IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC., a Delaware corporation, Plaintiff and Counterdefendant, v. FACEBOOK, INC., a Delaware corporation, Defendant and Counterclaimant.	Civil Action No. 1:08-cv-00862-JJF **PUBLIC VERSION**

PUBLIC VERSION OF

EXHIBITS 5 AND 30 TO THE

DECLARATION OF JEFFREY NORBERG IN SUPPORT OF DEFENDANT FACEBOOK'S ANSWERING BRIEF IN RESPONSE TO PLAINTIFF LEADER TECHNOLOGY, INC.'S ASSERTION OF PRIVILEGE

BLANK ROME LLP
Steven L. Caponi (DE Bar #3484)
1201 N. Market Street, Suite 800
Wilmington, DE 19801
302-425-6400
Fax: 302-425-6464

Attorneys for Defendant and Counterclaimant Facebook, Inc.

OF COUNSEL:

Heidi L. Keefe (*pro hac vice*)
Mark R. Weinstein (*pro hac vice*)
Melissa H. Keyes *(pro hac vice)*
COOLEY GODWARD KRONISH LLP
5 Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306-2155

Filed: March 8, 2010
Redacted copy filed: March 18, 2010

Exhibit 5

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

- - -

LEADER TECHNOLOGIES, INC., a Delaware corporation,

Plaintiff,

v.

FACEBOOK INC., a Delaware corporation,

Defendant.

: CIVIL ACTION NO.
:
:
:
:
:
:
: 08-862 (JJF-LPS)

- - -

Wilmington, Delaware
Friday, November 13, 2009 at 9:39 a.m.
TELEPHONE CONFERENCE

- - -

BEFORE: HONORABLE **LEONARD P. STARK**, U.S. MAGISTRATE JUDGE

- - -

APPEARANCES:

POTTER ANDERSON & CORROON, LLP
BY: PHILIP A. ROVNER, ESQ.

and

COOLEY GODWARD KRONISH, LLP
BY: HEIDI L. KEEFE, ESQ., and
JEFFREY NORBERG, ESQ.
(Palo Alto, California)

Counsel for Leader Technologies, Inc.

BLANK ROME, LLP
BY: STEVEN L. CAPONI, ESQ.

and

Brian P. Gaffigan
Registered Merit Reporter

APPEARANCES: (Continued)

KING & SPALDING
BY: PAUL J. ANDRE, ESQ., and
LISA KOBIALKA, ESQ.
(Redwood Shores, California)

Counsel for Facebook, Inc.

- oOo -

P R O C E E D I N G S

(REPORTER'S NOTE: The following telephone conference was held in chambers, beginning at 9:39 a.m.)

THE COURT: Good morning, everyone. This is Judge Stark. Who is there, please?

MR. ROVNER: Good morning, Your Honor. This is Phil Rovner from Potter Anderson on behalf of the plaintiff; and with me are Paul Andre and Lisa Kobialka from King & Spalding in California.

THE COURT: Okay.

MR. CAPONI: Good morning, Your Honor. Steve Caponi from Blank Rome for Facebook. With me this morning is Heidi Keefe and Jeffrey Norberg from Cooley Godward.

THE COURT: Okay. Good morning to all of you.

So this is, for the record, our case of Leader

Technologies Inc. versus Facebook. It's our Civil Action 08-862-JJF-LPS.

I do have a court reporter with me here today, of course, and the purpose of today's call initially was to resolve a discovery dispute brought to my attention by Facebook. I have reviewed those letters and we will get to that.

I did also receive, very recently, supplemental letters, one from Facebook and one from Leader with allegations of potential spoliation of evidence. This is an allegation coming from Facebook and made on an urgent basis with the request that we discuss it this morning. I have gotten a response as well from Leader.

I do want to start with the spoliation issue, but before I hear from counsel, I do want to say I am troubled that it appears that there was not any substantial effort by Facebook to do more to meet and confer on this issue with Leader's counsel prior to writing a letter that is publicly available on our docket, making these allegations. It certainly would have been preferable from my perspective if there had been a further meet and confer and a further effort to understand what may or may not have occurred during the conversation that is recited in the letters.

I'm not, at this point, going to ask both parties to just take the floor and go further with their allegations

against, and their accusations against one another. We're not going to spend a lot of time on this issue. I have just a couple of very direct questions, and I'll start with Facebook.

You can first respond to why there wasn't a further effort to meet and confer. Also, I'd like a better understanding as to how the information that you're seeking could be likely to lead to admissible evidence, why therefore it's even within the realm of discoverable. And, finally, the only relief I would even begin to consider granting that you have requested is your first bullet point: That, for some reason, you'd be provided with a list of the third parties that Leader has contacted regarding the documents. And I'm not inclined to provide you even that relief, but I'll certainly hear an argument for why I should.

So, very briefly, and I encourage both sides to do your best to refrain from trying to inflame one another any further than you already have, and let's see if we can keep this a civil and professional discourse.

