ILFA | INTERNATIONAL LEGAL FINANCE ASSOCIATION

May 21, 2021

Via E-Mail: localrules@njd.uscourts.gov

William T. Walsh
Clerk of Court
United States District Court for the District of New Jersey
Martin Luther King Jr. Federal Bldg. & U.S. Courthouse
50 Walnut Street
Newark, NJ 07101

Re: Comments Regarding Proposed New Local Civil Rule 7.1.1

Dear Mr. Walsh:

The International Legal Finance Association ("ILFA")[1] respectfully submits the following comments on the United States District Court for the District of New Jersey's proposed new Local Civil Rule 7.1.1 (the "Proposed Rule") regarding disclosure of third-party litigation funding. We welcome the opportunity to participate in public discourse regarding the Proposed Rule and contribute our views regarding the best interests of the District of New Jersey, as well as its constituent litigants and counsel.

I. Introduction

Over the past several years, ILFA's members have been intimately involved in public policy efforts related to the commercial legal finance industry. Such efforts include deliberations by the Advisory Committee on Civil Rules of the Committee on Rules of Practice and Procedure (the "Civil Rules Advisory Committee"),[2] the Association of the Bar of the City of New York (the "NYCBA"), and the Uniform Law Commission (the "ULC").

While ILFA does not oppose reasonable disclosure requirements, we believe that federal disclosure requirements should be appropriately tailored and consistent with the Federal Rules of Civil Procedure and applicable law. Despite highly politicized efforts to mandate disclosure in various forms, careful examination of the topic has yielded a consensus view among neutral

[1] Founded in September 2020, ILFA is the only global association of commercial legal finance companies. ILFA is a non-profit trade association that promotes the highest standards of operation and service for the commercial legal finance sector, including respecting duties to the courts, avoiding conflicts of interest, and preserving confidentiality and legal privilege.

[2] The Civil Rules Advisory Committee is within the Judicial Conference. Accordingly, "[w]hile the policy conclusions of the Judicial Conference may not be binding on the lower courts, they are at the very least entitled to respectful consideration." *See Hollingsworth v. Perry*, 558 U.S. 183, 193-94 (2010).

organizations – including the Civil Rules Advisory Committee and others – that existing disclosure mechanisms are adequate for the vast majority of federal cases.

Indeed, federal courts across the country have issued dozens of opinions analyzing disclosure of financing under Rule 26(b)(1), which have yielded an ever-growing body of precedent holding that disclosure is unwarranted absent special circumstances. Moreover, where disclosure is deemed appropriate, certain courts have exercised their inherent authority to implement orders that narrowly limit disclosure in a manner that promotes judicial economy, follows Rule 26's requirements of relevance and proportionality, and respects attorney-client privilege and work-product protection.

The current draft of the Proposed Rule not only deviates from this precedent but also appears to be a solution in search of a problem. We are unaware of any issue arising in any federal court – D.N.J. or elsewhere – that would justify the Proposed Rule's expansion of existing disclosure devices or obligations. Nor is it clear what the Proposed Rule intends to accomplish. While styled as a local rule supplementing Rule 7.1, various elements– including the nature and scope of disclosure – would require parties to divulge information bearing no relation to issues of judicial disqualification or recusal. References to a funder's "approval" and "authority" presumably aim to address champerty, an increasingly antiquated common law doctrine that New Jersey law does not even recognize. Other attributes of the Proposed Rule have no apparent intention other than inviting discovery into the terms of financing agreements, which courts have almost universally accorded work-product protection.

Although the purpose of the Proposed Rule is unclear, we note that its adoption would undermine the stated goals of the District of New Jersey Lawyers' Advisory Committee (the "LAC") to promote "consistency" and "benefit the public, the bench, and the bar"[3] in the wake of the *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig.* Decision ("*Valsartan*").[4] On the contrary, even without automatic disclosure, courts, counsel, and litigants regularly bear burdens associated with frivolous motion practice initiated by the mere suspicion that a party has received financing. In it is current form, the Proposed Rule would only compound that problem. As an effective amendment to parties' initial disclosure obligations under Rule 26(a)(1)(A), a party's compliance with the Proposed Rule would not end adversarial inquiries into a party's use of financing. Instead, it would serve as a starting point to launch satellite litigation concerning an issue that an overwhelming majority of courts have found irrelevant to the parties'

[3] *See* New Jersey Law Journal, *Follow the Money? Rule Would Require NJ Lawyers to Disclose Litigation Funding*, April 23, 2021.

[4] 405 F. Supp. 3d 612, 615 (D.N.J. 2019). Aside from *Valsartan*, ILFA is not aware of any instance in which the District of New Jersey has addressed issues related to the disclosure of financing.

claims and defenses. Such speculative motion practice would necessarily require the same case-by-case analysis undertaken by the District of New Jersey in *Valsartan.*

II. Issues Related to the Proposed Rule

ILFA submits that several aspects of the Proposed Rule warrant further consideration. *First*, the Proposed Rule departs from the views of various bodies that have extensively studied disclosure of financing. The LAC should share its rationale for the Proposed Rule so that the public may evaluate the grounds for imposing requirements that others have deemed unsound. *Second*, the Proposed Rule is unnecessary and would result in burdens that far outweigh any theoretical benefits. Unless modified, the Proposed Rule would incite needless motion practice concerning financing, thus creating court congestion and increasing the cost of litigation. *Third*, to the extent the Proposed Rule seeks to address issues related to conflicts of interest, class actions, or the doctrine of champerty, it is misplaced and/or overbroad. *Fourth*, the Proposed Rule improperly diminishes the scope of work-product protection and arguably violates the Rules Enabling Act. *Finally*, the Proposed Rule contains multiple ambiguities that would require clarification to enable proper compliance.

A. The Proposed Rule Deviates From Other Rulemaking Bodies' Recommendations Regarding Disclosure of Financing

Various rulemaking bodies have evaluated whether it is appropriate to require disclosure of financing, including the Civil Rules Advisory Committee, the United States Senate Judiciary Committee (the "Senate Judiciary Committee"), the NYCBA, and the ULC. As discussed below, each has extensively studied this issue and declined to recommend action to force disclosure, whether pursuant to an amendment to Rule 7.1, Rule 26(a)(1)(A), or otherwise. In each of these scenarios, the rulemaking body sought the views of commercial legal finance companies and other stakeholders in order to gather data and examine the likely impact – and the possible unintended consequences – of the proposal being considered.

