

Practical Tips For Presenting Your Case To Litigation Funders

By **Cindy Ahn, Justin Maleson and Casey Grabenstein** (June 1, 2020, 5:56 PM EDT)

The awareness and use of litigation finance have grown rapidly in recent years due to its many benefits, and the current COVID-19 environment has further increased interest, as even more companies and law firms explore the potential use of funding.

Because the benefits are already well-documented, this article instead focuses on providing practical guidance to attorneys seeking to better position their cases for success in obtaining funding, by offering perspectives from both the attorney seeking funding and the litigation funder.

Every Rose Has Its Thorns: Don't Hide the Challenging Aspects of Your Case

Every litigator knows that litigation success starts with establishing credibility and trust. This is true in the courtroom, and it is true when seeking litigation funding.

In the funding context, this is important because (1) funders make nonrecourse investments, which means they receive a return only if a case is successful, and (2) funders are passive investors with no control of the cases they invest in. As a result, when deciding whether to invest millions of dollars to fund a case, trust is paramount.

From a funder's perspective, the best way for a lawyer to build trust is by being candid when assessing the strengths and weaknesses of the case and potential damages (more on this in the next section), including the challenges counsel anticipates and strategies for overcoming those challenges.

Funders understand that no case is perfect and that unexpected developments arise in every case. Thus, having an opportunity upfront to understand and evaluate a lawyer's global strategy and candor in acknowledging and addressing potential weaknesses can provide valuable insight into how the attorney will respond when the unexpected inevitably occurs (which is critical given the passive role a funder plays when funding a litigation).

From an attorney's perspective, proactively addressing the challenging aspects of your case provides a



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great opportunity to showcase your preparedness, creativity and advocacy, thus helping to better position your case for obtaining funding. Additionally, an often-overlooked benefit of going through the funding process is that it provides counsel a unique opportunity to get (free) insight from unbiased former litigators with no preconceived notions about the case.

And, because communications with a funder are protected by the nondisclosure agreement entered into at the outset of the relationship, the funding process provides a safe space to stress-test potential arguments, which may shed light on creative ways to address issues that could arise over the course of the litigation.

Be Realistic About Damages: "Billions" May Be a Good TV Show, But It's a Bad Damages Estimate

One mistake that attorneys and claim owners commonly make when presenting a case to a funder is focusing almost exclusively on liability and giving short shrift to the damages analysis. While the merits are obviously critical, this unbalanced approach sometimes leads to a more aspirational damages estimate that falls apart when subjected to scrutiny.

From a funder's perspective, unusually high damages valuations often lack practical grounding and strong factual and legal bases, thus raising concerns that counsel (and/or her client) may have an unrealistic view of the value of the case. This may cause a funder to pass on an otherwise viable opportunity. Moreover, our experience has been that when counsel devotes the same level of attention to liability and damages, it results in a more accurate assessment of potential damages, which helps to better set everyone's expectations and makes the case more appealing to a funder.

As attorneys, we are accustomed to presenting aggressive (or even ultra-aggressive) damages numbers when communicating with third parties, so the idea of presenting a conservative damages estimate to a funder may seem counterintuitive. But while the aggressive approach may make sense with opposing counsel, it makes less sense when pitching a case to a funder, whose job is to identify good investment opportunities by assessing not only the merits of the case, but also the claim owner's and attorney's expectations.

For example, if the claim owner has inflated expectations about the value of the case, a funder may hesitate to fund the matter because it raises the specter that the claim owner could forego an otherwise favorable settlement offer. And while ultra-aggressive damages numbers may be theoretically available, the likelihood of recovering them through a settlement — or even at trial — is exceedingly rare. Simply put, one of the primary lessons learned from working through the funding process is that (fairly or unfairly), funders often equate unusually high damages numbers with unrealistic expectations.

Don't Stop Believin' ... Unless It's a Bad Case

From a funder's perspective, attorneys should only present cases they believe in. Contrary to certain ill-founded beliefs, funding is not an avenue to pursue longshot (or even mediocre) claims on someone else's dime. Rather, a core tenet of third-party funding is that it helps level the playing field, thus ensuring that meritorious claims are decided on the merits and not the financial strength of the parties.