With that, I will turn it over to Facebook.

MS. KEEFE: Absolutely. Thank you very much, Your Honor.

With respect to the timing of the letter, Your Honor, we only learned of this issue mid-to-late-day Wednesday, and I took all of Wednesday to try to investigate

to find out exactly what had happened from the parties that were involved, from my associate who received the phone call, from Shearman & Sterling. I then contacted Shearman & Sterling myself to try to find out a little bit more about what happened and to confirm everything that was happening. I then proceeded to do some research to try to find out exactly how this would affect our case.

Immediately the following morning, at the beginning of business, at the opening of business, I sent a letter to Mr. Andre explaining my problems and informing him that I actually felt the need to go to the Court regarding this issue. I heard nothing. I would have expected a phone call, given the urgent nature of this and given the seriousness of what I was bringing up.

I also knew that we had this hearing on Friday morning and wanted to be able to address this issue during this hearing, since it was already set between the parties with Your Honor. I was going to the Court. I knew that if I waited to go to the Court until the very end of the day on Thursday, that King & Spalding would comment that I had not given them a chance to respond to the Court, so I filed my letter with the Court, making sure that there was ample time for them to respond to the Court, to that letter, and that was the course of events, and those were the timing that had took place.

If I should have filed the letter under seal, I admit, Your Honor, that that was simply something that didn't come to mind, and perhaps I should have done so, and for that I apologize; but the urgent nature of this and the possibility that the documents have been or were being actively destroyed at this moment caused me to come to the Court as quickly as I did.

Now, with respect to why these documents are relevant, all of these documents, everything that we're talking about here -- if we just take one step back, all of these documents are documents between Leader Technologies and/or his counsel and third parties from who they're seeking funding for a lawsuit. Judge Farnan has indicated that is not a privilege, but we can put that issue aside for a moment.

Mr. Andre and King & Spalding have taken the position that all of those documents have some form of privilege because all of those conversations were done in anticipation of litigation. From what we've been able to glean from the documents that have been produced, all of those documents had something to do with this case. They had to do with prior art that the parties had found and indicated that they were discussing with each other. They had investigations concerning allegations of infringement, concerning possible damages, all things which are highly

relevant to this case, to what people thought about the patent, to documents that had been requested, all documents regarding prior art, regarding this litigation, regarding the decision to file this lawsuit, investigations done before the lawsuit, and all were done in anticipation of litigation.

If, as Leader has done throughout this case, they're claiming a privilege as to these documents, under the Rambus versus Micron case, all of those documents needed to be preserved. Instead, what we learned on Wednesday, and what has been confirmed by Mr. Andre in his letter is that rather than a contract to preserve those documents, there seems to be a nondisclosure agreement which, according to Mr. Segal, he understood mandated their destruction. And the word that got me very nervous and made me come to Your Honor was that word "destruction," and that was the word Mr. Segal informed me about. I confirmed that word with Mr. Segal twice. I called him to ask him about it. And then before I sent the letter to Your Honor, I actually read the entire letter to Mr. Segal to confirm that it actually accurately represented what he had heard and what he had said to me.

THE COURT: And you are saying, in your view, it would be unlawful for parties to have a contractual nondisclosure agreement that requires the destruction of

documents that are created as part of a request to raise funds to pursue litigation?

MS. KEEFE: Yes, Your Honor, I am. That is borne out by the fact that Mr. Andre and in all of LTI's correspondence, they had claimed privilege to these documents, based on the fact that all those documents were in anticipation of litigation. In the Rambus versus Micron case, specifically, the Court held, this Court, Judge Robinson, held that because the document retention policy -- in that case, it was a retention policy; here, it would be the nondisclosure agreement -- was discussed and adopted within the context of litigation strategy, therefore, Rambus, according to the Court, should have known that a general implementation of the policy was inappropriate because the documents destroyed would become material at some point in the future.

And I believe, given the fact that they're claiming privilege to these documents based on the fact that all of this correspondence was in anticipation of litigation, would have yielded a duty to preserve those documents.

Now, even if we take the assumption that King & Spalding wasn't involved at that stage of this litigation, we know they weren't involved in all of -- you know, throughout all of the time that Leader was talking about, the minute that King & Spalding became aware of NDAs which

would have mandated destruction of documents, knowing that they were in the case, they should have contacted those third parties to remind them of their obligation to preserve the documents in anticipation of litigation and instead.

What I heard from Mr. Segal at Shearman & Sterling was that he was reminded of the NDAs obligation to destroy the documents, not to tell his client of his obligation to preserve the document. That is what gave us such concern is that we actually have documents, contrary to the holding in Rambus, which implement a policy wherein documents created in anticipation of litigation were to be destroyed.

THE COURT: And do you have the list of all of the third parties? Let's turn to the relief you are asking for in that first bullet point. How much of that information do you already have?

