



# Professionalism Perspectives

The newsletter of the Lawyers' Professionalism and Ethics Committee

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professional conduct. These cases serve as a useful reminder that improper deposition conduct can lead to trouble.

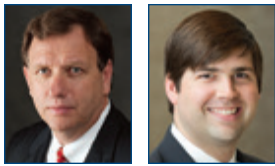
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*Caitlyn Parsley is an attorney with Bush Ross PA in Tampa, Florida. She graduated from the University of Florida Levin*

*College of Law in 2017. Ms. Parsley focuses her practice on professional liability defense. She is a member of the DRI Lawyers Professionalism and Ethics Committee and the DRI Young Lawyers Committee.*

## Litigation Finance: Legal, Ethical, and Professional Considerations

By John E. Hall and E. Wayne Satterfield



The use of litigation finance companies by attorneys to fund litigation has seen a dramatic increase over the past two years. A [2017 study by ALM Media](#) found that use of litigation financing has increased 28 percent from 2016. The study also found that 36 percent of U.S. law firms that responded to the survey reported using litigation finance, an increase from just 7 percent in 2013. Moreover, the study showed that half of lawyers involved in the survey who have not used litigation finance expect to do so within two years. A market that ten years ago was largely unknown has now become a \$5 billion industry in the U.S. However, such success has placed litigation financing in the spotlight, resulting in legal, ethical, and professional concerns. Defense attorneys need to be educated about the litigation finance industry and what roles they can play in litigation both ethically and professionally.

### What Are Litigation Finance Companies?

Litigation finance, also referred to as litigation funding or third-party funding, is the investment of capital in a lawsuit in exchange for a percentage of the proceeds recovered. [According to an article by the RAND Institute for Civil Justice](#), litigation financing can be used in several different ways to fund a lawsuit. One form is consumer legal funding, which is the provision of “non-recourse loans” or cash advances to individuals represented by attorneys in personal injury suits, often arising from auto accidents. Another form, law firm legal funding, is the provision of loans or lines of credits to law firms secured by the assets of firms, including future fees from cases. A third form is commercial claim funding, which provides direct capital to businesses to finance claims against other businesses.

### Legal, Ethical, and Professional Concerns

While all forms are available to plaintiffs’ attorneys, certain forms can impose legal, ethical, and professional issues in lawsuits that defense attorneys should consider. For example, [federal prosecutors in New York recently opened an investigation](#) into finance companies that provide cash advances to plaintiffs in lawsuits. Historically, these companies target personal injury and medical malpractice plaintiffs, but their [use has increased in sexual harassment suits](#) in the wake of the #MeToo movement. Prosecutors’ concerns come from companies that offer cash advances with high annual interest rates to plaintiffs not willing to wait to collect a settlement, which can trap recipients in debt. According to the New York Times, it appears that prosecutors are looking into financial arrangements between cash-advance firms and trial lawyers who refer the clients, which could be construed as illegal kickbacks.

Similarly, the Consumer Finance Protection Bureau and the New York Attorney General [sued a litigation finance company](#) alleging that it scammed NFL football players suffering brain injuries and 9/11 victims. The suit alleged that the litigation finance company contacted alleged victims who had received partial amounts of their settlements and tricked them into taking out high-interest loans while they waited for the remainder. According to the lawsuit, some alleged victims repaid more than twice as much as they borrowed. Although the suit was ultimately dismissed, it shows that prosecutors and regulatory agencies perceive certain loans to plaintiffs as illegal.

Similarly, litigation finance companies are also under scrutiny for ethical concerns that revolve around fee-sharing with non-lawyers. [Rule 5.4](#) of the American Bar Association’s Model Rules of Professional Conduct and numerous states’ version of the rule forbid the sharing of legal fees with non-lawyers under certain circumstances. Recently, the New York City Bar [addressed litigation funding](#)

[arrangements](#) between litigation finance companies and lawyers. The opinion was based on New York’s Rule 5.4, which provides that “[a] lawyer or law firm shall not share legal fees with a nonlawyer.” The New York City Bar found that a lawyer entering into a financing agreement with a litigation funder, a non-lawyer, under which the lawyer’s future payments to the funder were contingent on the lawyer’s receipt of legal fees or the amount of legal fees received, violated Rule 5.4. The opinion noted that “rightly or wrongly, the rule presupposes that when nonlawyers have a stake in legal fees from particular matters, they have an incentive or ability to improperly influence the lawyer.”

In addition to ethical problems, professionalism issues have been voiced, based on concern about the influence of litigation finance companies on litigation. [A recent ABA journal article](#) noted that in some cases, litigation funders can be involved in choosing attorneys and that most are notified of settlements. The article observes that some companies have sought to set a floor on the amount for which a case can settle. Such agreements affect professionalism because they take the focus off the strengths and weaknesses of a case and place it on lenders and their need to make a profit.

## Conclusion

Litigation finance companies can pose legal, ethical, and professionalism issues that will only increase with the development of the industry. As the industry grows, attorneys will see increased involvement from government regulators seeking to ensure compliance with the law. One

example is U.S. [Senate Bill 2815](#), the “Litigation Funding Transparency Act of 2018,” which seeks to “increase transparency and oversight of third-party litigation funding in certain actions.” Defense attorneys need to be aware of and stay up-to-date on the many issues that can stem from the use of litigation funding.

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*[John E. Hall, Jr.](#), is one of the founding partners of Hall Booth Smith, PC. He specializes in the defense of high exposure cases, involving hospitals and medical malpractice claims. He manages and handles high exposure cases in over 20 states as National Counsel for several Insurers, Companies and Hospitals. He has extensive litigation experience, having tried in excess of 120 civil cases. Mr. Hall is licensed in Georgia, Tennessee, Alabama and North Carolina.*

*[E. Wayne Satterfield](#) is an attorney in the Atlanta office of Hall Booth Smith, and his practice focuses on the defense of large hospital systems and healthcare providers in medical malpractice lawsuits. Wayne is well-versed in all stages of litigation and has defended cases through verdict in both federal and state courts. He is also a member of Hall Booth Smith’s National Trial Team and has assisted in the preparation of several high exposure medical malpractice trials throughout the country.*