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Hello, and welcome to today's program navigating the ethics of litigation finance. My name is Jim Batson. I am a senior investment manager and Director of Business Development and structuring for the US for the commercial litigation finance company on the bridgeway. ami. bridgeway is a publicly traded company headquartered in Australia, but with offices around the world in 10 countries with 18 offices and we have four offices in the United States, New York, LA, San Francisco, and Houston. Prior to joining the litigation finance industry, I was an litigation attorney for 20 years. My 15 minutes of fame come from litigating a case called zuba Lake against UBS Warburg, which led to many seminal e discovery decisions. But since then, as I, as I mentioned, I've been in litigation finance space itself for about eight years and with Omni bridgeway, formerly known as bent the mind map for the past six plus years. So today's program, we're gonna discuss litigation funding, you know, basically just what it is, for those of you that may be new to it. But, but particularly the ethical issues surrounding litigation funding. So for instance, this would relate to the attorney client and the work product privileges, it would relate to the intersection between the various ethical obligations that attorneys have disclosure issues that can come up, as well as the evolving legislative developments and various court rulemaking initiatives. So first of all, I mentioned we'd be focusing and that our company focuses on commercial litigation funding, excuse me. And it's important to draw a distinction between consumer funding and commercial funding. Consumer funding tends to apply to individuals that think might have been in slip and fall, or a car accident or something where maybe they have a structured settlement that they need to monetize. those tend to be very small, at least on a relative scale of financings think, maybe 5000 25,000, to enable individuals to pay the rent, pay their day to day living expenses, while they wait for their litigation, usually against the insurance company to conclude, commercial litigation finance on the other time, on the other hand, tends to involve companies soon companies for high stakes $10 million enough, where the amount that's being invested by the litigation finance company, like us, is at least a million dollars. And we've made

investments up to a north of $40 million. So very, very high stakes. So what is litigation funding, that essentially it's a non recourse investment, that is collateralized solely from the proceeds of a litigation itself? So what does that mean by non recourse? We, as a funder, get paid. If the case is successful, and we get paid from the proceeds of the case, many times we get the question, well, what if my case is unsuccessful? Or what if my recovery isn't enough to pay the agreed upon return? And the answer there is, then we don't get any we don't get any further funds, we cannot recover, for instance, from the our deals are structured such that we do not recover from sources other than the litigation, like the essence of the company, or some secondary payback obligation. It's solely from the proceeds of litigation. And that's what we mean when we say it's non recourse, it's really not it's really non recourse but for the proceeds of the litigation. Now, how are returns determined, they usually are a function of either the passage of time, or the size of the recovery, or the riskiness of the case. They the analysis of funding requires extensive due diligence, and I'll talk about what that entails and how that process works. But when you think about what litigation funding is, as a whole, think about money provided to a litigant that gets paid back and the return gets paid back. If the case is successful from the proceeds of the case. It covers a wide variety of types of litigation, people always ask me, you know, oh, what kinds of cases do you find and really, or don't you find, really, the

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focus is less so much on the subject matter of the case, although we personally don't fund personal injury, but more about the economics of the damage is high enough to support the amount of the investment And then the merits of the case supports. A couple things that funding is not. It's not alone. And I'll talk more about why that is. But it's important to know that we're not lending money that we can get paid back from any source other than litigation. Also, it's not an insurance company relationship where the funder dictates who the lawyers are, or how the case is litigated and so forth. And I'll talk about some of those specifics in a minute, in a minute, too. So why do we have litigation, finance, and I'll, these points are listed on slide seven. And I'll try to reference the slides as as I go along here. But firstly, litigation is, especially high stakes litigation is super expensive. You're if you're bringing a high stakes litigation as a company, you're going to want the top tier lawyers, many top tier law firms don't take cases on a contingency. So you have to pay their hourly rates, or at least a percentage of their hourly rates, expert fees, and discovery costs, if they just can be very expensive, they can get into the single digit, single millions and multiple millions, depending on the case and how long it goes. Also, litigation, as we all know, it takes time, it can take years, three, four or even more years. And if your company has been dramatically impacted by whatever the wrong is that's underlying the litigation, well, you may not be able to afford to wait to get your recovery. And you may feel like you have to settle for a fraction of what the case is really worth. Because you need the proceeds to to maintain your company's business and to contend to grow its business. Well, funders can come in and provide what we call operating capital directly to the company that it can use for whatever purpose not