MS. KEEFE: I honestly don't know, Your Honor. We have some information. We subpoenaed a number of third parties based on the limited e-mails that we did receive indicating, you know, correspondence was sent between Mr. McKibben, or someone else at Leader and a funding company, or someone other third party. With respect to those that were identified in those e-mails, we have subpoenaed their information and are receiving resistance on many levels, but that is okay.

I don't know how many people are out there that I don't know about. For example, I didn't even know that this supposed NDA existed until Mr. Segal called. And now, in Mr. Andre's letter, he says that it does exist but that he hasn't produced it yet, and he claims that it is not responsive, even though there was a document request back in February of this year asking for all documents regarding this litigation or decisions to file this lawsuit, things of that nature.

THE COURT: All right. Let me hear from Mr. Andre at this point, please.

MR. ANDRE: Your Honor, the NDAs that counsel is referring to are not regarding this litigation, and they obviously are not the least bit relevant. The documents they're seeking, there is no way they will ever get admissible evidence for any of these documents.

When I had my call with Mr. Segal, I had these calls dozens and dozens of times with third parties. It was a professional courtesy to let them know about this NDA because he asked about it. The NDA actually says the parties would probably return all copies of confidential information in its possession; and that's what I told Mr. Segal.

I also told him that there is a provision in there that said if they created additional documents based

on confidential information, then those would be destroyed. This is standard language in every NDA. If you cannot have this type of language in NDAs, NDAs would not be useful at all. Any type of privilege that would be claimed would be attorney-client privilege, not work product, and that is not anticipation of litigation, it's a straight attorney-client privilege.

That being said, what I informed Mr. Segal of, I think it's pretty clear in the letter, was nothing out of the ordinary. Even what Ms. Keefe accused me of or accused in her letter would not warrant her leaping to the type of conclusion that she has come up with.

I don't have much more to add than what is in the letter. I think that the facts are pretty clear as to what went down here; and I think the unfortunate aspect was Ms. Keefe did not pick up her phone and give me a call. I was in a meeting yesterday morning, and I got the letter to the Court actually before I got Ms. Keefe's letter.

I think that is all I have to say about that, unless Your Honor should have any specific questions.

THE COURT: Why should I not order you to turn over the NDA now just to get that out of the way and so there is no further dispute as to what it actually says?

MR. ANDRE: It's our responsibility to do the document request, Your Honor, but if Your Honor wants us to

produce the NDAs, we do have provisions in here that these were supposed to be to remain confidential, but we can put that as a privilege -- I mean as a confidentiality designation and produce it.

THE COURT: Right. We have a protective order in this case; right?

MR. ANDRE: Exactly. So I don't mind producing the NDA. They put in document requests as of October 21st, our response is due November 20th, where they specifically ask for these type of NDAs. I don't think this is remotely relevant to this case. There is no possible way this will get into evidence. But if it will make this issue go away, we'll produce it.

THE COURT: And what about, why should I not make you disclose to Facebook a list of every third party that you have contacted regarding documents related to this lawsuit?

MR. ANDRE: There is no reason to do so, Your Honor. There is absolutely no reason whatsoever. The fact that when the subpoenas went out, when they subpoenaed all these relevant documents, many of the individuals they subpoenaed were, some were former employees of ours. Some are actually current employees, part-time employees. One is a member of our board. And some of these financing companies, they contacted us and asked if we would represent

them and file their objections and produce the documents, if they had any in their possession. We agreed to do so.

This is not anything that happens out of the ordinary in the case. There is absolutely no basis for this type of relief. The allegations in Ms. Keefe's letter are what was the conversation I had with Mr. Segal, Shearman & Sterling. There is nothing improper about that type of conversation. There is absolutely no implication or suggestion that they destroyed documents.

In fact, when he asked me, do you think there would be many documents, I said I doubt there will be, because your client has informed us that they had already returned all the documents or destroyed them pursuant to the NDA. So it was a professional courtesy. I don't think there would be much for you to review.

And that was the extent of it. There is no basis for giving Ms. Keefe and Facebook any relief at all based on what has happened.

THE COURT: And what about the suggestion that the NDA provision referencing a destruction obligation is itself unlawful?

MR. ANDRE: I disagree with that completely, Your Honor. I think that the law is contrary to that. I think that is a complete mischaracterization of the law.

I don't know what case Ms. Keefe is talking

about. That was not addressed in her letter, so I'm not sure what the case is, but I know that NDAs of this nature are prevalent throughout industry. These are standard terms in every single NDA I have ever seen. So if these were in any way unlawful, then they would cease to exist. So I think that is a complete mischaracterization of the law.

THE COURT: All right. I've heard enough on this dispute.

I am denying all of the relief that has been requested by Facebook. I'm satisfied by the representations that have been made by Mr. Andre in his letter and this morning. I think, as is evident by the fact this is something like our fifth or sixth call regarding discovery disputes, that obviously counsel have had a problem getting along and meeting their obligations to their clients and to the Court. I think, unfortunately, there has been a rush to judgment on occasion on both sides to too quickly assume bad faith as the motive on the other side; and I believe that is what happened here.

