireya Navarro, \textit{Judge Rejects Deal on Health Claims of Workers at Ground Zero}, supra note 180, (“Richard A. Nagareda, a professor at Vanderbilt University Law School who specializes in mass personal-injury litigation, said that while other district court judges had reserved the right to review settlement agreements in similar mass tort cases, that authority had not been tested yet on appeal.”).
\item \textsuperscript{187} See \textit{World Trade Center Litigation Settlement Process Agreement, As Amended} 8, available at http://www.nysd.uscourts.gov/cases/show.php?db=911&id=540. The other firm serving as lead plaintiffs’ counsel “did not borrow funds to finance its World Trade Center cases.” Certification of Andrew J. Carboy Submitted in Response to the Court’s August 17, 2010 Order, \textit{In re World Trade Center Disaster Site Litigation}, No. 21 MC 100 (AKH) (S.D.N.Y. Aug. 18, 2010).
\item \textsuperscript{188} Appelbaum, \textit{Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts}, supra note 1.
\end{itemize}
sents more than 9,000 of the 10,000-plus plaintiffs involved in the litigation, had incurred $11 million in interest on the loan and had sought to pass through $6.1 million of the interest to its clients. In August 2010, as the settlement moved forward, Judge Hellerstein scheduled a hearing during which he questioned the appropriateness of passing the litigation financing expenses through:

My attention has been drawn to a category of expense intended to be applied to plaintiffs’ settlement recovery labeled ‘interest on funds borrowed by law firm.’ The reasonableness and appropriateness of this expense has not yet been shown. To clarify the position of plaintiffs’ counsel and the obligation of the plaintiffs, [lead plaintiffs’] counsel shall show cause . . . why this category of expenses should be allowed as a reasonable and necessary expense against plaintiffs’ recoveries.

To assist him in evaluating the issue, Judge Hellerstein ordered lead plaintiffs’ counsel to provide the court with additional information and documentation, such as copies of client disclosures, the accounting practices that had been used to track the use of the funds and allocate the interest among the plaintiffs, the types of expenses for which the funds had been used, and the criteria that the firms had used to determine whether particular expenses could be passed through to clients. WGENB provided the requested information and documentation and submitted a forty-five page memorandum in support of its position together with supporting affidavits from Professor Anthony Sebok of Cardozo Law School and Professor W. Bradley Wendel of Cornell Law School, who are experts in litigation financing and legal ethics. In complying with the court’s order, WGENB was put in a position in which it was necessary to reveal both the details of the financing, including the interest rates, as well as portions of its client

194. Plaintiffs’ Memorandum Responding to the Court’s Sua Sponte Order of August 4, 2010, In re World Trade Center Disaster Site Litigation, No. 21 MC 100 (AKH) (S.D.N.Y. Aug. 26, 2010).
letters, despite having argued that the information and documentation was proprietary, was a trade secret, and fell within the protection of the attorney-client privilege. Then, less than a month later, WGENB submitted a letter to the court withdrawing its claim for reimbursement of the interest expenses, ending the matter, with only the following sparse explanation: “Our numerous conversations with our clients have impressed us of their great need to obtain prompt and fair resolutions of their cases.”

Judge Hellerstein had previously taken hard positions on financial issues related to the case out of a concern for fairness toward the plaintiffs. Earlier in the year he had ordered that the attorneys’ contingent fees would have to be calculated on the net amount of the settlement, after expenses had been deducted, which effectively shifted 25% of the litigation expenses from the plaintiffs to their attorneys. And when Judge Hellerstein rejected the original settlement, he suggested that he might also intervene to limit contingency fee amounts, prompting the plaintiffs’ firms to voluntarily lower their contingency fees to 25% of their clients’ recovery or face “apply[ing] to the court for appropriate relief.”

Under the New York ethics rules cited by WGENB, the following five conditions must be met in order for an attorney to pass litigation finance interest through to a client:

1. The client is clearly advised that an interest charge will be imposed on disbursements that are not paid within a stated period of time and the client consents to that arrangement before it goes into effect.

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197. See, supra note 196, Exhibit “A,” .
199. Mireya Navarro, Judge Rejects Deal on Health Claims of Workers at Ground Zero, supra note 182.
200. In re World Trade Center Disaster Site Litigation, No. 21 MC 100 (AKH) (S.D.N.Y. June 25, 2010) (order setting forth the protocol for regulating attorneys’ fees and allowances of expenses).
201. Plaintiffs’ Memorandum Responding to the Court’s Sua Sponte Order of August 4, 2010, In re World Trade Center Disaster Site Litigation, No. 21 MC 100 (AKH) (S.D.N.Y. Aug. 26, 2010), at 10; see also Section I.A, supra (discussing the effect of calculating contingent fees based on plaintiffs’ net awards).
203. See Plaintiffs’ Memorandum Responding to the Court’s Sua Sponte Order of August 4, 2010, In re World Trade Center Disaster Site Litigation, No. 21 MC 100 (AKH) (S.D.N.Y. Aug. 26, 2010), at 5.
(2) the client is billed for the disbursements promptly after they have been incurred so the client may decide whether to pay the disbursements or incur the interest charge,
(3) the period of time between the bill and the imposition of the interest charge is reasonable,
(4) the disbursement itself is appropriate, and
(5) the interest rate is reasonable.204