having anything to do with the cost of litigation. But even there, the funders return comes only from the proceeds of the litigation. So again, as opposed to the company having to encumber its assets by taking a loan may be collateralized by its assets, it's able to get funding from a mitigation finance company. And the only thing encumbered quote, unquote, is the litigation itself. It won't, it won't impact any covenants, for instance, that the company might have relating to other loans and finances. It also lets the company diversify its risk. Well, look, it may have one big judge a big judgment. They know that that judgments gonna go up on appeal. But that judgment certainly has value, especially once the it's been, it's been reduced to a judgment. Well, we can come in and say, all right, look, you've got this 100 million dollar judgment, let's say, we'll provide you with, you know, $5 million off the bat and get our return two years from now, or whatever it takes for the case to run its way through appeal. And that way, if the case is unsuccessful, whether the company knows, alright, look, even if it gets reversed on appeal, we've got the 5 million, maybe they've, they've at least paid off the expenses they had for litigating it, or maybe they get more than that maybe they get 10 or 15 million so that they know no matter what we've made a profit on this process. And we can lock that profit in.

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Another thing to talk about is sort of leveling the playing field. If you think about it, many litigations, the company that's been wronged maybe a smaller company, that, that can't afford the top tier counsel or all the top tier experts that the larger company, the better funded company may be able to afford. And so the larger company and the well funded company, has an advantage. They've got a bigger war chest for this extended protracted litigation. Well, if the smaller company, the less funded, less well funded company, can bring in a litigation finance company. Well, now we've bounced the playing field now it's level instead of being disproportionate, that fact alone if you think about it can actually lead to an earlier settlement. For instance, or for you know, a large multinational company thinks that they can just basically stall hinder and delay and, you know, cause extensively litigate the motion the case in such a way that the smaller company is going to have to throw up, throw up its hands and settle for only a little bit. They might adopt that strategy and the case drags on. Whereas if they find out that the smaller company now has funding and can afford to fight the case, tooth and nail the whole way and and have a better shot at winning, then the larger company might say, Hey, you know what, maybe it's not worth fighting this fight. Let's settle at a level that might be more reasonable and more palatable, let's pay more money than we would have otherwise paid. And then lastly, mitigation finance provides budgeting benefit If a company is paying for its litigation on an hourly basis, it knows that litigation costs tend to be volatile. early stages, you file the complaint, you might wait a while before the defendant makes a motion to dismiss, then discovery starts, there's a lot of fighting about what should or shouldn't be produced, those 10 periods of time tend to be less expensive. However, once discovery ramps up, and experts are being hired, and expert reports are being written and depositions are being taken, and you know, all kinds of ancillary

motion practices beginning it can become very expensive, then it falls down again, while there are pending motions for summary judgment, then those are decided in trial occurs and expenses ramp up again, companies don't like in generally speaking, that volatile nature of expenses when they're budgeting for their quarter, and for their term, they'd like to have some predictability. Well, by taking the cost of litigation off its balance sheet off its income statement, and bringing in a litigation finance company. Now we're paying those expenses, they they have a smooth budget for their legal department, they don't have to worry about that fluctuation that I just described. And yes, they'll pay some return on the back end to the finance company for providing that capital. But many times, the company's shareholders would much prefer having predictable costs, and getting still a sizable recovery at the end of the day, then having to have this big and fluctuating outpouring of expensive. So budget stability is another another factor in there. And in these veins, I'd like to just read two quotes from from two seminal cases in this area. The first comes from a case Miller big Caterpillar, it's on page six of the of the slide deck. It points out that predict protracted discovery is expensive and is a drain on the party's resources. Where a defendant enjoys substantial economic superiority, it can if it chooses to embark on a scorched earth policy and overwhelm its opponent. And judge Branston from New York Supreme Court wrote in a decision called and this is on slide seven, litigation funding LLC against less off litigation funding allows lawsuits to be decided on their merits, and not based on which party has deeper pockets, or a stronger appetite for protracted litigation. So I think now I'll talk about the different types of funding arrangements that exist. These are listed on slightly, the simplest, although least least common is a full hourly arrangement where the funding company pays the lawyers full hourly rates, there's no budget cap, they pay it as incurred. And in exchange for that the thunder gets the return. And there's no contingency component for the law firm. And let's, let's step back here for a second and point out one of the overall overarching

13:15

accomplishments that litigation finance can provide. Essentially, we bridge the risk gap. So if a law firm thinks that a case is going to cost it