I'm satisfied that both parties acted in good faith, but further meeting and conferring on this issue would have allowed it to be resolved without reaching the level it did and without requiring the Court's attention. And I can only tell counsel that I've -- well, I haven't been in this job for a long time. I have handled a lot of

discovery disputes and various parts of high stakes litigation and intellectual property in other cases, and somehow it seems counsel, in almost every case, find a way to vigorously represent their clients but also to fulfill their obligations to the Court and to one another as members of the bar, to work cooperatively, to push a dispute properly through the process; and, at times, it has seemed this case is the exception, and I hope that things will improve as we go forward.

So I'm denying the relief that is requested. I am going to order that Leader produce the nondisclosure agreements, and to do that no later than five days from today.

I am not prepared at this point to make any ruling on who is right as to whether provisions in those agreements are, on their face, unlawful or not, but at least by providing those documents to Facebook, Facebook can see what the documents actually say. And if there is a basis to seek further relief, then I'm sure you will be able to pursue your rights at that point.

So that is enough on that issue. Let's turn now to the original issue that was the basis for this call. I don't want to spend a great deal of time on this one either, but I will give each side a chance to briefly respond to what they heard in the letters primarily; and since this is

Facebook's complaint, let me hear first from Facebook.

MS. KEEFE: Thank you very much, Your Honor.

Your Honor, this request regards the fact that after Your Honor's deadline of October 15th for putting in infringement contentions and after the deadline for Facebook to serve written discovery requests in this case, Leader supplemented its interrogatories to add three new never before disclosed claims. One of those claims is at least facially dramatically different from all of the other claims that have ever been asserted in this case. As a result of that dramatic difference, that particular claim has not been subject to analysis or investigation by Facebook. As a result, Facebook, if that claim stays in this case, Facebook will need to be able to mount an investigation, answer written discovery regarding that claim. That claim is No. 17, and it involves words and phrases that appeared in no other claim that has ever been previously asserted in this case, including, for example, the words "ordering," "arrangement" and "traversing."

Mr. Andre is correct that Facebook did put into its ex parte request for reexamination claims that had not been asserted, but those claims were only included because they included virtually identical language to other claims that had already been asserted or were dependent on an independent claim that was already asserted.

THE COURT: So Claim 17 is not part of the reexamination?

MS. KEEFE: Claim 17 is not part of the reexamination.

THE COURT: And have you conducted a search for prior art relating to Claim 17?

MS. KEEFE: We just started that search. During the process of meeting and conferring on this issue, these claims were added on October 29th. We immediately started the process of meeting and conferring. To the contrary of Mr. Andre's assertion that everything I ever wanted to do was stall the case, quite the opposite. My first request to Mr. Andre was to remove these claims from the case to avoid the need to extend discovery in this case.

I offered a compromise: That if Mr. Andre wanted Dependent Claims 3 and 6 to be in the case, he could leave those in because those were related to claims that we had done investigations on, and he would just drop Claim 17 so that we could preserve the current calendar which has claim construction beginning the very first week in December.

At this point, we have begun our prior art analysis but we are nowhere near finished; and we have not had the opportunity to serve written discovery regarding that claim.

THE COURT: All right. So why isn't it, though, that Leader has until November 20th under my order to add a new claim, including a new independent claim?

MS. KEEFE: It's our belief, Your Honor, the way the entire process played out, that by October 15th, because of Your Honor's order carving out contention interrogatories regarding infringement, that those allegations were to have been put in by the 15th.

As of the 15th of October, Leader, by its own admission, had all of the documentation that it needs. Nothing has changed since the 15th. No new information has been propounded. No new information has been handed over. Leader hasn't even come back to, you know, look at the source code again. Nothing changed from the time of the 15th. We think that Your Honor's order actually carved out that contention interrogatory from the remainder of the schedule so that the parties would know what claims were at issue in this case so that discovery could be finalized and so that we could go forward.

THE COURT: Are you referring to the September 4th order?

MS. KEEFE: Yes, Your Honor.

THE COURT: Okay. Let me hear from Mr. Andre, please.

MR. ANDRE: Your Honor, I think you are correct,

the scheduling order permits us to supplement our contention interrogatories up until November 20th. That's what we did.

The September 4th order talked about supplementation of the claims, and we had to include the source code modules. That is what the September 4th order was about. As you will recall, there was a large fight as to whether we could see the source code or not. And then we had to supplement our interrogatories with that source code information.

The fact of the matter is, is that we did that supplementation; and Facebook was not happy with the supplementation. They kept pushing us to supplement further. They produced the most critical documents to us unredacted in early October. And we have, after the second supplementation in October, we supplemented adding these three additional claims that are based solely on the confidential information that we received in September and early October. The previous supplementation was based on those claims that we could determine from the public information that were being infringed. These three additional claims we could not determine from the public information, but we could determine from the confidential source code and the documents that were produced in October.

