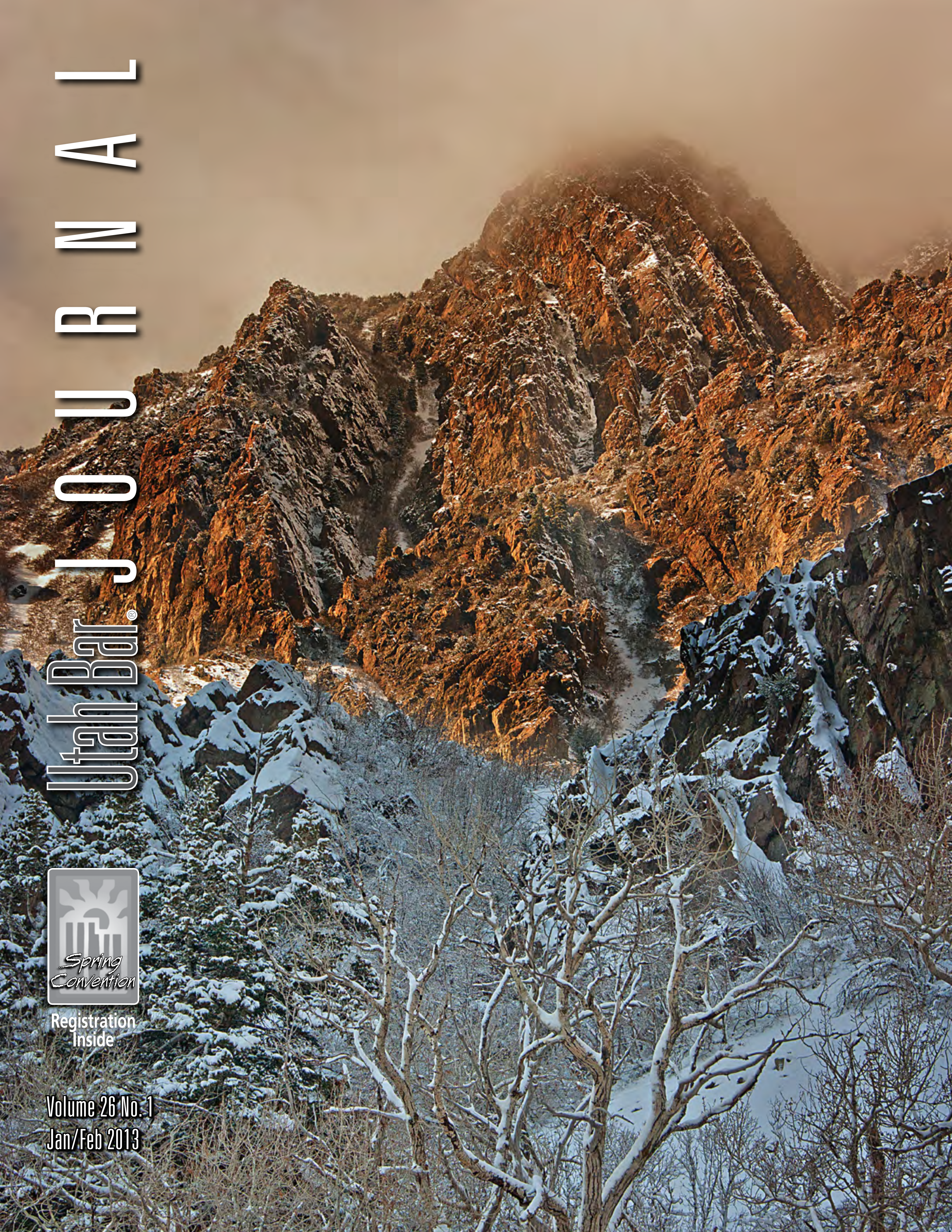

Utah Bar® JOURNAL

Spring Convention

Registration Inside

Volume 26 No. 1
Jan/Feb 2013

Using Other Peoples' Money to Finance Litigation

by Keith A. Call

Last week I drove my wife's minivan (yes, minivan) across town to visit her elderly parents with our kids. After a nice visit, I got back in the minivan and noticed that my sweetheart left me with NO GAS! The DTE (distance to empty) indicator said we were down to our last seven miles. We drove straight to the Maverick, whereupon I realized I had forgotten my wallet and only had four quarters in the ash tray. Four quarters was not even enough to get any gas to the end of the gas pump hose.