We understand that the LAC conducted its own study in developing the Proposed Rule but did not seek outside input from those who would be affected by the imposition of such a rule. Moreover, the results of that study – and how they might differ from those of others that have studied this issue – are unknown. Without prejudice to the other issues raised in this submission, ILFA respectfully urges the LAC to share its perspective so that stakeholders may better understand the reasoning underlying the Proposed Rule and provide informed views.

1. *The Civil Rules Advisory Committee*

Efforts before the Civil Rules Advisory Committee to amend the Federal Rules of Civil Procedure to mandate disclosure have been persistent yet unsuccessful. In 2014, 2015, 2017, 2018, and 2019, the United States Chamber of Commerce's Institute for Legal Reform (the "Chamber")

lobbied the Civil Rules Advisory Committee to force disclosure of funding arrangements in all civil cases through an amendment of Rule 26(a)(1)(A). After multiple in-depth studies of the topic, including the creation of a subcommittee that undertook a roadshow across the country to examine the disparate views on the topic at several academic conferences, the Civil Rules Advisory Committee has repeatedly declined to recommend amending Rule 26 to force disclosure.

For instance, in 2014, the Civil Rules Advisory Committee's reporter stated that "a disclosure regime that applies in every case except those exempted by Rule 26(a)(1)(B) might seem far too broad to address the concern[s] raised."[5] Further, in his Report to the Standing Committee on Rules of Practice and Procedure, the Honorable David G. Campbell remarked that "judges currently have the power to obtain information about third-party funding when it is relevant in a particular case."[6]

In 2016, the Civil Rules Advisory Committee again declined to take action when the Chamber renewed its proposal. The Committee acknowledged the Chamber's "suggestion follow[ing] up an earlier submission that the Committee should act to require disclosure of third-party financing arrangements."[7] Nonetheless, "[t]he Committee decided, as it had earlier, that this topic should remain open on the agenda without seeking to develop any proposed rules now."[8]

In its most recent examination of the topic in June 2019, the MDL Subcommittee of the Civil Rules Advisory Committee declined to make any proposals – including proposals to supplement Rule 7.1 regarding recusal decisions – stating:

> The MDL Subcommittee continues to study third-party litigation funding (TPLF), including various proposals for disclosure. All that is clear at the moment is that the underlying phenomena that might be characterized as third-party funding are highly variable and often complex. They continue to evolve at a rapid pace as large third-party funders expand dramatically. It seems clear that more study will be required to determine whether a useful disclosure rule could be developed. Nor does it seem likely that the several advisory committees will soon be in a position to frame possible expansions

[5] *See* Advisory Committee on Civil Rules, Rule 26(a)(1)(A): Reporter's Memorandum & Suggestion, 14-CV-B at 10 (Oct. 30-31, 2014).
[6] *See* Hon. David G. Campbell, Report of Advisory Committee on Civil Rules, at 4 (Dec. 2, 2014).
[7] *See* Advisory Committee on Civil Rules, April 14, 2016 Minutes, at 35 (Apr. 14, 2016).
[8] *Id.*

> of disclosure requirements designed to support better informed recusal decisions.[9]

On December 21, 2020, the Chamber again urged the Civil Rules Advisory Committee to take various steps toward requiring disclosure.[10] Notably, the Civil Rules Advisory Committee did not even address the issue during its April 23, 2021 meeting.[11]

2. *The Senate Judiciary Committee*

Attempts to pass federal legislation to force disclosure have likewise failed. The Chamber-supported Litigation Funding Transparency Acts of 2018 and 2019 would have required the disclosure of the identities of funders and the funding agreements in a class action or multidistrict litigation.[12] No version of the bill has ever progressed beyond referral to the Senate Judiciary Committee.[13]

3. *The New York City Bar Association*

In 2019, the NYCBA formed a working group "to study TPLF and to provide a report on observations and recommendations regarding the practices utilized in connection with litigation funding."[14] The working group included "a range of interested professionals, including private practitioners, ethics professors and specialists, litigation funding executives, a former federal judge, in-house counsel, ADR specialists, and representatives from several of the City Bar's standing committees."[15]

In February 2020, the working group published a report that devoted approximately thirty (30) pages to this issue and concluded that there was not support for "any mandatory disclosure requirement with respect to the funding of commercial litigation" or "discoverability of the details of funding arrangements absent special circumstances."[16] With respect to "recusal and

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[9] *See* Hon. John D. Bates, Report of the Advisory Committee on Civil Rules, at 2-3 (June 4, 2019).
[10] *See* Letter from the Chamber and Lawyers for Civil Justice to Rebecca A. Womeldorf (Dec. 21, 2020).
[11] *See* Advisory Committee on Civil Rules, Meeting Agenda (Apr. 23, 2021).
[12] *See* https://www.congress.gov/bill/115th-congress/senate-bill/2815/text; https://www.congress.gov/bill/116th-congress/senate-bill/471/text.
[13] *See* https://www.congress.gov/bill/115th-congress/senate-bill/2815/actions; https://www.congress.gov/bill/116th-congress/senate-bill/471/actions. We note that the Litigation Funding Transparency Act was reintroduced in March of this year. *See* https://www.grassley.senate.gov/news/news-releases/lawmakers-reintroduce-litigation-funding-transparency-bill.
[14] *See* The New York City Bar Association Working Group on Litigation Funding, Report to the President (Feb. 28, 2020).
[15] *See id*. at 1.
[16] *See id.* at 72.

disqualification decisions," the working group found that "requiring a blanket disclosure in all funded cases of the existence and identity of funders appears overbroad."[17]

4. *The ULC*

The ULC[18] has twice formed committees to study this issue and declined to proceed with proposing uniform state legislation on both occasions. As recently as July 2020, the ULC noted that "the topic remains highly politically charged" and "the committee did not receive reports of a lack of uniformity [concerning legal finance] causing any problems."[19]

B. The Proposed Rule Is Unnecessary and Would Cause Undue Burdens

As set forth below, the Proposed Rule is unnecessary in light of Rule 26(b)(1) and the inherent authority of courts to manage discovery and would create superfluous disclosure obligations. Moreover, by mandating automatic forced disclosure to all parties across all types of litigation, the Proposed Rule would invite fishing expeditions in every funded case. Courts would then be obliged to analyze whether disclosure is appropriate, which would lead to increased expenditure of judicial and party resources on an issue adjudged to be irrelevant in nearly every instance.