So we think we've supplemented in good faith pursuant to the discovery order that was entered in this

case. We don't think there is any prejudice whatsoever for the written discovery that Facebook has provided, has not seen without certain claims. They've asked general discovery information about all the claims, and we will have to supplement all those written interrogatories and produce all documents related to these additional claims, just like we did the previous claims.

Then, I guess, lastly, if this is Facebook's position there is no allowed supplementation, no additional claims are allowed to be added, I think it would extremely unfair, the fact they were able to identify an additional 35 or so odd additional references just last week. They're supplementing their interrogatories, adding new claims of invalidity. They're trying to even amend their complaint -- their counterclaims to add in a claim of false marking. So I think it's a little disingenuous to say that adding three claims in that are on the exact same subject matter -- and Claim 17 just adds couple additional new terms, it's not vastly different technology, obviously. There is no prejudice at all.

THE COURT: So the contention interrogatories that you provided with respect to Claim 17, are they of the same level of detail as what you provided for the others that we've talked about previously and that you had to do by October 15th?

MR. ANDRE: They are, Your Honor. They add all the -- it's based purely on confidential information. There was no public information we could base the claim of infringement on, so it was based purely on our review of the source code and their highly confidential documents that were produced in late September and early October.

THE COURT: Are you planning any further supplementation with respect to Claim 17 by the November 20th deadline?

MR. ANDRE: Your Honor, they've asked us to supplement once again the claims. It's really more of in form, and that's part of their letter brief here, that they want us to make sure that any of the source code modules we listed in the accused instrumentality was included in the claim charts as well, that there would be no discrepancy. So we've agreed to supplement on that, in substance. There would be no additional supplementation of those claims other than the supplementation that we'll be getting out later today to Facebook based on their requests.

THE COURT: All right.

MR. ANDRE: There will be no new source code modules not previously identified --

THE COURT: All right.

MR. ANDRE: -- or documentation.

THE COURT: Ms. Keefe.

MS. KEEFE: Your Honor --
THE COURT: Yes, go ahead.
MS. KEEFE: I'm sorry, Your Honor. We actually disagree that the disclosure with respect to Claim 17 is of the same level of detail. I think if Your Honor simply looks at Pages 27 and 28 of the interrogatory response where the cells are containing the words, for example, that I am the most concerned about, things like "traversing" the different arrangements, you can see that there's actually no detail there whatsoever. We're back to parroting claim language with a simple pointing to one source code module. No explanation of how that source code module does it, what any of those terms mean. It's just a mere parroting.
The parroting here in Claim 17 looks more like the type of facially insufficient analysis that we originally complained about. Now, I will admit fully that with respect to the old claim, Leader did actually give us more detail, finally, and has given us a more detailed limitation-by-limitation analysis; but that had not happened with respect to Claim 17, and we think the document shows that.
THE COURT: Well, I think that there was an ambiguity in the various orders with respect to Leader's obligations on supplementing contention interrogatories, and this dispute falls right into that ambiguity. Whereas I

think it was reasonable for Facebook to understand that by October 15th, they would have full and complete contention interrogatories with respect to all of the claims that were being asserted, I also think it was reasonable for Leader to read the overriding date of November 20th as the deadline to allow it to do as it has done here.
While I am hearing and sympathetic to Facebook's suggestion that it may need relief from the accelerated schedule here now that three new claims, including one independent claim, Claim 17, have been added, I'm not yet persuaded that additional time is going to be necessary. I'm also not yet persuaded that I should strike the independent claim, Claim 17.
I'm also aware that while today is November 13th, it's not yet November 20th. So my ruling is I'm denying the requested relief from Facebook today. I'm going to let this play out another week. I'm not, at this point, assessing the sufficiency of the contention with respect to Claims 3, 6, and 17, but what I am holding is that no later than November 20th, those contentions must be of the same level of clarity and detail and comprehensiveness as those which had been the subject of many conversations between us, that is, with respect to the other claims that were asserted from the beginning of the case.
So, at this point, I see no basis for ordering

any further relief. My hope is that there won't be any further dispute with respect to this issue, but I am mindful of where both sides are coming from. And keeping in mind my goal to keep this case on track to the trial date, which I think is next June, if events warrant, after the November 20th deadline, providing some additional relief with respect to the schedule or with respect to making this case narrower, I will deal with that if, and when, those disputes arise.
I believe that is all the issues that are in front of me today. Is that correct, Ms. Keefe?
MS. KEEFE: I believe so, Your Honor.
THE COURT: Okay. Mr. Andre?
MR. ANDRE: Thank you, Your Honor. That's all.
THE COURT: Okay. This transcript will serve as my ruling on the issues today. Thank you very much. Good-bye.
(The attorneys respond, "Thank you, Your Honor.")
(Telephone conference ends at 10:13 a.m.)