I had only one option: return to my in-laws' house, hat in hand, and ask for a loan. It surely was not a big deal, except it gave me flashbacks to twenty-four years ago. My wife's parents were extremely generous to us, freely lending (well, giving) us a car, food, and cash. Though I now recognize their generosity really was free, in my young zeal I felt I was somehow compromising my independence. I thought their "loans" came with "strings." For example, if they were paying for the car and the gas, it seemed we couldn't refuse their requests for weekend visits, even if we thought we had "better" things to do.

"[S]pecific terms of a proposed loan arrangement can make a big difference on whether or not the loan is ethical."

Like today's gas prices, litigation is expensive. Experts are expensive. Depositions are expensive, especially if travel is involved. And let's not even start on e-discovery. Since most of our in-laws are not likely to fund these costs, can a lawyer ethically borrow from other third parties to finance them? Do such loans come with strings that could compromise the lawyer's independent professional judgment? This issue is especially important for lawyers who take cases on a contingent fee basis.

What Is Allowed and What Is Not

Several rules are potentially implicated, most notably Rule of Professional Conduct 5.4(a): "A lawyer shall not share legal fees with a nonlawyer" (except for four exceptions that do not apply here).

The Bar's Ethics Advisory Opinion Committee has weighed in on this issue at least twice. Utah Bar Ethics Advisory Op. Comm., Op. 97-11 (1997); Utah Bar Ethics Advisory Op. Comm., Op. No. 02-01 (2002). In Opinion No. 97-11, the Committee opined that a lawyer *cannot* ethically finance the costs of a contingent fee case in which a non-recourse promissory note is secured by the attorney's interest in the contingent fee. The Committee reasoned that the lawyer's judgment could be impaired, for example, when drawing up a budget for proposed expenses or when recommending that a settlement offer be accepted or rejected.

In Opinion No. 02-01, the Committee *approved* a financing arrangement in which the lawyer was obligated to repay the loan *regardless* of the outcome of the case and the client was obligated to reimburse the lawyer for the cost of the loan. The Committee recognized that the third-party lender had no interest in the lawyer's contingent fee award because the lawyer was on the hook for repayment regardless of the outcome. Similarly, the client's obligation to repay litigation costs (including loan costs) was not contingent. The Committee found this arrangement to be mutually beneficial to both the lawyer and the client without compromising the lawyer's independent professional judgment.

From these two opinions, we learn that the specific terms of a proposed loan arrangement can make a big difference in whether

KEITH A. CALL is a shareholder at Snow, Christensen & Martineau, where his practice includes professional liability defense, IP and technology litigation, and general commercial litigation.

or not the loan is ethical. If you are contemplating a third-party loan to finance a case, take the time to read Opinions 97-11 and 02-01 carefully. The guiding principal is found in the purpose of Rule 5.4, which is "to protect the lawyer's professional independence of judgment." Utah R. Prof'l Conduct 5.4, cmt. 1.

Other Warnings

Keeping your independent judgment is not the only concern. *See, e.g., New York City Bar Ass'n, Comm. on Prof'l Ethics*, Formal Op. 2011-2 (2011). A common criticism of third-party litigation financing is its excessive cost. A lawyer must give her client candid advice. Utah R. Prof'l Conduct 2.1. Advise your clients to consider the costs of the loan, as well as possible alternatives.

Do not let any self-interest you may have cloud your advice. Referral fees from litigation financing companies can be dangerous. Accepting such a fee would be unethical if it prevents you from rendering candid and independent advice.

Third party financing arrangements can also jeopardize client confidentiality and the attorney-client privilege. This risk arises from provisions in loan agreements that require the lawyer to disclose or report on the merits or progress of the case. The safest course is to avoid any requirement for the disclosure of client confidences.

You should also be wary of financing agreements that require the lawyer to inform the lender prior to making or responding to settlement offers or taking other similar steps. Such notice provisions raise the specter that the lender will try to exercise its influence to direct the course of the lawsuit, a role that is reserved for the client, as guided by the lawyer's independent and candid advice.

Conclusion

Like higher gas prices, litigation financing appears to be a growing trend. Used properly, it can have a valuable role in providing access to the courts for clients and financial flexibility for lawyers. Be careful, however, because discerning between a myriad of ethical and unethical financing practices is difficult.