1. *Authorities Exist for Adequately Addressing Disclosure*

a. **Rule 26(b)(1)**

Legal finance is not a new phenomenon. While it has been a popular topic of discussion in recent years, an increase in attention should not equate to an increase in discoverability. In each and every case, courts can, and must, conduct a relevance and proportionality analysis. No local rule can obviate this requirement.[20] The District of New Jersey will continue to analyze issues surrounding the disclosure of financing under Rule 26(b)(1), just as it did in *Valsartan*, regardless of whether the Proposed Rule is adopted.

b. **The Court's Inherent Authority**

Judges may also exercise their inherent authority to order disclosure of financing where appropriate. Two notable examples of this inherent authority in use are the *Opioids* and *Zantac*

[17] *See id.* at 73.
[18] Although the ULC proposes uniform state law legislation, its mission involves "strengthen[ing] the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states." *See* https://www.uniformlaws.org/aboutulc/overview.
[19] *See* Cassandra Burke Robertson, Memorandum to Study Committee on Third-Party Funding of Litigation and Arbitration (May 20, 2020).
[20] *See* Rule 83(a)(1) ("A local rule must be consistent with—but not duplicate—federal statutes and rules").

MDLs.[21] In both cases, the courts required specific disclosure on *ex parte* and *in camera* bases. These sensible approaches balanced the courts' obligation to inquire into financing arrangements for specific, narrow purposes against the reality that funding issues are rarely relevant to the parties' claims and defenses. Judges within the District of New Jersey already may elect to employ similar mechanisms as they deem fit, whether or not the Proposed Rule is enacted.[22]

In the *Opioids* MDL, Judge Dan Polster had reason to believe that attorneys in the MDL had or were interested in receiving funding. He issued a court order explicitly stating that "[a]bsent extraordinary circumstances, the Court will not allow discovery into [funding]."[23] Instead, he required *ex parte* disclosure of funding arrangements for *in camera* review consisting of affirmations by counsel and financier that the funding does not:

> (1) create any conflict of interest for counsel,
> (2) undermine counsel's obligation of vigorous advocacy,
> (3) affect counsel's independent professional judgment,
> (4) give to the [funder] any control over litigation strategy or settlement decisions, or
> (5) affect party control of settlement.[24]

Similarly, in the *Zantac* MDL, Judge Robin Rosenberg issued a pretrial order in connection with MDL leadership applications requiring the provision of affidavits from counsel for *in camera* review.[25] The order required attorneys utilizing funding to respond to the following prompts:[26]

> (i) Does the litigation funder have any control (direct or indirect, actual or apparent or implied) over the decision to file or the content of any motions or briefs, or any input into the decision to accept a settlement offer?
>
> (ii) Does the financing (1) create any conflict of interest for counsel, (2) undermine counsel's obligation of vigorous advocacy, (3) affect counsel's independent judgment, (4) give to the lender any control over litigation strategy or settlement decisions (as to either the

[21] *See In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 U.S. Dist. LEXIS 84819 (N.D. Ohio May 7, 2018); *In re Zantac (Ranitidine) Prods. Liab. Litig*., No. 2924, 2020 U.S. Dist. LEXIS 62805 (S.D. Fla. Apr. 3, 2020).
[22] Indeed, the Proposed Rule itself acknowledges the court's inherent authority, providing in Section (c) that "[n]othing herein precludes the Court from ordering such other relief as may be appropriate."
[23] *See In re Nat'l Prescription Opiate Litig.*, 2018 U.S. Dist. LEXIS 84819, at *46.
[24] *See id.* at *45.
[25] *See In re Zantac (Ranitidine) Prods. Liab. Litig*., 2020 U.S. Dist. LEXIS 62805, at *40.
[26] The *Zantac* order also required disclosure of details concerning leadership applicants' personal and financial relationships with clients and parties.

> common benefit work done by counsel or work for individual retained clients), or (5) affect party control of settlement?
>
> (iii) Briefly explain the nature of the financing, the amount of the financing, and submit a copy of the documentation to the Special Master.[27]

Both the *Opioids* and *Zantac* orders were positively received as thoughtful and balanced methods to address disclosure. No record exists of either court taking issue with any aspect of any disclosed funding arrangement.

2. *The Proposed Rule Would Cause an Increase in Speculative Motion Practice, Burdening the Courts, Counsel, and Parties*

Beyond the fact that the Proposed Rule is unnecessary, its implementation would increase burdensome and speculative motion practice regarding legal finance. Across the country, unsupported conjecture concerning legal finance often inspires parties to demand disclosure. Such efforts are typically motivated by voyeurism and the desire to uncover prejudicial information. These efforts rarely succeed, and instead needlessly consume judicial and party resources.

One can only assume that the Proposed Rule will embolden movants' fishing expeditions, driving discovery disputes that compound court congestion and increase the cost of litigation. Disclosures pursuant to the Proposed Rule will give movants a starting place to propound document requests and interrogatories, ask deposition questions, and/or issue subpoenas to funders with increased frequency. Their efforts will be met with relevance, proportionality, and privilege objections. If unresolved, such objections will necessitate judicial intervention. As discussed above, judges presiding over such motions would invariably need to expend time and resources to determine whether the requested disclosure is appropriate under Rule 26, sometimes performing *in camera* review, given the sensitive nature of the documents in question. Motion practice will distract counsel and the judiciary from substantive case issues. Recipients of funding would also shoulder the burden through the need to finance increased legal fees.

