



## Beneath the Surface: A Deeper Dive Into Third-Party Litigation Funding

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Litigation funding is experiencing rapid growth. Total litigation funding investments are estimated to reach \$18.9 billion in 2025 and to exceed \$67 billion annually by 2037.<sup>1</sup> Despite this momentum, important ethical and legal questions persist for attorneys considering the use of third-party funding. These include how litigation financing arrangements can be squared with attorney ethical rules, and whether funding agreements or facts relating to those agreements must be disclosed in litigation. This article explores key considerations that may determine whether a case is well suited for third-party litigation funding and highlights certain factors that may make cases more attractive to funders than others.

### State Laws Governing Litigation Funding

As of July 2025, seven states—Indiana, Kansas, Louisiana, Montana, Oklahoma, West Virginia, and Wisconsin—have regulations governing litigation funding.<sup>2</sup> These regulations vary significantly in scope. For example, Montana’s regulations include enumerated prohibitions, automatic disclosure requirements, and limits on the percentage of recovery allowed to litigation funders.<sup>3</sup> Oklahoma and Wisconsin’s regulations, in contrast, merely specify that litigation funding arrangements are within the scope of discovery.<sup>4</sup>

The most common effect of these laws is to regulate disclosure of funding arrangements. In some states, disclosure is automatic and includes divulging the funding agreement.<sup>5</sup> In other states, facts regarding litigation funding may be requested in discovery.<sup>6</sup> Some states also require specific disclosures regarding the influence of a litigation funder. For example, Kansas requires a party to disclose whether a funder has approval rights for settlement and case resolution.<sup>7</sup>

<sup>1</sup> See *Global Litigation Funding Investment Market Size, Forecast, and Trend Highlights Over 2025-2037*, Research Nester, <https://www.researchnester.com/reports/litigation-funding-investment-market/2800>.

<sup>2</sup> See Ind. Code § 24-12-11 (2024) (effective Apr. 30, 2025); Kan. Stat. Ann. § 60-226(b)(3)(B) (2024 Supp.) (approved Apr. 7, 2025); La. Stat. Ann. § 9:3580.12(A), (B) (2024); Mont. Code Ann. § 31-4-108 (2023); Okla. Stat. tit. 12, § 3226(B)(1)(c) (effective Nov. 1, 2025); W. Va. Code § 46 (2024); Wis. Stat. § 804.01(2)(bg) (2018). Although other state legislatures have considered litigation funding regulations, it is not clear whether those states will implement the proposed regulations, and there is current regulation at the federal level.

<sup>3</sup> See Mont. Code Ann. § 31-4-108 (2023).

<sup>4</sup> See Okla. Stat. tit. 12, § 3226(B)(1)(c) (effective Nov. 1, 2025), Wis. Stat. § 804.01(2)(bg) (2018).

<sup>5</sup> See Mont. Code Ann. § 31-4-108 (2023); W. Va. Code § 46 (2024); Wis. Stat. § 804.01(2)(bg) (2018).

<sup>6</sup> See Ind. Code § 24-12-11 (2024) (effective Apr. 30, 2025); La. Stat. Ann. § 9:3580.12(A), (B) (2024); Okla. Stat. tit. 12, § 3226(B)(1)(c) (effective Nov. 1, 2025).

<sup>7</sup> See Kan. Stat. Ann. § 60-226(b)(3)(B) (2024 Supp.) (approved Apr. 7, 2025).

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Several of these state regulations include meaningful restrictions on a litigation funder's influence over the decision-making process about the funded claim. For example, Montana restricts the provision of legal advice by a litigation funder and prohibits funders from deciding whether to file claims or make key decisions on case strategy and resolution.<sup>8</sup> Likewise, West Virginia, Indiana, and Louisiana limit a funder's authority over the filing and prosecution of legal claims.<sup>9</sup>

### Disclosure through Discovery

Absent state regulation, court order, or discovery agreement, litigation funding agreements are not necessarily subject to disclosure. In general, courts have limited discovery requests on litigation funding to those relevant to a particular claim or defense. For example, in *Nelson v. Millennium Labs., Inc.*, No. 2:12-cv-01301-SLG, 2013 WL 11687684, at \*5–6 (D. Ariz. May 17, 2013), the court ordered the production of a plaintiff's fee agreement where the defendant asserted that a market competitor was funding plaintiff's litigation. Similarly, in *Nunes v. Lizza*, No. 20-cv-4003, 2021 WL 7186264, at \*4, 6 (N.D. Iowa Oct. 26, 2021), the court found that litigation funding documents "are relevant to respond to a 'David vs. Goliath' narrative" where the plaintiffs had "not denied that the litigation is being funded by others." In contrast, the court in *VHT, Inc. v. Zillow Grp., Inc.*, No. C15-1096, 2016 WL 7077235, at \*1–2 (W.D. Wash. Sept. 8, 2016), rejected a motion to compel discovery responses on the identity of plaintiff's litigation funder where "[n]othing more than speculation" supported defendant's requests.