Exhibit 30

ABA

August 2006
e-news for members

Send a letter to the editor Print this article Email this article

Eye on Ethics

Do you have a question about legal ethics that affects your practice? ETHICSearch can help For quick and confidential research assistance click here to send us your questions

Litigation Financing

By Peter H. Geraghty, Director, ABA EthicSearch

A lawyer represents a client in a personal injury matter. The client is unable to finance the costs of the litigation, and is considering dropping the case.

- ***May the lawyer refer the client to a litigation financing company?***
- ***May the lawyer assist the client in obtaining a "nonrecourse" loan, the repayment of which is contingent on the outcome of the case?***
- ***May the lawyer obtain financing to fund the litigation, and allow the financing company to take a percentage of the settlement as its fee?***
- ***May the lawyer refer a client to a litigation finance company in which the lawyer owns an interest?***

Over the past several years, ETHICSearch has received many inquiries about the ethical propriety of lawyers' involvement with various litigation financing arrangements.

ABA Opinions

ABA Standing Committee on Ethics and Professional Responsibility **Formal Op. 00-419 [PDF]** (2000) *Use of Credit Cards for Payment of Legal Fees; Withdrawal of Formal Opinions 320 (1968) and 338 (1974) and Informal Opinions 1120 (1969) and 1176 (1971)* is the ABA Standing Committee's latest pronouncement on this topic. Citing to outmoded restrictions on lawyer advertising, this opinion withdrew most of the older ABA opinions discussing financing arrangements for clients. In its discussion of ABA Formal Opinion 338 (1974), the opinion

stated:

> ...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; in so doing, the Committee accepted, per se, the propriety of using credit cards to pay legal fees. However, Opinion 338 carried forward from another earlier opinion, Formal Opinion 320 (Legal Fee Finance Plan), a series of requirements that are not justified by the present-day Model Rules of Professional Conduct.
>
> Because the Model Rules require only that any advertising materials used by a lawyer not be false, fraudulent, or misleading, and because they do not require any advance approval by a bar association for a lawyer's participation in a credit-card plan, the Committee hereby withdraws each of the four opinions referred to above. 00-419 at 1

State Bar Ethics Opinions

There have been a great number of state bar ethics opinions issued on various issues relating to this topic. (See, the digests of 46 state bar opinions dating from 1986 through 2003 listed in the **additional resources page**. Where available, links to the full text of the opinions are also included). These opinions focus on the following ethics rules:

1. **Rule 5.4** (*Professional Independence of a Lawyer*) prohibitions against fee-sharing with non-lawyers may arise if the lawyer receives a fee, or the loan is secured by the client's settlement or judgment.
2. **Rule 1.7** (*Conflict of Interest: Current Clients)* personal interest conflicts may arise where the lawyer's financial interest could be affected by advice given to the client.
3. **Rule 1.8 subsection (e)** (*Conflicts of Interest: Current Clients: Specific Rules*) may be implicated, in that it forbids a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation except under certain enumerated circumstances.
4. **Model Rule 2.1** (*Advisor*) Under Model Rule 2.1, a lawyer "shall exercise independent professional judgment and render candid advice" in representing a client. Involvement of a third party company poses risks that lawyers may not exercise independent professional judgment.

Because of the significant differences in how financing arrangements with clients may be structured, a variety of ethical issues may be implicated, and the opinions tend to be fact specific. For example, a common question is whether a lawyer can refer his client to a litigation financing company. Many bar opinions state that this is appropriate provided that such an arrangement does not interfere with the lawyer's independent professional judgment and the lawyer does not disclose client confidences without the client's consent. See, **Florida State Bar Association Opinion 00-3** (2000) (A lawyer may provide client with information about litigation finance companies if the lawyer believes this to be in the client's best interest. The lawyer may also give factual information about the case with the client's consent, and the lawyer may honor the client's written assignment of a portion of the recovery

ABA offers input on changes in Social Security disability determination process

ABA Section of Taxation suggests issues for upcoming Treasury-IRS guidance list

IN CASE YOU MISSED IT

Have a plan in litigation—it works and it's cheaper

to the company). See Also New Jersey Advisory Committee on Professional Ethics Opinion 691 (2001). Some of these opinions state that the lawyer should warn the client about the possible loss of the attorney-client privilege when making disclosures to financing companies. See, e.g. New Jersey Advisory Committee on Professional Ethics Opinion 691 (2001), Missouri Office of Chief Disciplinary Counsel Informal Opinion 2000-0229 (11/00) Committee on Ethics of the Maryland State Bar Association Opinion 92-25 (1992), Committee on Professional Ethics of the Connecticut Bar Association Opinion 99-2 (1999) and Committee on Legal Ethics and Professional Responsibility of the Pennsylvania State Bar Opinion 99-8.

Committee on Professional and Judicial Ethics of the **Michigan State Bar Opinion RI 321** (2000) found an agreement between a venture capital company and plaintiff to be so onerous that it created irreconcilable conflicts of interest between the lawyer and his client. The Michigan Committee noted that the agreement required among other things that the client waive any defenses in the event of a dispute between the client and the company and restricted the right of the plaintiff to discharge his lawyer.