13:27

$10 million in hourly fees over the duration of the case from filing all the way through a PA, let's say the client doesn't want to have to pay any money out of pocket. There's a real risk out there. They say to the lover, will you take this out of full contingency, the law firm says we can't do that. It's not the way our firm is structured. We, we don't take full contingency cases. But they might say we're willing to take some risk, we're willing to give you a reduced hourly rate, or allow you to pay a flat monthly rate. Or maybe say alright, well, we'll only charge 50% of our fees. But in exchange for that, we'll want 20% of the upside. Well, the client might say, well, that's helpful. But I really don't want to spend any money on litigation fees. You know, liquid capital is important to us, I

want to spend my money on the business at hand. And so we come in and we can bridge that risk gap. We say, all right, well, we'll pay the additional attorneys fees that the law firms not willing to pay. And we'll take a percentage of the recovery so that you the client, wind up with the functional equivalent of a full contingency, even though you might be paying a certain percentage to the law firm and a certain percentage to the funder at the end of the day. For you. You're getting your your your proceeds as if you were paying a full contingency. So by way of example, let's say a typical contingency you might hear as a third. Sometimes it's 40%. Let's use 40% cuz it's easier to divide. So the law firm says All right, well We'll, we'll agree to take only 50% of our fees during the course of litigation. But in exchange for that, we want 20% of the upside, fine. That's a typical hybrid arrangement. But we come in and say, All right, we'll pay the other 50% of those fees, we'll pay the ongoing fees that you do require. And we'll take 20% of the upside for that. So the client then winds up with not having to pay any legal fees. And having to pay 40% of the judgment to both the law firm and the funder in some proportion in my example, is 20, and 20. But it could be, it could be different. That's what we call sort of the 5050 model, the hybrid funding originally, and that's probably the most common out there, it might not be 5050, it might be 6040, it might be 7030. But the structure is such that, at the end of the day, the client winds up with the functional equivalent of a full contingency. Now, the next thing that comes up often is cost funding. So you might find a law firm. And there are plenty in certain, particularly certain practice areas like patent litigation, who are willing to take cases on a full contingency, but only with respect to their fees. So they won't charge you any hourly fees during the course of the litigation. And they'll get a share of the recovery if the case is successful. But they won't front they won't pay out of pocket, the law firm will pay out of pocket, the costs of the litigation by costs, I mean, expert fees, deposition costs, travel ediscovery searching and maintenance costs, all the kinds of things that come up in the course of litigation, many law firms will say like we need the client to pay those, Well, again, it's client either can't or doesn't want to have to pay that we can come in and pay that. So maybe your law firm says we'll do it for free, we won't charge for hourly fees. And we want a 1/3 for contingency for that. But we need you to pay costs. Well, the client comes to the funder and says, hey, what will you take? If you pay the costs? We say, all right, well, we'll pay the $2 million projected costs. And in exchange for that will take 10% of the upside. And so the client says great, Alright, so now I'm, I'm paying out 43% of the upside, I'm getting 57% of the upside, and I don't have to pay anything during the course of litigation. It's another way this can work out. Then there are working capital arrangements, which I alluded to earlier, where maybe the law firm has it and the client has the case on a flow, contingency fees and costs. But they want some capital for their business or other reasons. We can provide that on top on top of it, or I should say we can provide that collateralized by the litigation, but not going to the costs of litigation. And sometimes we can fund a case where we are paying litigation costs. And yet, we're also providing additional capital to the client for these non litigation purposes. There's appeal funding for cases that have been decided, but that are now up on appeal. And I alluded to that earlier. And sometimes we can provide judgment enforcement funding where you've obtained the judgment, but let's say it's against a company overseas, or a defendant who's hiding their assets