In addition, the attorney must “not compromise client confidentiality in connection with the financing arrangement,” and “the interest charge must be set forth in [the required written disclosures].”205 Based on the limited information available to the public, it appears that WGENB was generally in compliance with these requirements.206 The firm indicated that it had obtained the consent of its clients207 and that “the loans were taken at the lowest available interest rates.”208 It apparently had billed its clients because some of them publicly voiced opposition to the expense, indicating that, despite the notice, they were unaware that they might be billed for the interest.209 Given that WGENB represented over 9,000 of the more than 10,000 plaintiffs involved in the suit, it certainly would have been difficult to “explain clearly” to each client that he or she might be charged interest.210 Whatever the reason, WGENB’s decision to forego the interest resulted in the more than $6 million interest expense211 being absorbed by the firm, and the difficulties that the firm faced while arguing its position—despite appearing to be in compliance with the ethical rules on point—suggests that attorneys considering accepting a case that will require outside financing should take into account the possibility that they will not be able to pass the litigation financing expenses through.

206. See Appelbaum, Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts, supra note 1 (quoting a WGENB attorney who stated that the firm had “followed the rules.”).
207. See, supra note 203, at 3-4 (“[O]f the releases received thus far from our clients, all have accepted this expense included in their retainer agreement and have specifically signed off on the recoupment.”); Appelbaum, Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts, supra note 1.
209. Id.
211. See, supra note 203, at 6; Appelbaum, Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts, supra note 1.
IV. Conclusion

With the ABA analyzing the current state of litigation financing, the rules of the game may change. The conclusions of the ABA Commission on Ethics 20/20 seem to suggest that litigation financing is here to stay, but that attorneys must proceed carefully to ensure that litigation financing arrangements do not compromise their ethical obligations to their clients.212 Given that numerous state and local ethics committees have set forth a near-uniform position of permitting attorneys to borrow funds to cover litigation expenses and pass the interest and costs through to clients, it seems doubtful that the ABA will stray substantially from this aspect of the existing status quo. And even if it does, the state ethics committees may or may not follow the ABA’s lead. The ABA Commission’s report and any formal action that the ABA takes in response possibly will lead to increased uniformity among the jurisdictions regarding such matters as what constitutes informed consent to a financing arrangement, what constitutes acceptable collateral for such loans, and what information can be shared with lenders without breaching the attorney-client privilege and attorney-work-product doctrine.

As it stands, attorneys considering financing litigation with third-party funding have a number of possible ethical ramifications to take into account. Disclosure is critical in order to be able to pass loan interest through to clients as a litigation expense, and, because the exact disclosure requirements vary among jurisdictions, the prudent attorney should be sure to exercise due diligence in determining what is appropriate in his or her jurisdiction. The safe road entails ensuring that clients actually understand the nature of the financing—at minimum, that the attorney will borrow funds to assist in financing the litigation, that the client may be responsible for paying interest and other costs associated with the funds, what the interest rate is and how interest is calculated, and that the client may be responsible for paying the financing expenses even if the litigation is unsuccessful. Likewise, prudent attorneys should tread cautiously when disclosing information to a prospective lender. As the Facebook case213 illustrates, sharing information with a lender may compromise the attorney-client privilege and attorney work product doctrine, which could render the information subject to discovery and have possible ethical ramifications for the attorney. And the aforementioned issues are but only two of the many potential pitfalls that attorneys are best advised to avoid. Nevertheless, the ability to borrow funds and pass the interest through to clients will often be worth navigating the obstacles, and, if done properly, it can make the difference in leveling the playing field to achieve a fair and full legal victory.

Finally, in considering whether to pass litigation financing interest through, one also should consider law firm capitalization and cash flow issues as well as clients’ ability to choose who represents them. Smaller firms will largely be unable

213. See Section I.C.3, supra.
to compete with highly capitalized firms in mass tort cases, for example. Of course, attorneys are prohibited by every state’s ethics rules from taking cases beyond their competency,214 but a smaller, sophisticated personal injury firm may be quite capable of litigating a particular mass tort case. Inhibiting access to adequate financing with a rate of return sufficient to justify the lending risk may inhibit client choice. Moreover, it may push the client to a larger firm with higher overhead costs that, in the end, translate into a lower net recovery. This issue seems never to have been raised in any of the cases or ethics opinions discussed in this article, but it merits consideration, particularly by the ABA in taking any formal action following the February 2012 submission of the Commission’s informational report, in further deciding what litigation financing arrangements ought to be allowed.