Discovery requests may also seek production of a litigation funder's due diligence with respect to a funded claim, which raises questions regarding the applicability of the work product and common interest doctrines. Courts frequently apply these doctrines to protect third-party litigation funding documents from disclosure. See, e.g., *United States ex rel. Fisher v. Homeward Residential, Inc.*, No. 4:12-CV-461, 2016 WL 1031154, at \*6 (E.D. Tex. Mar. 15, 2016) (certain litigation funding documents are protected by the work product doctrine if they are prepared to "aid in future or ongoing litigation"); *Devon It, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160, at \*1 n.1 (E.D. Pa. Sept. 27, 2012) (finding that the common interest doctrine applied because the funder and the plaintiff "ha[d] a common interest in the successful outcome of the litigation").

Although the trend in case law favors protection of third-party litigation funding documents under the common interest and work product doctrines, not all courts have agreed that both doctrines apply. For example, in *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 733 (N.D. Ill. 2014), the court found that the plaintiff and its third-party litigation funders "did not share a common legal interest" sufficient for the common interest privilege to apply, where litigation was already "well underway" and plaintiff was only "looking for money from prospective funders, not legal advice or litigation strategies." Even there, however, the court held that certain documents reflecting counsel's mental impressions and theories created because of litigation *were* protected by work product protection, and that it was *not* waived by disclosure to the third-party funders, with the court giving significant weight to the fact that there were oral confidentiality agreements in place. *Id.* at 737–38.

### Fee-Shifting from Defendants

Another question that may arise is whether the use of a third-party funder deprives a plaintiff of standing to recover fees from a defendant. Several courts have held that a plaintiff retains standing to recover fees even where a third party has financed the plaintiff's litigation. See, e.g., *FastShip, LLC v. United States*, No. 12-484C, 2019 WL 2702073 (Fed. Cl. June 27, 2019) (presence of third-party litigation funder did not deprive plaintiff of standing to recover attorneys' fees in

<sup>8</sup> See Mont. Code Ann. § 31-4-108 (2023).

<sup>9</sup> See W. Va. Code § 46 (2024); Ind. Code § 24-12-11 (2024) – effective Apr. 30, 2025; La. Stat. Ann. § 9:3580.12(A), (B) (2024).

patent infringement case); *NorCal Tea Party Patriots v. Internal Revenue Service*, No. 1:13cv341, 2018 WL 3957364 (S.D. Ohio Aug. 17, 2018) (granting plaintiff’s motion for fees in action against IRS for inappropriate screening criteria of requests for 501(c) status, noting that “there is an important societal interest in rewarding attorneys and third-party funders who engage in public interest litigation.”). Nevertheless, defendants may argue that plaintiffs with third-party financial backing should be precluded from seeking fees because fee-shifting in such a case would constitute an impermissible “double recovery.” Separately recovering fees where third-party funding exists could also undermine the original purpose of granting fee-shifting to plaintiffs.

## **Ethical Guidelines and Rules of Professional Conduct**

Perhaps the most complex set of considerations when assessing the use of third-party litigation funding is the application of rules of professional conduct.

Several of the ABA’s Model Rules of Professional Conduct are directly relevant. Model Rule 1.8(f) prohibits a lawyer from “accept[ing] compensation for representing a client from anyone other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected” as required by the attorney-client privilege.<sup>10</sup> In addition, Model Rule 5.4(a) prohibits an attorney or law firm from sharing legal fees with a nonlawyer except in limited circumstances.<sup>11</sup> And, under Model Rule 5.4(c), “[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.”<sup>12</sup>

In August of 2020, the American Bar Association (ABA) House of Delegates issued “Best Practices for Third-Party Litigation Funding” (the “Report”).<sup>13</sup> While not intended to be read as “recommended standards of professional conduct,” the Report is framed by the ABA “as a shorthand for issues that should be considered before entering into a litigation funding arrangement.”<sup>14</sup>

The Report’s recommendations mirror many of the provisions codified in the state statutes discussed above: focusing on clear disclosure of terms, requiring litigation funding agreements to be non-recourse, and prohibiting funding companies from influencing strategic decisions relating to the underlying litigation.<sup>15</sup>