Many opinions caution lawyers who have interests in or who receive referral fees or other benefits from the finance companies they refer their clients to. See, Pennsylvania Opinion 91-9, Committee on Professional Ethics of the **New York State Bar Opinion 666** (1994), and Board of Commissioners on Grievances and Discipline of the **Ohio Supreme Court Opinion 2000-01** (2000). Compare **Texas Opinions 465** (1990) (A lawyer may own an interest in a lending institution that loans money to the lawyer's personal injury clients so long as the lawyer complies with the rules on conflicts of interest, advertising and misconduct.) **and 483** (1994). Ethics Advisory Committee of the **South Carolina Bar Opinion 92-06** (1992) states that a lawyer may own an interest in a company that makes loans to non-clients. **New York State Bar Opinion 769** (2003) states that after full disclosure, a lawyer may bill a client for services in representing the client in negotiations with the financing company. See also Board of Commissioners on Grievances and Discipline of the **Ohio Supreme Court Opinion 2002-2** (2002):

> ...improper under DR 5-101(A)(1) and DR 5-104(A) of the Ohio Code of Professional Responsibility for a lawyer to provide loan applications and make referrals of clients to lenders recommended to the law firm by a consulting company that receives commissions or referral fees from the lender for each loan completed and also receives an annual consulting fee from the law firm, unless there is full disclosure and informed consent.

Another common scenario involves lawyers who wish to finance the costs of litigation for their clients through third-party lending institutions that loan funds to lawyers for litigation expenses. May the attorney borrow money from the lending institution for case expenses, and ethically charge or pass on to the client the interest or finance charges of the institution? Most opinions state that this is permissible so long as the lawyer obtains the client's consent and the interest rate is reasonable. See, e.g. Committee on Rules of Professional Conduct of the **State Bar of Arizona Opinion 2001-07** (2001), **Maine Board of Bar Overseers Opinion 177** (2001), Missouri Bar Ass'n Informal Opinion No. 970066, (2001), **New York State Bar Opinion 754** (2002) and Ethics Committee of the **Utah State Bar Opinion 02-01** (2001).

Back to top

Yet another scenario involves situations where the lawyer obtains nonrecourse loans to finance the litigation in a contingent fee case, where the lawyer is obligated to repay the loan from his fee generated in the case. **Utah Bar Association Opinion 97-11** (1997) found such an arrangement to constitute the sharing of legal fees with non-lawyers. See Also Board of Commissioners on Grievances and Discipline of the **Ohio Supreme Court Opinion 2004-2**:

> ...improper for an attorney, upon reaching a settlement agreement in a client's legal matter, to sell or assign his or her legal fee to a funding company in exchange for immediate cash at a small discount to the full value of the legal fee. Such sale or assignment of an attorney's legal fee is an improper division of legal fees with a non-attorney and is an interference with the duty of loyalty in an attorney-client relationship.

Caselaw

There are a number of recent cases that have discussed litigation financing issues. Theses cases address some of the ethics issues implicated, but they tend to focus on legal questions including champerty, maintenance and usury. See, e.g *Rancman v. Interim Settlement Funding Corp.* 789 N.E. 2d 217 (2003) (except as otherwise provided by legislative enactment or the Code of Professional Responsibility, a contract taking the repayment of funds advanced to a party to a pending case contingent upon the outcome of that case is void as champerty and maintenance.) After the *Rancman* case was issued, the Ohio Board of Commissioners on Grievances and Discipline withdrew their **Opinion 99-6** (1999). Compare Saladini v. Righellis, 687 N.E.2d 1224 (Mass. 1997) and *Osprey, Inc. v. Cabana*, 532 S.E. 2d 269 (2000), in which the South Carolina Supreme Court abolished the defense of champerty:

> ...we abolish champerty as a defense. We are convinced that other well-developed principles of law can more effectively accomplish the goals of preventing speculation in groundless lawsuits and the filing of frivolous suits than dated notions of champerty.
>
> ...We note two peripheral matters that we do not address today. First, the case before us involves a financial arrangement between non-lawyers. Various ethical constraints closely control and in many instances prohibit business transactions between a lawyer and his or her client. *See* Rule 1.8, RPC. In particular, a lawyer may not acquire a proprietary interest in the subject matter of litigation the lawyer is conducting for a client, except that the lawyer may acquire a lien to secure the lawyer's fees or expenses, and the lawyer may contract with a client for a reasonable contingent fee in a civil case. Rule 1.8 (j), RPC. We do not address whether a lawyer may act as a financier in a case involving a litigant who is not the lawyer's client. *See* Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 Am.Bus.L.J. 485, 488 (1992) (listing statutes in several states that prohibit attorneys or others connected with the judicial process from engaging in maintenance and champerty). Second, our decision today neither addresses nor authorizes the syndication of lawsuits, a practice in which a litigant sells shares in his lawsuit to investors. *See* Martin, *supra*; Dobner, *supra* (discussing syndication of lawsuits). *Osprey*, at 382.