To be clear, the facts surrounding how a party finances its litigation – whether self-funded, contingency, traditional bank loan, legal finance, or otherwise – are simply not relevant to the merits of the litigation in the vast majority of cases. Federal case law overwhelmingly holds that legal finance is outside the scope of permissible and proportional disclosure unless it is relevant to

[27] *See id.* at *40-41.

a particular case.[28] Furthermore, even in the rare circumstances where legal finance may be relevant, courts regularly deny disclosure on the basis of work-product protection.[29] In other words, in the exceptional case where cause for disclosure exists, that inquiry cannot be resolved without a Rule 26(b)(1) analysis. The Proposed Rule would not alter the need for or outcome of this analysis; it would merely promote the expenditure of increased resources on a topic that already receives excessive attention, given its marginal relevance, if any, to the merits of litigation.

The District of New Jersey is no exception to the overall federal trend against blanket disclosure. In *Valsartan*, the defendants moved to compel discovery related to plaintiffs' funding. The *Valsartan* court denied defendants' motion in a nineteen-page decision. In doing so, it "agree[d] with the plethora of authority that holds that discovery directed to a [party's] litigation funding is irrelevant," and held that "litigation funding is irrelevant to the claims and defenses in this case and, therefore, plaintiffs' litigation funding is not discoverable."[30] The court further found that "[e]ven if plaintiffs' litigation funding is marginally relevant, which is not the case, defendants' requested discovery would be denied because it is not 'proportional to the needs of the case.'"[31]

Although *Valsartan* did not state that "litigation funding discovery is off-limits in all circumstances," it held that "rather than directing *carte-blanche* discovery of plaintiffs' litigation funding, the Court will Order the discovery only if good cause exists to show the discovery is relevant to the claims and defenses in the case."[32] Despite "defendants rais[ing] a parade of

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[28] *See, e.g., AVM Techs., LLC v. Intel Corp*., No. 15-33-RGA, 2017 U.S. Dist. LEXIS 65698, at *8-9 (D. Del. Apr. 29, 2017) (finding litigation funding agreements to "have no relevance"); *Colibri Heart Valve LLC v. Medtronic CoreValve LLC, et al,* Case No. 8:20-cv-00847 (C.D. Cal. Mar. 26, 2021) (finding litigation finance documents not discoverable; defendant's "skepticism" that plaintiff's discovery responses were not accurate or complete did not demonstrate the requisite relevance of the funding documents to the claims and defenses in the matter); *MLC Intellectual Prop. LLC v. Micron Tech., Inc.*, No. 14-cv-03657, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019) (finding that defendant's attempts to establish relevance based on potential bias and conflicts of interest concerns were speculative); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 724 (N.D. Ill. 2014) (rejecting discovery into litigation funding arrangements; noting defendant's assertion of relevance lacked "any cogency"); *VHT, Inc. v. Zillow Group, Inc.*, No. C15-1096JLR, 2016 WL 7077235, at *1 (W.D. Wash. Sept. 8, 2016) (rejecting discovery into litigation funding arrangements absent "some objective evidence that any of Zillow's theories of relevance apply in this case").

[29] *See, e.g., Elm 3DS Innovations Ltd. Liab. Co. v. Samsung Elecs. Co. Ltd..*, No. 14-1430-LPS, 2020 U.S. Dist. LEXIS 216796 (D. Del. Nov. 19, 2020) (finding some documents reviewed *in camera* to be "marginally relevant to the claims and defenses" yet "clearly prepared in anticipation of litigation" and "thus protected by the work product doctrine"); *Lambeth Magnetic Structures, LLC v. Seagate Technology (US) Holdings, Inc*., Nos. 16-538, 16-541, 2017 U.S. Dist. LEXIS 215773, at *15-16 (W.D. Pa. Jan. 18, 2018) (denying motion to compel funding materials because they were "undisputedly prepared in anticipation of the instant litigation and for the purpose of pursuing the litigation"); *Devon IT, Inc. v. IBM Corp.*, No. 10-2899, 2012 U.S. Dist. LEXIS 166749, at *2-3 (E.D. Pa. Sep. 27, 2012) (granting motion to quash subpoenas to funders where "there was no waiver of the attorney-client privilege or the work product doctrine").

[30] *See Valsartan*, 405 F. Supp. 3d at 615.

[31] *See id.* at 616.

[32] *See id.*

horribles that could or may arise from litigation funding agreement," the court denied the defendants' motion to compel because they "raised no nonspeculative basis for their discovery request,"[33] and "[s]peculation does not justify discovery."[34]

The *Valsartan* decision has been followed elsewhere within the Third Circuit. Last June, the District of Delaware addressed the disclosure issue in *United Access Techs., LLC v. AT&T Corp*.[35] Citing *Valsartan*, the court noted that "[d]iscoverability of litigation funding materials under Federal Rule of Civil Procedure 26 is a contested issue on which there is no binding precedent in the Third Circuit."[36] The *United Access* court accordingly determined that "close consideration of the subject matter in the disputed documents (*e.g.*, through *in camera* review) is a prudent approach."[37] Following its *in camera* review, the court held that the movants "failed to meet the threshold requirement to show that the litigation funding-related discovery [they] seek here is relevant."[38] That is because the materials reviewed "[did] not appear to be relevant to any issue in this case."[39]

ILFA understands that *Valsartan* was at least one factor influencing the LAC's recommendation of the Proposed Rule based on a belief that it would foster "consistency" and "benefit the public, the bench, and the bar."[40] It is true that the Proposed Rule would lead to consistent disclosure of the existence of funding and certain high-level details of the arrangement. However, such disclosure is unlikely to satisfy adversaries' desires for discovery. Instead, it will serve as a starting point, inspiring the pursuit of highly prejudicial and protected information in discovery, leading in turn to expensive and time-consuming motion practice, given the sensitive nature of the information sought.[41] For instance, movants regularly seek party and third-party discovery ranging from the funding agreement itself, to the litigation budget, to communications