or maybe it's against a sovereign nation that is is not

18:11

as willing to or doesn't as often pay its international arbitration awards the way some other jurisdictions wood. So funders can can provide that as well. And there's a portfolio type of funding where, if you're a company that has multiple litigations, the cost of the funding can be reduced because the returns can be cross collateralized. If we funded a portfolio three cases, for instance, and two were unsuccessful, we could get our return from the third, we charge a lower overall rate because our our risk is lower. We know that okay, only one of these three cases may has to be successful for us to get our return. less risk, less, less return. So let's talk about the process. Many people ask how does this work? And this process will be important for some of the ethical issues that I'm going to talk about, especially dealing with attorney client privilege, and so forth. And I'm looking at slide nine now. A funder will typically assess the case early on preliminarily, make sure the economics work out. Maybe that's the first phone call or so then immediately we'll send out a nondisclosure agreement, otherwise known as an NDA. This is critical, because it is an important factor in maintaining the work product privilege. Generally speaking, and pretty much nationwide, although work product is a function of state law, if a client has taken reasonable steps to ensure that the materials covered by work product are not going to be turned over to their adversary, then the work product protection remains and the existence of a nondisclosure agreement is is generally found to be sufficient in that regard. So after that preliminary assessment, we will negotiate a term sheet terms are non binding pending the diligence period. But at least we'll both know, okay, what are the deal terms here? Assuming we have the signed term sheet, then generally funders require 30 to 45 days to conduct a deep dive due diligence, where we'll look at all of the underlying documents with the client will talk to lawyers. And again, those conversations and what documents are exchanged are critical factors and some of the ethical concerns that I'm going to talk about here today. And then finally, there'll be the execution assuming the diligence process has been successful. Will it be the execution of a long foreign funding agreement? And once again, we'll talk today about whether or not that funding agreement ever needs to be disclosed? And if so, under, under what circumstances? So what are the ethical implications, ethical rules that are implicated? we listed them on page 10. There's the model rules anyway. There's no point in my reading them all off to you, they're they're listed there, I'll just say that. The critical aspect is always the lawyers need to protect her or his independent professional judgment. All of these rules tend to relate to that in one way or another. And then, of course, company, confidentiality concerns and so forth. But really, they all flow from the need to maintain their independent professional judgment. So we'll talk about different issues that arise. is funny, even permitted in a certain jurisdiction, how do you protect confidential information? How do you avoid representing adverse interests, and what what ethical concerns are implicated when you have financial arrangements with non lawyers? So first ethical issue we're going to talk about many of you may not have even heard of, since law school, it's usually not something people deal

with called champerty. maintenance, and maybe more common usury. So champerty arose, actually, in medieval times, when nobles were supporting litigation, not for the purposes of the actual any actual underlying wrong, but rather to try and cause the, their adversaries the nobles with whom they're competing maybe for land, have to spend a ton of money defending lawsuits. And this quickly overburdened the courts. And the courts decided, you know, that has to stop it. So they made rules against champerty. And maintenance, which is a type of champion, we're both defined on page 13 of the of the slide deck here. But they made these rules, and America imported those when we adopted the English common law system.

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But basically, what they what champerty is, is a bargain with a stranger to the lawsuit, a third party who undertakes to carry the litigation at their own risk and cost in exchange for receiving part of the proceeds of the litigation, which in many ways is what most litigation finance arrangements are. However, over time, courts have recognized that because of the cost of litigation, because of the imbalance, many times that many times exists between the parties. funding of a litigation is a societal good, it enables good cases to go forward that otherwise might not have been able to be brought. And, and all the other benefits that I've talked about earlier, so many jurisdictions, and usually the jurisdictions that are commercial centers, like New York and California and Florida, and Chicago, so forth, Illinois, have done away with restrictions on championing at least ones that would come that would impact the type of financing that we're talking about here today. many jurisdictions do have restrictions on litigation finance, but it's clear that they exist to protect unsophisticated consumers in the consumer financing sphere would say, you know, unsophisticated individuals who were in a car accident, for instance, and the lawyers or the funders know that the case is going to is not going to be a loser, that there's going to be recovery, and yet they charge an exorbitant rate to, to, to provide the capital. So they're basically taking advantage of the unsophisticated planet. So some states have come in and said, Well, we need to regulate that we need to fix the amount of the recovery or provide other requirements so that the clients made aware of exactly what they're paying, what the returns would be, and so forth. And, but again, those aren't really geared toward commercial litigation funders. However, Sometimes they're brought so broadly written that they do at least impact parts of commercial litigation, finance. And then there are other jurisdictions that just flat out, either don't allow commercial don't allow litigation finance at all, or restricted in such a way that it really becomes impractical, impractical for funders to fund litigations there. So that, and it's basically about 20 states where it's pretty hard to finance litigation. So right off the bat, lawyers who are funding litigation are involved in cases where there's litigation finance for their client, need to make sure they're in a jurisdiction where it's permissible. And understand the rules around that. And that's really one of the reasons you want to make sure that you're working with sophisticated, well established litigation finance company that pays attention to these things, and that you pay attention to them. Because there are some ways in which it's okay. So for

instance, in Pennsylvania, there are many restrictions on litigation, finance. But there's also case law that makes clear that if the choice of law provision is written in such a way that another jurisdictions, laws governing, let's say, New York, then Pennsylvania will adhere to New York law and not prohibit the litigation finance transaction from occurring, or vitiate. That transaction. other jurisdictions, such as Minnesota, for instance, will not honor or or defer to the choice of law provision, and but will will rather apply their own law to the appropriateness of litigation finance arrangement. So it's very important to know which jurisdiction you're in, which jurisdictions law would apply, and what their rules are with respect to championing and maintenance. We'll talk about usury, the vast majority, I'd say almost every jurisdiction, although you should certainly check, does not consider litigation does not consider the prohibitions on usury, to apply to a litigation finance transaction. And that's because litigation financing arrangements is much more akin to an investment as opposed to a loan. Because it is contingent on the outcome of the litigation. It's that contingent component that makes a litigation finance arrangement fall outside of usury restrictions. So now, if you look at slide 15, you'll see that there are some states where you can see case law that talks about where it can be prohibited. I referenced Minnesota already, there's another case they're referencing Kentucky where it can also be prohibited.

