

# Guidelines for litigation loans

There are only a small number of litigation lenders in Australia. While the Queensland Law Society's Ethics Committee is aware of three, there may be more.

At one time, a number of banks provided litigation loan facilities. They might still provide such facilities for particular clients but they no longer openly market them as a product available to the general public.

## What is a litigation loan?

Typically, a litigation loan is a loan to a client, by way of a payment to a law practice trust account, for the purpose of funding the client's legal expenses of litigation. It might be restricted to simply covering the disbursements, or it might cover both the law practice's professional fees and the disbursements.

Litigation lenders are generally prepared to lend money to clients in respect of personal injury, family law and estate administration matters.

The litigation lender will make its own assessment of the strength of the client's case and will only advance money to the client if it assesses the client as having good prospects of success. The lender may require the client to give a mortgage over property but will generally not require security, instead relying on an irrevocable authority signed by the client to repay the loan from the proceeds of the action.

Due to the fact that the litigation lender has a relatively high degree of risk, there is a high cost to the client for the loan. Generally, interest rates are more than 25% a year.

## Can a law practice recommend that a client take out a litigation loan?

There is nothing wrong with a practitioner alerting a client to the possibility that the client can get a litigation loan to fund their legal costs. Nor is there anything wrong with a practitioner telling a client that the practitioner will not represent the client unless the client pays the practitioner's costs on a monthly, quarterly, or other time period basis, and that a litigation loan will enable the client to do this.

Rule 7 of the Law Society of New South Wales Revised Professional Conduct and Practice Rules provides that a practitioner who has assisted a client to obtain a litigation

loan must not withdraw any money from the litigation loan account except for the purpose of reimbursing the practitioner for a disbursement already paid by the practitioner or paying, on behalf of the client, any amounts due for payment to a third party.

While there is no similar rule in Queensland, it is noted that Dal Pont, in his book, *Law of Costs 2009*, said: "A lawyer who is a party to an arrangement with a lending institution for the advance of funds to the lawyer on the client's behalf is placed in a situation of a direct conflict of interest, at least when seeking to withdraw funds from the litigation loan account for costs not yet due, and may face a conflict of interests in advising the client in relation to the loan itself."

## Duty to make full disclosure to the client

The Ethics Committee's view is that there is a direct conflict of interests if the practitioner intends to withdraw money from the litigation loan account for the payment of professional fees and it is absolutely essential, when advising a client that it is possible for a client to obtain a litigation loan (even when the practitioner is not intending to withdraw money from the litigation loan account to pay professional fees), that the law practice make the following disclosures to the client:

1. Other law practices may be prepared to act for the client on a speculative basis, such that it will not be necessary for the client to obtain a litigation loan.
2. Litigation lenders charge a very high interest rate.
3. It may be cheaper for the client to obtain a conventional loan from a financial institution to fund the litigation.
4. The decision as to whether to take out a litigation loan is the client's decision and the law practice has not made a recommendation to the client as to whether the client should do so.
5. The client should obtain independent legal advice before entering into a litigation loan agreement (the Legal Practice Tribunal determined in the matter of *Legal Services Commissioner v Dempsey* [2009] LPT 20 that a solicitor has such a duty).
6. The client should consider obtaining independent financial advice before entering into a litigation loan agreement.

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