[33] *See id.*
[34] *See id.* at 619.
[35] No. 11-338-LPS, 2020 U.S. Dist. LEXIS 103532 (D. Del. June 12, 2020).
[36] *See id*. at *3.
[37] *See id.*
[38] *See id.*
[39] *See id.*
[40] *See* n.3, *supra*.
[41] *See, e.g.*, *Fulton v. Foley*, No. 17-CV-8696, 2019 U.S. Dist. LEXIS 209585, at *8 (N.D. Ill. Dec. 5, 2019) (granting motion to quash subpoena to funder seeking "information and communications" related to funding agreement including "counsel's description of the case and counsel's assessment of the strengths and weaknesses of the case" on relevance and work-product grounds, noting that "[l]itigation funding communications are designed to be confidential. Otherwise, no counsel would ever memorialize on paper the relative merits and the chances of success of a piece of litigation and apply for litigation funding. Similarly, if litigation funding companies did not maintain confidentiality of documents provided by attorneys about their evaluation of the case, these companies would run out of clients fairly quickly.") (internal citation omitted).

with funders evaluating case merits and risks.[42] Indeed, the *Valsartan* movants sought much more than would have been disclosed under the Proposed Rule. Specifically, they endeavored to explore "the real party in interest," "whether plaintiffs have standing to sue," "plaintiffs' credibility and bias," "the scope of proportional discovery," "the scope of potential sanctions," and "the medical necessity and the reasonableness of plaintiffs' treatments."[43]

Thus, even if the Proposed Rule were in effect at the time of the *Valsartan* decision, the movants' desires for disclosure still would have compelled the court to conduct a case-specific analysis in light of Rule 26(b)(1)'s overarching relevance requirement. By requiring disclosure in every case and opening the door to "other disclosure" that is "necessary to any issue in the case," the Proposed Rule would encourage parties to make similar motions that, if precedent is any

[42] *See, e.g.*, *V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 306, 313-14 (D. Nev. 2019) (denying motion to compel "deposition testimony from several witnesses who refused to answer questions posed to them regarding attorneys' fees and litigation funding . . . given that the subjects are irrelevant and, therefore, beyond the scope of allowable discovery"); *Space Data Corp. v. Google LLC*, No. 16-cv-03260 BLF (NC), 2018 U.S. Dist. LEXIS 228050, at *5 (N.D. Cal. June 11, 2018) (denying motion to compel "production of Board minutes that discuss the potential funding" and "the deposition of [plaintiff's board member] who declined to answer questions about the potential funding" on relevance and proportionality grounds because "[e]ven if litigation funding were relevant (which is contestable), *potential* litigation funding is a side issue at best," "there is much discovery that would be more important in resolving the merits of this case," and "the burden of responding would outweigh its likely benefit to defendants"); *Benitez v. Lopez*, No. 17-CV-3827-SJ-SJB, 2019 U.S. Dist. LEXIS 64532, at *5 (E.D.N.Y. Mar. 14, 2019) (rejecting defendants' argument "that they should be able to inquire about any financing 'and the motives behind it'" because "[a] defendant is not entitled to learn any of these things in any case, absent some special need or showing"); *Fulton*, 2019 U.S. Dist. LEXIS 209585 (granting motion to quash subpoena to litigation funder seeking "communications with Plaintiff and his attorneys, summaries and assessments of the case, applications for funding, and all funding agreements and statements of the terms of funding"); *Elm 3DS Innovations*, 2020 U.S. Dist. LEXIS 216796, at *2-4 (denying motion to compel production of "agreements with third parties that provided or considered providing litigation funding," "communications with third parties that did not provide litigation funding," "communications with funders that occurred prior to this litigation," and "communications with funders that occurred after this litigation began" on relevance and work-product grounds); *Miller*, 17 F. Supp. 3d 711 (denying motion to compel "all documents created by [plaintiff], [plaintiff]'s counsel, or any third party entity for the purpose of considering, investigating, pursuing, arranging, or obtaining litigation funding," "all documents transmitted, shared, or discussed between [plaintiff] and [plaintiff]'s counsel, between [plaintiff]'s counsel and any third party entity, or between [plaintiff] and any third party entity for the purpose of considering, investigating, pursuing, arranging, or obtaining litigation funding," and "all communications between [plaintiff] and [plaintiff]'s counsel, between [plaintiff]'s counsel and any third party entity, or between [plaintiff] and any third party entity relating to litigation funding").

[43] *See Valsartan*, 405 F. Supp. 3d at 614.

indication, are destined to fail. Such motions would waste judicial and party resources and divert focus from key issues that are actually material to adjudicating the parties' claims and defenses.

C. The Proposed Rule's Provisions Are Misguided

Notwithstanding the indeterminate goals of the Proposed Rule, we surmise that the LAC sought to address issues related to judicial conflicts of interest,[44] class actions, and champerty.[45] As discussed below, the current draft of the Proposed Rule lacks a cogent legal or policy basis.

1. *Judicial Conflicts of Interest*

An apparent extension of Rule 7.1, the Proposed Rule presumably is intended to enhance disclosure requirements for recusal and disqualification decisions. If adopted, it would be the first local supplement to Rule 7.1 in the country[46] to specifically target financing in all cases[47] or require disclosure of information beyond the identity of a financially interested party and nature of its financial interests.[48] The Proposed Rule's disclosure requirements exceed those in Rule 7.1 in multiple regards and without sufficient justification.

Rule 7.1(a) requires that a "nongovernmental corporate party" disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock."[49] As the Civil Rules Advisory Committee noted regarding the 2002 amendment, "[t]he information required by Rule 7.1(a) reflects the 'financial interest' standard of Canon 3C(1)(C) of the Code of Conduct for

[44] While it is not apparent, the Proposed Rule may also intend to address counsel conflicts of interest. Doing so would be misplaced. As the Civil Rules Advisory Committee has appropriately observed, "it is not at all clear that the way to police lawyers' ethics is for trial courts to take the lead. Traditionally, that is the job of state bar ethics committees and the like. Judges who become aware of questionable conduct thus may refer matters to the state bar. So the entire topic seems somewhat outside the normal scope of disclosure and discovery." *See* n.5, *supra*, at 7.

[45] To the extent the Proposed Rule has other rationales, ILFA would welcome the opportunity to comment.

[46] Certain novel local rules are discouraged. As the Civil Rules Advisory Committee noted with respect to Rule 83, local rules should "promote inter-district uniformity and efficiency."