In *Echevierra v. Lindner*, 801 N.Y.S. 2d 233 (2005), the court held that while under New York law an agreement between the plaintiff and a litigation finance company was not champertous, it did violate the New York state usury laws.

In *Lawsuit Financial v. Curry*, 683 N.W. 2d 233 (2004), the Michigan Court of Appeals held that non recourse capital advances made by litigation funding company were loans, and that the loans were usurious. In *Curry*, the funding company loaned the client $177,500 and soon after demanded payment of $887,500.

In *Core Funding Group v. McDonald*, 2006 WL 832833 (2006), the Ohio Court of Appeals court rejected the reasoning in Board of Commissioners on Grievances and Discipline of the **Ohio Supreme Court Opinion 2004-2** found that a law firm's assignment of its interest in attorney's fees to a litigation finance company was enforceable, and was not violative of Rule 5.4:

> [I]t is routine practice for lenders to take security interests in the contract rights of other business enterprises. A law firm is a business, albeit one infused with some measure of the public trust, and there is no valid reason why *a* law firm should be treated differently than an accounting firm or a construction firm. The Rules of Professional Conduct ensure that attorneys will zealously represent the interests of their clients, regardless of whether the fees the attorney generates from the contract through representation remain with the firm or must be used to satisfy a security interest. Parenthetically, the Court will note that there is no suggestion that it is inappropriate for a lender to have a security interest in an attorney's accounts receivable. It is, in fact, a common practice. Yet there is no real 'ethical' difference whether the security interest is in contract rights (fees not yet earned) or accounts receivable (fees earned) in so far as Rule of Professional Conduct 5.4, the rule prohibiting the sharing of legal fees with a nonlawyer, is concerned. It does not seem to this Court that we can claim for our profession, under the guise of ethics, an insulation from creditors to which others are not entitled. *PNC Bank* at fn. 5.
>
> {¶ 63} We agree that at this juncture, we cannot claim for appellees, under the guise of ethics, an insulation from appellant-creditor. *Core Funding Group*, at 10.

Back to top

In *Fausone v. U.S. Claims, Inc.* 915 So.2d 626 (2005) the Supreme Court of Florida upheld an agreement between a litigation financing company and the plaintiff, noting that Florida did not appear to have laws regulating such loan agreements. The Court went on to state:

> **...V. A Possible Need For Regulation**
>
> The Florida Bar has issued an Ethics Opinion ruling that a lawyer may provide a client with information about companies like U.S. Claims and may provide factual information to those companies with the consent of the client. The lawyer may honor the written assignment of claim but may not issue a letter of protection to the funding company. *See* Prof'l Ethics of the Florida Bar, Op. 00-3 (2002). Although lawyers may take these actions, the literature concerning litigation loans provides divergent views of their merit. See Kenneth L. Jorgensen, *Presettlement Funding Agreements: Benefit or Burden*, 61 Bench & B. Minn. 14 (2004); Andrew Hananel & David Staubitz, *The Ethics of Law Loans in the post-Rancman Era*, 17 Geo. J. Legal Ethics 795 (2004); Terry Carter, *Cash Up Front*, 90 A.B.A.J. 34 (2004); Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 Mercer L.Rev. 649 (2005).
>
> A person who suffers a severe personal injury will often need money

to care for herself and her family during the pendency of litigation. Lawsuits take time and come with few guarantees. Grocery stores and home mortgage lenders do not wait for payment merely because a person is unable to work due to an automobile accident or other injury. Thus, it cannot be denied that people like Ms. Fausone may need a credit source during litigation.

On the other hand, a person who is the victim of an accident should not be further victimized by loan companies charging interest rates that are higher than the risks associated with the transaction. We emphasize that the record does not reflect the value of Ms. Fausone's claim when U.S. Claims negotiated with her, but a company that only loaned money when it was secured by high-grade personal injury claims would seem to be able to charge a lower interest rate than some of the rates described in this opinion, even when the arrangement is a nonrecourse loan.

The purchase agreement in this case is one-sided and designed to prevent a Florida citizen from having access to a local court or another local dispute resolution forum. Such agreements create confusion concerning the party who actually owns and controls the lawsuit, and create risks that the attorney-client privilege will be waived unintentionally.

This court has no authority to regulate these agreements. However, if The Florida Bar is going to allow lawyers to promote and provide such agreements to their clients, it would seem that the legislature might wish to examine this industry to determine whether Florida's citizens are in need of any statutory protection. *Fausone*, at 629

For further resources on legal ethics issues as they relate to litigation financing, see the list of law review articles and state bar ethics opinions that are listed in the **additional resources page**.

ETHICSearch is intended to stimulate awareness of ethical problems and illustrate the varying approaches of different jurisdictions. It is not intended as legal advice. The ABA Model Rules of Professional Conduct and the opinions discussed are advisory only; the ethics rules, laws and court decisions of your jurisdiction may dictate a different result.

Back to top