From an attorney's perspective, there are a couple key points to keep in mind.

First, funders conduct extensive diligence when deciding whether to fund a case, thereby making it highly likely that weaknesses will be uncovered.

Second, while the funder takes on the lion's share of the financial risk, it is important to remember that the law firm also bears some of the risk. In particular, most funders require litigation counsel to share risk through a reduced-fee arrangement, which represents the law firm's skin-in-the-game, and aligns all parties' interests. In exchange for litigating the case at a reduced rate, the law firm receives an upside stake in the outcome of the case, which gives the firm an opportunity to earn significantly more than standard rack rates in the event of a favorable outcome.

So, from an attorney's standpoint, it is important to seek funding only for cases you truly believe in because tethering your firm to years of reduced-rate litigation with a low probability of success (or realization) may lead to jeopardizing internal relationships.

Can You Handle The Truth? Five Tips for Presenting Your Case

When you reach the point where you have decided to seek funding and are ready to present the case to a funder, here are some practical tips:

1. Be prepared to sign an NDA before engaging in any substantive discussion about your case.

Courts across the country have consistently ruled that attorney work product disclosed to a litigation funder is protected and off-limits from discovery, as discussed in a recent **Law360 guest column**.^[1] Thus, best practice dictates entering into an NDA at the beginning of the relationship before sharing any nonpublic information.

2. Prepare a comprehensive packet.

Every funder will need to conduct its own diligence in deciding whether to invest in your case. Though not strictly necessary, a well-prepared packet will help expedite the diligence process, and while the contents will differ depending on the type of case being presented, every packet should include at least the following: (1) a budget for legal fees and expenses; (2) a damages analysis; (3) key filings and orders, if any; and (4) core fact documents (including claim charts in patent cases).

3. Be prepared for follow-up requests.

After receiving the initial packet, a funder will typically reach out to the attorney to request additional information and clarification, and to schedule a follow-up call. You should expect substantive and often technical questions in any follow-up calls.

Funders certainly do not begrudge lawyers for requesting additional time to think through and prepare more fulsome responses to thorny issues, but when an attorney is unable to answer basic questions or repeatedly defers to another (absent) attorney, this may raise a red flag.

4. Be flexible — different funders have different requirements and processes.

Not surprisingly, different funders operate differently. As with most things, the best way to position yourself for success is to try to understand the funder's specific requirements and be responsive to specific requests, to the extent possible. You will undoubtedly have questions as you go through the diligence process, especially if it's your first time working with a particular funder. When questions arise, don't hesitate to pick up the phone because a five-minute call can often save significant time and help

avoid spinning your wheels or going down unnecessary rabbit holes.

5. A final word from counsel — choose your funder wisely.

All funders are different. Those differences range from how each funder is capitalized (e.g., public versus private), to minimum investment sizes, to the types of cases they invest in (e.g., some funders avoid patent cases), to their diligence processes (e.g., some funders take a deep dive into the diligence before they feel comfortable issuing a term sheet and requesting exclusivity, while others issue term sheets early in the process and then dive into the diligence).

Less talked about but equally (and possibly more) important is that the funder should be a good fit for you and your client. This is critical because the relationship with a funder does not end upon signing a funding agreement. And while there are many factors to consider depending on your client and case, here are some things to consider when advising your clients about how to select a funder.

First, while a funder's most obvious contribution is money, a funder should add value beyond capital. For example, as mentioned above, a good funder brings an unbiased perspective to your case by drawing on his or her own litigation experience, which can be helpful in identifying ways to make your case even stronger.

Second, a funder should understand your practice, your clients, and your relationships with clients and colleagues. Armed with that understanding, a good funding partner can help with business development by identifying other potential funding opportunities among your existing client base, as well as other ways to use litigation funding to expand your practice.

Finally, you should feel comfortable with the funder and confident recommending him or her to your clients. This may sound obvious, but as noted above, because the relationship does not end with the signing of a funding agreement, you will want to have a good working relationship with the funder.

We hope that armed with these practical tips, you will go boldly into the world of litigation finance.

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