[47] The only district to have any specific requirement concerning funding is the Northern District of California. Specifically, it has a standing order that requires disclosure of a funder's identity, but with application limited to class, collective, and representative actions. *See* N.D. Cal. Standing Order on the Contents of Joint Case Management System (effective Nov. 1, 2018). This approach confirms that an across-the-board disclosure requirement is unnecessary. The Northern District of California considered requiring disclosure of funding in *every* civil lawsuit, but ultimately decided against a local rule, and limited the scope of disclosure. *See* U.S. District Court for the Northern District of California, *Comments Received on Draft Local Rule 3-15*.

[48] A minority of federal district courts, none of which is within the Third Circuit, maintain local rules that require the disclosure of non-public outside parties with a financial interest in the outcome of litigation.

[49] *See* Rule 7.1(a). As a historical note, Rule 7.1 was adopted because of a number of prominent "news reports of cases in which judges ha[d] inadvertently failed to disqualify themselves because of a failure to connect with financial information that requires disqualification." Minutes of Advisory Committee on Civil Rules at 9 (Apr. 10-11, 2000). According to the Committee, "[t]here [had] been two recent waves of embarrassing publicity about inadvertent failures to recuse." *Id.* at 10. The decision made at that time was to enact a limited, rather than excessively broad, rule.

United States Judges" to "support properly informed disqualification decisions."[50] The required disclosures are "limited" because "[f]raming a rule that calls for more detailed disclosure will be difficult" and "[u]nnecessary disclosure requirements place a burden on the parties and courts."

Here, to the extent the Proposed Rule in fact intends to bolster Rule 7.1,[51] it is excessive in scope. Contractual terms related to "the funder's approval" bear no relation to judicial conflicts. Furthermore, the Proposed Rule deliberately singles out funding for no just reason. A true desire for more robust conflict disclosures would warrant inclusion of *all* financially interested parties, ranging from recourse lenders (which the Proposed Rule intentionally excludes), to financial backers of *amici curiae*, to "officers, directors, or trustees" of interested parties,[52] to financial interests derived from "insurance, a franchise agreement, lease, profit sharing agreement, or indemnity agreement."[53] Moreover, ILFA is unaware of any reports that unwittingly conflicted judges failed to recuse themselves in funded cases.

Federal judges are well aware of their ethical responsibilities and would be well advised to avoid investing in legal finance entities (whether public or private). And if a federal judge ever were to have a relationship with a funder that rose to the level of warranting disqualification in cases in which that company was involved, such a judge would be fully equipped to issue an individual practice rule or standing order requiring disclosure of any relationship with that company. Any concern about judicial conflict of interest is therefore so attenuated that it cannot support the Proposed Rule's broad disclosure mandate directed principally at funding arrangements.

2. *Class Actions*

The Proposed Rule provides that parties may "seek additional discovery of the terms of any [funding] agreement upon a showing of good cause that . . . the interests of parties or the class (if applicable) are not being promoted." This appears to be an attempt to enhance disclosure related

[50] Canon 3(C)(1) provides, in pertinent part, that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which . . . (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding."

[51] Alternatively, to the extent the Proposed Rule has goals beyond judicial disqualification, it is inappropriate. Rule 83(a)(1) provides, in pertinent part, that local rules "must conform to any uniform numbering system prescribed by the Judicial Conference of the United States." As the Civil Rules Advisory Committee noted on the 1995 amendments to Rule 83, "[l]ack of uniform numbering might create unnecessary traps for counsel and litigants," particularly in light of the "increasingly national bar" and goal of enabling "litigants to locate a local rule that applies to a particular issue."

[52] *See* S.D. Ga. L. R. 7.1.

[53] *See* E.D. Mich. L. R. 83.4.; E.D. N.C. L. R. 7.3.

to adequacy factors for class certification under Rules 23(a)(4) and 23(g). If that is the case, it is equally misplaced.[54]

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." The only reference in Rule 23(a)(4) to "conflicts of interest" relates to those "between named parties and the class they seek to represent." It is difficult to see how legal finance could affect this factor, given the extreme rarity of a class representative taking funding.[55] Accordingly, this aspect of the Proposed Rule appears to be directed at the adequacy of counsel. The Third Circuit has a "directive to assess adequacy of counsel separately under Rule 23(g)."[56] Rule 23(g) permits courts to consider various factors in assessing counsel, including "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[57]

ILFA is not aware of any class action in which legal finance resulted in a failure to promote the interests of a class. And even if such a case existed, class issues and discovery thereof should be appropriately addressed under Rules 23 and 26.[58] In addition, it is well-settled that "[p]recertification inquiries into the named parties' finances or the financial arrangements between the class representatives and their counsel are rarely appropriate, except to obtain information necessary to determine whether the parties and their counsel have the resources to represent the

[54] *See* n.51, *supra*.
[55] A class member has no inherent authority to bind absent members of a class, and therefore only the proceeds of their own claim are available to secure financing. Moreover, class representatives typically retain counsel on a contingency basis, subject to attorney fees being awarded by the court pursuant to Rule 23(h), so there are not significant litigation expenses to finance. To the extent a court has concerns about the presence of legal finance in the class action context, orders like those in *Opioids* and *Zantac*, *see* Section II.B.1.b., *supra*, are already available and sufficient to answer those concerns.
[56] *See Dewey v. Volkswagen of Am*., 909 F. Supp. 2d 373, 384 (D.N.J. 2012).
[57] *See* Rule 23(g)(1)(B).
[58] *See Kaplan v. S.A.C. Capital Advisors, L.P*., No. 12-CV-9350 (VM)(KNF), 2015 U.S. Dist. LEXIS 135031, at *15-18 (S.D.N.Y. Sep. 10, 2015) (denying requests for disclosure concerning class counsel's funding arrangement under the relevance standard Rule 26 where defendants' adequacy arguments were "purely speculative").

class adequately."[59] It is also typically within the province of the court – and not the parties – to review whether class counsel "met fiduciary obligations" to the class.[60]

3. *Champerty*

The Proposed Rule would require parties to disclose "whether the funder's approval is necessary for litigation decisions or settlement decisions in the action and if the answer is in the affirmative, the nature of the terms and conditions relating to that approval." An affirmative answer also provides a basis for parties to "seek additional discovery of the terms of any [funding] agreement." While the rationale for including provisions regarding approval rights is not stated, we can only assume it derives from the ancient doctrine of champerty.

