



The Lawyer's "Duty-to-Know & Duty-to-Tell" in Third Party Funding: A Time to Recognise & Respect these Obligations

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Introduction & Overview

A lively focal point in the Third Party Funding industry has been the obligations of the Funders. In the UK that interest and related inquiries and analyses have resulted, after three years of study and debate, in the November 2011 launch of a UK Code of Funding about the Funders' obligations. In the US, we have seen similar studies by the American Bar Association and others, with publications of white papers and other reports relating to Funders' obligations.

It is now time that the obligations of others in the market and industry receive equal attention and helpful guidelines. In this respect, the spotlight should fall, as a priority, on the legal and ethical obligations of the lawyers for the claimants. In a recent media article, the question of lawyers' obligations was raised with various professionals, and those interviewed said that there should be obligations imposed on the lawyers. This article was first published by Commercial Dispute Resolution, a leading journal on litigation, arbitration and funding, on 9th July 2012.

To kick off what hopefully will be a deep research dive into the area, this article contends that lawyers have what should be called a "Duty-to-Know, and Duty-to-Tell" their clients about Third Party Funding. Only if the lawyer has and fulfills these duties can their clients be given what they need to decide whether or not to seek Funding, and if so, how? what kind? and from whom?

Ethical Duty

The duty seems to be both an ethical duty and a separate legal one. This is the case at least if one focuses on the two most active litigation and funding jurisdictions in the world, the UK and the US. The ethical duty might be found in various explicit and implicit rules in various jurisdictions. For example, in the UK, the newly modified (15 June 2011) Ethical Code of Conduct for Solicitors, the SRA Code of Conduct 2011, lays down this requirement.

Here, in the Code as well as the Indications of Behavior to the Code, there are any number of separate and independent provisions that identify and generate these duties. Collectively, they say the same thing. (The prior Code also contained a provision, RULE 9 that was often read to carry the same obligation).

Indeed the Code emphasises, as does this Article, the overriding importance that the 'public interest' plays in this situation (as in others). It reads:

'Where two or more Principles come into conflict the one which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice. Compliance with the Principles is also subject to any overriding legal obligations.'

The situation in the U.S. is similar. In general, lawyers of course owe clients a variety of ethical duties with regard to Funding. This was discussed in an important and far reaching ethical opinion issued in June of 2010 by the Ethics Committee of the New York City Bar Association. (For example, the lawyer and the client may face a conflict of interest when the lawyer is negotiating a financing agreement with the Funder.) Among the ethical duties a US lawyer has, it would not be hard to spell out explicitly and/or by inference the "Duty to Know" about third party funding and when appropriate, the "Duty to Tell" the client about it.

Legal Duty

Beyond ethics, a legal obligation can be taken from various possible legal sources. In the UK, an illustration of a court decision supporting this position is the Queen's Bench decision in 2010, *Adris v. Royal Bank* [2010] EWHC 941 (QB). There, the Court found that a solicitor's failure to obtain costs insurance for his client, protecting against adverse costs that later were incurred, was a "gross breach of the Consumer Credit Act of 1974 s. 78." Such a duty here, as in the area of Funding, is one that is rooted in the basic requirement that a lawyer be competent in what the lawyer is doing, and provides his or her client with competent advice. The branches of this fundamental requirement spread far and wide.

Specific Questions & Duties

Within the general duties posited, there is also a need to address concrete specific questions that abound. Can a lawyer avoid culpability for lack of knowledge on the back of an argument that the industry is a young one unknown to many or indeed most lawyers? Is actual knowledge the test, versus "should have" known? Is there mandated "knowledge," and automatic liability?

Does a duty apply in the UK not only to solicitors but also to barristers under the ethical and legal rules that apply to barristers? Can an unknowing barrister maintain that knowledge and guidance here is the responsibility of the solicitors only.

What do the duties entail? How much must be known? Must one know all the basic subtleties that go into Funding? Should, for example, the lawyer be concerned about his or her potential lack of experience or capacity to adequately understand and advise on the topic? What about an actual or potential "conflict of interest"? Should "independent advice" be sought by the lawyer on behalf of the client?

What differences exist between common law systems as found in the U.S. and U.K., and civil law systems, as found in Germany and France? What about nuanced differences within different legal systems? How are conflicts resolved or harmonised?

In the study that should go into this area, there should of course be an opportunity for all stakeholders to voice their views. The lawyers are of naturally at the head of the queue among that group. So also is anyone who has challenged the industry on various grounds. The most vocal and well known one is the U.S. Chamber of Commerce. It and any kindred spirit should have the chance to voice their views.

Conclusions & Recommendations

This article is of necessity short and summary, but that should not mask the scope of the need and responsibilities to fill – they are broad and deep. The market and industry are young. The guidelines are relatively few, and a work in process. The emphasis to date has been on the requirements imposed on the funders.

That emphasis on funders is producing results. However, alone, the results are inadequate. The market and industry requirements weave a seamless web. The time has come to expand the emphasis to the other stakeholders. The legal community's duties are compelling, as one's instincts can confirm. Those duties should be spelled out. The health of the market and industry need this. So does the legal community itself. The project is not a small one. It requires collaboration of the different participants in the industry, clarifying the duties and rights of each segment.

But most of all it takes leadership and time from the legal community. The Law Society in U.K., the bar associations in the U.S. and elsewhere, are logical candidates to take this forward, as they have taken forward so many other projects effecting the law and legal services. The industry should work hand in hand with these groups.

In fact, the duties here go well beyond the practicing lawyers. Law schools and educational programs should be informing their students about the industry and market, and how to act within them. A few are starting to do this. But very few. At one point all the law schools should put this topic on their standard teaching programs.

In the meantime, regardless of the actual state of the ethical and legal responsibilities, it seems sensible to assume there is a duty to adequately know, with a corresponding duty to tell. The assumption in practice will, in

the end, not only better serve the client, the market, and the industry. It will, in the end, better serve the lawyer. It will also by itself provide impetus to the overall and more formal analysis of and reporting on the situation.

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