27:46

Now, many bar associations have provided guidance on litigation finance, that's another way to to clarify whether your jurisdiction with restriction and if so in what way, it's not always a statutory restriction, it can be a common law restriction. The ABA has issued a few different reports on litigation finance, one was or a white paper that came out in 2011 is like 40 pages very comprehensive on issues that lawyers need to be careful of when dealing with litigation finance. Another ABA report came out much more recently, more of a guidelines for lawyers to be aware of when dealing with litigation, finance. But the New York State Bar Association, the New York City Bar Association, and many other states, bar associations have also issued opinions on on litigation finance, in whole or in part. So the next topic I want to talk about is how to protect a client's confidential information. And what you really need to worry about here are the attorney client and the work product privileges. So the attorney client privilege is sacrosanct, and is critical because it can be waived if the material is disclosed to a party outside of the attorney client relationship. So if I as a lawyer, if I were working as a lawyer, and I have a client, if I have a meeting with my client, but I include individuals that are not parties to the litigation, and they're listening in on those conversations, while those conversations could be discoverable, my client might have testified to them in their deposition or trial. So lawyers are always careful to maintain the attorney client privilege. We we say to all of our clients, that we never want to see any material that your counsel believes is covered by the attorney client privilege, because we don't want to run the risk of waiver. Although there may be certain privileges that attached to the litigation funder in different circumstances, for instance, some jurisdictions find that there's a cost common interest privilege, others do not. We don't want to rely on that. As a rule of thumb, you

do not want to share attorney client information with the funder. Many people are surprised to hear that Well, how do you diligence the case you can't see attorney client information? The short answer is if we don't think we can diligence without that, then we just won't be able to make the investment. But there are many other things that funder can look at. That's not attorney client privilege, that can still enable them to diligence the case, for instance, the pleadings, of course, and in any other filings, documents that are going to be produced in litigation anyway or that have already been produced. But if it's pre filing, look, if we the contract, any other documents that are going to be produced Anyway, we'll certainly can share those with the funder in advance because you're not worried if the if there was ever a need for the funder to turn them over. And then the work product privilege now, attorney client is one thing, work product is a wholly different thing. And if you see on slide 18 work product is broadly defined as materials prepared in anticipation of litigation, by or for the parties representative. And so that can include both lawyers notes, memoranda about the case, information shared with an expert if it's especially if it's a non testifying expert, information shared with other agents of the litigation that are working for the law firm. But think think thoughts and mental impressions of lawyer. So in that case, we will ask the lawyer to share with us their conclusions about the case, they're thinking about strategy and so forth. And again, it's not always a bright line between the attorney client privilege material and work product material. And we would err on the side of saying it's borderline, we don't want to see it. But when it comes to the work product doctrine, that privilege is protected, as long as there's a nondisclosure agreement in place, or other restrictions on the ability of your adversaries counsel to obtain the information. So that's an important distinction. When you're dealing with a funder. Be careful not to share attorney client privilege material, but be comfortable sharing attorney work product material, if you've got an NDA in place. But if you're not sure which camp limit the information falls into, err on the side of not sharing it. We don't want to have a waiver of the attorney client privilege.

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So there's an important case here on the subject, referenced on slide 20, called lambda out of the Western District of Pennsylvania, that talks about how the plaintiffs agreements since it was prepared in just the plaintiffs funding agreement. Since it was prepared in anticipation of litigation for the purpose of pursuing litigation. It's shielded by the work product privilege. And the case military Caterpillar that I referenced earlier. The full site, as well as some other cases are also listed on page 21 here that all address work product protection, and relevance. And I urge you if you're interested and want to learn more about the work product and attorney client privilege, and how those issues can arise in the funding relationship. So look at the military Caterpillar case, because it really breaks out a variety of different scenarios in which disclosure can occur. So how does this come up? And why or why am I talking about this waiver issue? What tends to happen is during the course of litigation, the other side might suspect or become aware of the fact that there's litigation finance and think, Oh, well, this is a free opportunity for us to obtain discovery of