Champerty is defined as a "bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of receiving part of any judgment proceeds."[61] It is a "form of maintenance," which is "an officious intermeddling in a lawsuit by a non-party by maintaining, supporting or assisting either party, with money or otherwise, to prosecute or defend the litigation."[62] The common law prohibition against champerty "traces back many centuries" and its adoption in the United States was "uneven."[63] Various states have relaxed or abolished champerty restrictions over time; other states never adopted champerty at all. Last year, the Minnesota Supreme Court abolished champerty entirely, stating that "[o]ur review of changes in the legal profession and in society convinces us that the ancient prohibition against champerty is no longer necessary."[64]

It is undisputed that "New Jersey law does not prohibit champerty."[65] Nor is champerty recognized under federal law.[66] In any event, funders (unlike insurance companies which can

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[59] *See* Manual for Complex Litigation § 21.141 (4th ed. 2004). For example, in *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI (N.D. Cal. Aug. 5, 2016), after putative class counsel put their funding at issue in response to questions about adequacy of counsel, the court ordered production of the funding agreement so that the adverse party could make an informed decision whether to contest appointment of counsel.

[60] *See In re Third Circuit Task Force on the Selection of Class Counsel*, 2002 U.S. App. LEXIS 30242, at *43 (3d Cir. Jan. 15, 2002) ("Rule 23 requires, and logic supports, a review at the conclusion of a case—at a minimum to examine whether counsel met fiduciary obligations and performed at the level expected when the case began"); *see also In re Cendant Corp. Litig*., 264 F.3d 201, 272 (3d Cir. 2001) (noting that the Third Circuit has emphasized "the inherent conflict between lead counsel and the class" and that the court's "interest and supervisory role is pervasive and extends not only to the final fee award but also to the manner by which class counsel is selected and the manner by which attorneys fee conditions are established") (quotation and citations omitted).

[61] *See In re Rite Aid Corp. Sec. Litig*., 146 F. Supp. 2d 706, 716 (E.D. Pa. 2001) (quoting *Black's Law Dictionary* 231 (6th ed. 1990)).

[62] *See id*.

[63] *See Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235, 237 (Minn. 2020).

[64] *See id.* at 238.

[65] *Riffin v. CONRAIL*, 783 F. App'x 246, 249 (3d Cir. 2019) (citation omitted).

[66] *See Lincoln Nat'l Life Ins. Co. v. Silver*, No. 86 C 7175, 1990 U.S. Dist. LEXIS 20883, at *12 (N.D. Ill. June 26, 1990).

compel or direct a litigant to retain a particular attorney or accept a settlement) typically disclaim any such rights expressly in their funding agreements.[67] ILFA is not aware of any other rule, law, or doctrine implicated by a funder's ability to control litigation. A funder's approval rights therefore lack legal significance and should not constitute a basis for additional disclosure.[68]

D. The Proposed Rule Improperly Abrogates Work-Product Protection

The Proposed Rule effectively authorizes discovery into funding materials that courts have repeatedly afforded work-product protection. In doing so, the Proposed Rule improperly substitutes the exacting "substantial need" standard for piercing work product with a relaxed requirement to show "good cause," or worse, meet the vague standard that "such other disclosure is necessary to any issue in the case."[69] This not only constitutes an improper abrogation of work-product protection under Rule 83,[70] but it arguably violates the Rules Enabling Act in light of its inconsistency with Rule 26(b)(3).[71]

Section (b) of the Proposed Rule provides that:

> The parties may seek additional discovery of the terms of any such agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case.

Even in the rare circumstances where funding agreements may be considered relevant, state and federal courts across the country have consistently held that such agreements, along with communications and documents exchanged among litigants and their funders, are entitled to work-product protection.[72] These documents are protected as they were prepared because of litigation

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[67] *See* Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 Geo. L.J. 65, 92 (2010) ("Funders generally do not control the course of litigation or unduly interfere with the attorney-client relationship").

[68] While the laws of New Jersey do not apply to every dispute in the District of New Jersey, it would be an unusual choice to incorporate other states' inconsistent legal concepts in a local rule.

[69] We assume that the phrase "such other disclosure" refers to "the terms of any [funding] agreement." To the extent "other disclosure" is intended to include materials beyond agreements, it would be unwarranted and would respectfully request the opportunity to submit further comments.

[70] Rule 83 provides, in pertinent part, that "[a] local rule must be consistent with . . . federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075."

[71] *See Baylson v. Disciplinary Bd. of Supreme Court*, 975 F.2d 102, 107 (3d Cir. 1992) (federal district courts may "prescribe local rules of practice so long as these rules are consistent with the rules of practice and procedure promulgated by the Supreme Court under [28 U.S.C. §] 2072").

[72] *See, e.g.*, *Cont'l Circuits LLC v. Intel Corp.*, 435 F. Supp. 3d 1014, 1021 (D. Ariz. 2020); *Impact Engine, Inc. v. Google LLC*, No. 3:19-cv-01301-CAB-DEB, 2020 U.S. Dist. LEXIS 194517, at *4 (S.D. Cal. Oct. 20, 2020); *United States ex rel. Fisher v. Ocwen Loan Servicing, LLC*, No. 4:12-CV-543, 2016 U.S. Dist. LEXIS 32967, at *16 (E.D. Tex. Mar. 15, 2016).

and reflect the mental impressions of counsel.[73] While work-product protection is not absolute, it may only be overcome pursuant to Rule 26(b)(3) where a party "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."

Notably, "substantial need" differs from "good cause." As the Civil Rules Advisory Committee stated in its notes to the 1970 amendment of Rule 26, the demonstration of a "substantial need" requires a "special showing." This is consistent with the standard enunciated by the Supreme Court in *Hickman v. Taylor*: "where production of those facts is essential to the preparation of one's case."[74]

The Proposed Rule seemingly endorses the production of funding agreements based on various showings, none of which meets the binding "substantial need" standard. Specifically, whether a "non-party has authority to make material litigation decisions or settlement decisions" bears no relation to case merits and should not be presumptively deemed relevant – let alone "essential" – to a party's case.[75] As discussed above, New Jersey law does not even recognize the doctrine of champerty. Likewise, issues regarding "the interests of parties or the class (if applicable) or "conflicts of interest" are ancillary to "the preparation of [a defendant's] case." Finally, a showing that "disclosure is necessary to any issue in the case" is extraordinarily open-ended and vague, and would completely nullify the "substantial need" standard (as well as Rule 26's relevance standard).

