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## PROFESSIONAL RESPONSIBILITY AND LAWSUIT FUNDING

Despite the litigation funding explosion in the legal marketplace, there continues to be controversy regarding the attorney's role in these transactions and questions regarding ethical responsibility in referring the plaintiff to or participating in a transaction with a lawsuit funding company.

There has been some concern in the ethical legal community that the litigation funding industry is unregulated. While that is substantially true, it is also true that the legal finance industry is far more regulated today than it was just ten years ago. Then, there was absolutely no regulation, just self-regulation by ethical companies. In 2005, many in the industry were forced to enter into an agreement with the New York State Attorney General Consumer Protection Division. That agreement is now the New York State standard for a lawsuit finance company's conduct, and has also been adopted in Florida as the ethical benchmark for Florida's trial bar. It also served as the basis for the first litigation finance industry legislation in Maine and Ohio, both of which previously prohibited the practice of lawsuit financing. Like Florida, many states have issued ethics opinions regarding the practice of lawsuit funding. The New York Agreement, adopted by the Florida Bar ethics community, requires (in relevant part) that all legal cash advance contracts:

1. Be in "plain language" (as defined in New York's General Obligations Law, Sec 5-702)
2. Be completely filled in and containing disclosures on the front page, in at least 12 point bold type, appropriately headed,
  - a. The total amount advanced to the consumer
  - b. Itemization of one-time fees, broken out item by item (e.g. application, processing, attorney review, broker, etc.)
  - c. Percentage fee or rate of return, stated on an annualized basis, including frequency of compounding
  - d. Total amount to be repaid by the consumer, broken out by six month intervals, carried forward to 36 months, and including all fees as well as any minimum required payment amount.

3. Provide a five business day cancellation policy
4. Provide for consumer's initials on each page of the contract
5. Contain a legend, immediately above the consumer's signature, in at least 12-point boldface type, to read:

Do not sign this contract before you read it completely or if it contains blank space. Before you sign this contract you should obtain the advice of your attorney. You are entitled to a completely filled in copy of this contract.

6. Contain a written certification by the consumer's attorney record that he/she has reviewed the contract and explained to the consumer its terms.
7. For foreign language speaking persons, the "principal terms" shall be translated in writing into the consumer's native language.
8. May not require mandatory or binding arbitration
9. Shall comply with all existing state and federal statutes

Thus, the New York agreement and the Ohio and Maine legislation can be used by attorneys, across the country, as benchmarks for the minimum ethical standards required when their clients enter into legal funding contracts. In addition to the New York standard, it is also suggested that the following standards be considered, as well:

1. The lawsuit finance company should not, in any way, participate in, interfere with or attempt to sway or influence the litigation and/or litigation outcome.
2. The litigation funding company should make a detailed inquiry into the client's current financial situation and fund only the current need. Substantial consumer savings can be derived by funding the client over the length of the case rather than a "front end" advance to cover the estimated length of time the case will take to resolve.
3. A lawsuit finance company should never intentionally over-advance funds; funding should be limited to an amount that, with profit, will not exceed one-third of case value. Most companies accomplish this by limiting the amount funded to 10 percent or less of the case value their underwriter places on the case. This is a function of experience and superior underwriting. *Ask the lawsuit financing company how long they have been in business and whether they are a principal or a "broker."*
4. Avoid any legal finance company that offers to pay you a commission, kickback, or referral fee for referring your clients to them. If it is unethical for you to advance your own money to a client; it is equally unethical for you to profit off of a referral to a company that performs this service for your clients.

5. Do not participate with any lawsuit funding company that does not first seek your consent in entering into a legal funding relationship with your client. If you are presented with a client-executed agreement as your first contact with the lawsuit finance company, refuse to participate in the transaction and refer your client elsewhere.

The educated attorney is the consumer's best advocate. Lawsuit funding, from an ethical and flexible plaintiff advocate oriented legal finance company can be a valuable revenue-enhancing tool in plaintiff counsel's litigation arsenal. Be certain, also, to deal with a company that is attorney owned and operated, because all disclosures will be considered attorney-to-attorney, thus confidentiality is assured. Ask questions; satisfy yourself that the company is one that you can work with. Often, your client will bring you into a litigation finance situation. While you must recognize that in the attorney-client relationship, the client is the "employer" and the attorney, the "employee," your previous relationship with a trustworthy lawsuit finance company should be discussed with the client as an alternative to an unknown, untested company.

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*Mark Bello is the owner and founder of Lawsuit Financial Corporation where he is instrumental in providing cash flow solutions and consulting when necessities of life funding is needed during litigation. Mr. Bello has thirty years experience as a trial lawyer and nine years as an underwriter and situational analyst in the litigation funding industry. Mr. Bello is a Sustaining and Justice Pac Member of the Michigan Association for Justice, Member of the American Association for Justice, business associate of the Florida Justice Association, and a member of the Michigan and American Bar Associations. If you would like to review the ethics opinion in your state, please go to [www.lawsuitfinancial.com](http://www.lawsuitfinancial.com) <<http://www.lawsuitfinancial.com>> and click on "ethics opinions."*

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