things that the client might have said to the funder or things that the lawyer might have said to the funder. Maybe they said something bad about the case, maybe they provided information that we wouldn't otherwise get, let's seek that information in a document or interrogatory to the party, or let's issue a non party subpoena to the litigation finance company. Courts tend to view such discovery negatively because litigation finance arrangement is something that came about post dispute. It's not something that occurred, that was part of the underlying issues and events in the litigation. And judges tend to have an aversion to satellite litigation. That is, you know, fights about discovery, that don't really pertain to the core of the case. But that's not to say that there's not any circumstance where information share with litigation funder could be relevant. So the first step tends to be to look at relevance. Like, I know that the judge might say, Look, I know that you guys want everything you can possibly get. But what was discussed with the funder is not relevant to this litigation. It's not it's not again, it doesn't pertain to the events that To place at the time, you're just trying to find out, you know what the resources are on the planet, for instance, to it's protected by work product, hopefully. So they're going to look at relevance, they're going to look at whether there's one or more privilege protects the information. But there have been cases where it's been determined that what we share with the funder is relevant. For instance, there have been times where the court found Well, when the client became aware of the harm, in part can be determined by when they sought funding. Okay, so funding two years ago, then two years ago, they probably were aware of the harm. But as an example,

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now,

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I've talked about discovery in the production of confidential information and discovering context. It can also there have been efforts to make discovery mandatory under certain circumstances. So for instance, there was a proposal and this is now on slide 22, there was a proposal to revise Federal Rules of Civil Procedure 26 to require automatic disclosure of any litigation finance arrangement, that proposal was rejected back in 2014, but it was resubmitted in 2017. And to my knowledge is still under consideration study by the Federal Rules Committee in the Northern District of California, issued a standing order. But first, they issued that order for comment, and an earlier draft of the order required disclosure of litigation funding, essentially, in any case, but after receiving comments, the actual standing order that was issued, made clear that litigation funding needed to be disclosed, but only when there was a collective action or class action. And again, there's some logic to that, because in a class action, for instance, the plaintiff, there's no specific plaintiff isn't necessarily negotiating the or all of the class isn't really part of the negotiation. I might be a member of a class, but I'm not named plaintiff. And so I'm not there and the court has to step in and make sure that these funding arrangements make sense. So when there is funding

for class action, it's typically disclosed to the court early on, it wouldn't be required to be disclosed by the Northern District, California, and other jurisdictions are adopting that approach. So disclosure could be mandatory, if it's for a class action. Certain arbitral bodies such as the American arbitration Association require disclosure of funding, or at least under certain circumstances can require disclosure of funding to make sure that the arbitrators are impartial. And it's something that is typically disclosed in international arbitrations. Again, not always not every case, not for every arbitrator. These tend to be case specific when you're dealing with arbitration. But if you're getting funding for an arbitration, you can expect that there's a likelihood that you're either going to have to at least disclose the existence of funding, probably the name of the funder, but usually not the terms of the funding. So So slides 23 and 24. Talk about the Northern District California rule that I just identified. There's also been a movement in Congress to amend the Federal Rules judge Grassley, and I'm sorry, Senator Grassley and Cornyn proposed legislation along those lines, it's gone nowhere. But it's out there and could rear its head again at some point in the future. But there was the litigation funding Transparency Act of 2019. That was introduced in 2018 2019. It relates solely to class actions or mdls, multi multi district litigations. So that's something to bear in mind, but it has not been enacted.

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So let's, let's discuss for a second the pros and cons of litigation, the disclosure of litigation funding, the pros and cons of the disclosure of litigation funding.

39:17

Because, you know, look, you may be on either side of this issue, maybe you wind up on both sides of it in different parts of your career as a as a mitigator. The cons of disclosure, I'm sorry, the arguments in favor of disclosure, tend to say, well, it's got to be relevant. I mean, it's, you know, it's a discussion just communications between the the party and the funder or about the case. Therefore, it relates to the litigation, therefore, it's should fall within the broader ambit of what's discoverable under Rule 26 again, in the federal court context, so it should be disclosed. It means there may be some type of conflict you know, if the if the Trier of fact If the judge perchance was invested in litigation finance company, you know, they might have a they might have a conflict. These are arguments I've heard. Some people have contended, well, if the case is being financed, then our is the named plaintiff, really the real party in interest, isn't it the funder, that's the real party in interest? that's rarely considered the case. Because again, the funders only financing part of the case they're not buying the claim. There are exceptions to that sometimes in the patent context, if the funder is purchasing a patent, some courts have found that well, there there should be disclosure so that the other side can determine whether or not the funder is actually the real party in interest here. And some people have said, Oh, it's just like insurance. We you know, we're a party has insurance, they're required to disclose the insurance on the defense side, why