Of particular interest in the Report is the ABA’s categorization and characterization of various litigation funding arrangements, which the ABA appears to view with varying degrees of skepticism. The Report does not identify significant ethical concerns with funding that merely provides “living support for unsophisticated litigants,” or “cause-based funding.”<sup>16</sup> The Report warns, however, that in cases of “revenge funding,” in which “the funder advances sums to a litigant to sue someone to further the personal . . . objective of the funder,” an attorney “should examine whether the motives

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<sup>10</sup> See Model Rules of Pro. Conduct r. 1.8 (Am. Bar Ass’n), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_8\\_current\\_clients\\_specific\\_rules/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_8_current_clients_specific_rules/).

<sup>11</sup> See Model Rules of Pro. Conduct r. 5.4 (Am. Bar Ass’n), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_5\\_4\\_professional\\_independence\\_of\\_a\\_lawyer/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_4_professional_independence_of_a_lawyer/).

<sup>12</sup> *Id.*

<sup>13</sup> Am. Bar Ass’n, Resolution 111A: Best Practices for Third-Party Litigation Funding, 2020 A.B.A. Annual Meeting (Aug. 2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/08/2020-am-resolutions/111a.pdf>.

<sup>14</sup> Report, at 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, 7-8.

of the funder will affect the legality and enforceability of the arrangement.”<sup>17</sup>

Commentators, including commercial litigation financiers, have criticized the ABA’s Report. For example, commentators have questioned the wisdom of applying a standard rubric to both consumer and commercial litigation financing.<sup>18</sup> Others have critiqued the ABA’s cautious approach to asserting work product protection over litigation funding documents.<sup>19</sup> More specifically, the Report recommends that an attorney representing a claimant should not disclose to a funder any opinion about the underlying claims—and should only provide the funder with documents that are already publicly available—albeit acknowledging that “the current trend in the case law favors continuing to protect material disclosed to funders (generally as work product).”<sup>20</sup>

### Key Considerations for Litigation Funding

Given this legal landscape, assessing whether a case is a good candidate for third-party litigation funding is a complex and highly individualized inquiry. At a minimum, parties should consider any governing statutes and case law in the applicable jurisdiction, the applicable principles regarding disclosure of litigation funding in discovery (and their strategic implications), and adherence to any applicable ethical and professional rules.

Attorneys considering third-party litigation funding should also evaluate whether disclosure of the funding arrangement is likely to be required—and to what extent such disclosure may impact the strength of their underlying case. If plaintiffs in a class action, for example, are pursuing a “David vs. Goliath” narrative, portraying themselves as “everymen” fighting against the “deep pockets” of a corporate defendant, such a strategy may open the door to rebuttal discovery regarding any third-party funding arrangements supporting plaintiffs’ case. Likewise, both courts and juries may find relevant that a corporate defendant’s competitor is funding a plaintiff’s case.

Attorneys should likewise consider potential implications of disclosure of documents from a third-party litigation funder during discovery—especially when the funder may generate “due diligence” documents assessing the strength of a party’s claims and defenses or the value of those claims. Are such documents likely to be protected from disclosure under the work product and common interest doctrines in the relevant jurisdiction? Could those documents be damaging in their candid assessments of potential weaknesses in the case? And could disclosure risk waiver of privilege as to other sensitive documents? All these questions (and others) must be critically assessed.

Due to the complexity of these issues and the continuing development of the governing law, there are no bright-line rules for attorneys faced with these questions. Nonetheless, the authors hope that these suggested considerations may offer guidance to assist in identifying the circumstances under which third-party funding may be appropriate.

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<sup>17</sup> *Id.*, 9.

<sup>18</sup> Andrew Cohen, *ABA’s New Guidance on Litigation Funding Misses the Mark* (Aug. 6, 2020), <https://www.burfordcapital.com/insights-news-events/insights-research/abas-new-guidance-on-litigation-funding-misses-the-mark/>.

<sup>19</sup> See, e.g., Latif Zaman, *ABA Outlines Best Practices for Third-Party Litigation Funding*, ABA Consumer Financial Service Committee Newsletter, November 2020, <https://www.hudsoncook.com/temp/aba-outlines-best-practices-for-third-party-litigation-funding.pdf>. See also *ABA’s New Guidance on Litigation Funding Misses the Mark*, *supra* n. 15 (“In fact, materials created for and provided to a potential financier as a consequence of litigation are generally protected under the work-product doctrine in the U.S., particularly when there is an existing confidentiality obligation, such as a nondisclosure agreement, in place.”).

<sup>20</sup> Report, at 5.