shouldn't the plaintiff have to disclose it on the plaintiff side. However, that argument is a false equivalency, because the disclosure of insurance is designed to determine whether or not there's even something to fight about, the defendant doesn't have insurance, and they don't have assets within wire, nobody should be bothered, the plaintiff shouldn't bother bringing the case the court shouldn't be burdened with the case, there's really nothing to fight about. Because they won't there won't be proceeds at the end of the day. financing the plaintiff doesn't determine whether or not there's something to fight about. That's determined by the court as to the validity of the claims. And that's determined by whether or not their assets to recover. All the financing would reveal to the defendant is Oh, what is the plaintiffs were just like, can they afford to fight this case, it would provide an insight that the defendant arguably isn't entitled to. So that's the counter argument to that, why shouldn't you disclose it? Well, you shouldn't disclose because as I said earlier, we don't need these ancillary discovery fights over nothing, you know, over over things that occurred long after the dispute itself arose. It might, if there's a fear of disclosure, then parties might not get litigation, finance, because they'd be worried about disclosure, and therefore they can't bring cases that are meritorious. People talk about Oh, is litigation, finance going to increase litigation? It may. But it's only going to increase litigation that's meritorious that the point of having the courts if somebody was wrong, you know, litigation is not free, unfortunately, for the litigants. And so we shouldn't prevent people from bringing good good cases. One of the reasons is, you know, look, cases have become so long and drawn out that, you know, Justice delayed is justice denied. Well, with litigation finance, you can help mitigate that concern, because the delay, the funding can enable the party to weather the delay, until they get to the ultimate justice itself. So let's talk about adverse the concern of adverse interests. And that that's reflected on slide 28. Look, many litigation, professionals like myself, are lawyers. But we don't represent the client. Of course, we represent the funding company, we're acting in a business capacity, negotiating the terms of the agreement, and so forth. We don't and this is critical, we don't dictate or at least funders should not the course of the litigation. This is different in jurisdictions outside of the United States, but in the United States, we don't tell a party when they must, or must not settle the case, for instance, or what motion should or shouldn't be brought, usually, and certainly for our company, the funders rights are really to be paid the negotiated return, to be informed of developments in the case, and maybe to be heard, so that, you know, the funder has a chance to weigh in and provide their thoughts on the case. But at the end of the day,

43:52

it's the client that has the ultimate ability to decide what happens next. And I often liken our relationship to akin to the plaintiff's attorney. Now, I've represented plaintiffs many times on a contingency basis when I was practicing law. And there were many times where I said to my client, you know, look, I recommend you settle, or I recommend that you don't settle. But my clients thought, you know, I look, I appreciate that. But for various reasons, I think we should settle

or I think we shouldn't settle. And that's what I want to do. And of course, I was duty bound to follow the clients which wishes. Same thing here. As a litigation finance company, we like to come in and said, Look, we have expertise and value in litigation. We think you can do better or we think this is a great offer, based on our experience. But at the end of the day, it's the client doesn't want to take it or doesn't want to take it. It's the clients choice. in negotiating the funding agreement, obviously, we represent the funding company, we don't represent the other side and and so sometimes the plaintiffs will come to us directly without their lawyers saying, Hey, you know, I need to pay my lawyers. Can you find my case? We might say yes, but you need to Get your own counsel to represent you in negotiating this agreement. If you're not going to be using the same law firm that's representing you in the case itself. We sometimes engage outside counsel ourselves to help us evaluate a case. For instance, if it's a patent dispute, we actually have in house expertise in patents, but we might want to engage somebody in this particular technology. or there might be an antitrust case where we might not have the expertise in house will engage external counsel to give us an opinion on the merits of that litigation. And that claim, again, that outside counsel does not represent the client litigation, although we may share some of the opinions that we get from the outside counsel to help strengthen the claim, we decided to fund it. And most importantly, I think, as a practitioner, you should bear this in mind. Most importantly, we try to structure our investments, and you should make sure that investment is structured in such a way that all of our interests are aligned. So that's why we get paid only if the case is successful, the lawyers are sharing the upside of the case, they're not only getting paid by their hours, for instance, that there they see a reward and a successful result. And hopefully, the client has some skin in the game too. We do like it where the clients can pay some of the expenses, for instance, or have some contribution to the case so that when there's a settlement discussion, we're all have pluses and minuses toward compromise. I meant the next slide talks about control. And I've already mentioned, we don't control the litigation. And that's critical for the lawyer to because the lawyer wants to make sure that his or her independent professional judgments not compromised. And if we have the ability to dictate something in the case, then the lawyer may not feel like they're fully independent. This also can come into play, where there's funding of the law firm directly. There is in portfolio funding, funders can fund law firms directly when there's a portfolio of three or more cases, it tends to be our approach. There are recoveries collateralized just by the law firms, contingent share in those cases, we don't get paid from their hourly fees. But if they have three cases on a contingency, we can provide capital directly to law firm, collateralized just by their contingent shares. That's what we call law firm portfolio funding. Their courts have to make sure that their judgment isn't impacted by that funding arrangement, which is why we require three or more cases in those portfolios to mitigate that concern. Now some jurisdictions have taken issue with that type of funding, the New York City Bar Association recently issued an opinion contending that that those types of arrangements can be violative of model rule 5.4. However, they subsequently because a lot of people took issue with that ruling for that decision, even though it was advisory, they've come out with subsequent recommendations, that would call for a change in rule 5.4, where those arrangements would not be deemed a

violation of fee splitting. And so segwaying to fee splitting, on slide 31, we talked about the issues that I was just going over there, listing the bullet points to be careful of when you're dealing with an individual case funding, not ceding control to the funder, having a separate group, maybe having separate counsel reviewed the funding agreement or if not, that the client is aware that there may be some

48:45

issues of partiality there, you know, and that there be a knowing waiver by the client have any concerns of partiality, because as a as a lawyer, perhaps, I'm incentivized to get funding so that you'll hire me to bring the case? Well, if the client knows that I have that incentive, but by the same token, I believe I can be impartial and I will be impartial. Well, the client has the ability to waive any conflict argument there, but it should be unknowingly ruined. So it's important to counsel your client about that and and band provide the option that the client may get their own counsel to negotiate the funding agreement. And some law firms insist on that. But but many others feel confident that with a knowing and voluntary waiver, that they can also negotiate the terms of the funding agreement for their client with the litigation funder touched on fee splitting and but but there's more notes about this in the deck on slides 32 and through 34. discussing whether or not funding of a law firm directly are law firms portfolio directly constitutes fee splitting. And that is an important analogue here. So I worked in a plaintiffs firm and like many firms, we had a credit line and So if a law firm has a credit line, collateralized by all of its assets, and you're a contingency law firm, well, guess what you're sharing your contingency fees with the lender that provided you that facility. The difference between that facility and what we provide from portfolio funding is, when we're funding a law firms portfolio, our return only comes from the cases in that portfolio. And so if those cases are all unsuccessful, well, I'm not going to reach to the assets of the law firm their property, their bank accounts, and so forth. Like I'm done, I the funder only gets paid from those cases where Citibank, if your cases are unsuccessful, well, they might reach it. And I don't mean to single out Citibank, any, any bank. If those cases aren't successful, they're going to look to the assets of the law firm itself, and maybe even the partners own assets. So that's a big distinction there between portfolio funding from a litigation finance company, and funding from a bank or other credit provider. So, key takeaways, as we come to the end of this presentation, be aware of the different rules and laws in states pertaining to champerty and maintenance and usury, because they vary from state to state. And most states allow for commercial litigation, finance, some don't. Others are a little bit of a gray area, and you want to make sure you're navigating those rules, very sensitive to attorney client and work product issues. err on the side of non disclosure, if it's attorney client, make sure you have a non disclosure agreement in place. If you're dealing with work product material, in any type of funding arrangement, as the lawyer, make sure that you're maintaining your independent professional judgment, look at the rules that are identified earlier in the slide deck. But just in general, feel comfortable with that be cognizant of fee splitting, and issues that can arise. And again, with

portfolio funding, or depending on your jurisdiction, or what have you monitor the developing regulation of litigation, finance, I've mentioned a couple things going on in Congress, that some of the courts are looking at potential amendments to the federal rules. And be aware of the discovery issues that can arise and if you are representing somebody who's received a subpoena or whose work from home, litigation, finance documents are being sought. Be aware of the arguments that exist, such as those that are identified in military Caterpillar and the other cases cited here. Relevance arguments, in addition to the privilege arguments that I that I mentioned, I always have a nondisclosure agreement. And because you never hurts, and you can always help. So but of course, if you have any questions about any of the above, obviously, it's what what I do, it's what we do something that interests me, please feel free to reach out directly to me, you can email me my information is provided on the deck here, but I'll say as well, that j Batson at Omni bridgeway comm you can call us at 212-488-5331. We're happy to, you know, give you our thoughts on any ethical issues that arise regardless of whether or not you're actually seeking funding. Thank you.