E. The Proposed Rule Requires Explanation and Clarification to Enable Proper Compliance

The Proposed Rule contains numerous ambiguities that would render compliance difficult absent clarification. Such ambiguities include the definition of "funder," the distinction between "recourse" and "non-recourse" funding, and meaning of "non-monetary results."

1. *The Definition of "Funder"*

The Proposed Rule requires disclosure of "information regarding any person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation." Read literally, an attorney is "not a party" and would be required to disclose a

[73] *See Miller*, 17 F. Supp. 3d at 735.
[74] *See Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *see also* 6 Moore's Federal Practice - Civil § 26.70 (2019) ("Substantial need for material otherwise protected by the work product doctrine is demonstrated by establishing that the facts contained in the requested documents are essential elements of the requesting party's prima facie case").
[75] *See, e.g., Benitez*, 2019 U.S. Dist. LEXIS 64532, at *4-5 (denying motion to compel production of "litigation funding documents" because, *inter alia*, "they are irrelevant and outside the scope of what a party needs to defend or prosecute its case").

contingency-fee arrangement (particularly where the attorney is responsible for out-of-pocket expenses). It is unlikely that this is an intended consequence of the Proposed Rule.

Regardless of whether attorneys constitute "funders," clarification is needed regarding disclosure of law firm financing.[76] Specifically, it is unclear whether a financial arrangement directly between a third-party and a law firm (as opposed to the law firm's clients) requires disclosure. It is also ambiguous whether nonlawyers with direct financial interests in law firms must be disclosed. This is a particularly timely consideration, as there is a growing recognition of the need to consider rules to permit nonlawyer participation in the delivery of legal services. The momentum in many jurisdictions is toward allowing and endorsing broader access to legal finance. A number of states are in various stages of consideration and implementation of rules to permit the delivery of legal services by nonlawyers and nonlawyer law firm ownership.[77] In February 2020, the ABA's House of Delegates went so far as to pass a resolution calling for "regulatory innovations that have the potential to improve the accessibility, affordability, and quality of legal services."[78] Likewise, the Conference of Chief Justices passed a similar resolution, citing "consideration of alternative business structures" as an area for consideration.[79]

The Proposed Rule also warrants clarification regarding the direct or indirect provision of capital. An "entity" providing funding can take many forms, ranging from an operating company, to an investment fund, to a special purpose entity managed by an investment fund, to an entity capitalized by various sources. And any type of entity will typically have its own collection of financially interested parties, which may include equity holders, debt holders, limited partners,

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[76] As the NYCBA working group aptly observed, "requiring disclosure would necessitate developing a further body of law surrounding the extent of disclosure. Such law would need to address various complicated issues, *including what constitutes litigation funding (e.g., portfolios, monetizations, recourse and debt instruments)*, who has access to such disclosure (*i.e.*, factfinders or parties), what disclosure is appropriate (*e.g.*, the fact of funding, redacted or unredacted single-case and portfolio transaction documents, communications with funders, communications with potential funders), and why disclosure is appropriate (*e.g.*, relevance and privilege). It may be that over time, as legislatures and tribunals thoughtfully consider the complex issues associated with disclosure, patterns will become more apparent and disclosure rules can be promulgated that are efficient and advance legitimate needs, while avoiding unnecessary complexities and risks." *See* n.14, *supra*, at 73 (emphasis added).

[77] *See, e.g.*, Arizona Supreme Court, Administrative Office of the Courts, *Arizona Supreme Court Makes Generational Advance in Access to Justice* (Press Release) (Aug. 27 2020); State Bar of California, *State Bar of California Task Force on Access Through Innovation of Legal Services: Final Report and Recommendations* (Mar. 6, 2020); D.C. Bar, *D.C. Bar Global Legal Practice Committee Seeks Public Comment on Rule of Professional Conduct 5.4* (Press Release) (Jan. 23, 2020); State of Utah Judicial Council, Administrative Office of the Courts, *To Tackle the Unmet Legal Needs Crisis, Utah Supreme Court Unanimously Endorses a Pilot Program to Assess Changes to the Governance of the Practice of Law* (Aug. 13, 2020); *see also* Regulatory Innovation Working Group, Commission to Reimagine the Future of New York's Courts, *Report and Recommendations of the Working Group on Regulatory Innovation* (Dec. 3, 2020) (offering broad support for legal finance and noting that Rule 5.4 of the New York Rules of Professional Conduct, which prohibits fee-sharing between lawyers and nonlawyers, should be revised to ensure greater access to legal finance).

[78] *See* American Bar Association, Resolution 115 (Feb. 5, 2020).

[79] *See* Conference of Chief Justices, Resolution 2: Urging Consideration of Regulatory Innovations Regarding the Delivery of Legal Services.

and/or lenders, some of which may be publicly traded. A "funder" may also manage risk through syndication, partial or full disposition of an investment on the secondary market, or procurement of an insurance policy. Importantly, parties and counsel are rarely – if ever – privy to the capital sources behind the entity funding a case, the identities of which are confidential. Clarification is consequently needed regarding the level of disclosure required by the Proposed Rule.

2. *The Distinction Between Recourse and Non-Recourse*

The Proposed Rule only applies to funding "on a non-recourse basis." The term "non-recourse" is not defined and could have several meanings. For example, a funding arrangement may be completely non-recourse in that the funder has no entitlement to any collateral except litigation proceeds. Alternatively, a funder may have *some* recourse to other collateral, such as equity in the client, securities, intellectual property.[80] A funder may also have *full* recourse, but only to a certain extent, such as recovery of the amount of its investment (without any profit). Conversely, some "recourse" loans may be effectively non-recourse, for example if the claimant has little or no assets other than the litigation itself. The Proposed Rule should therefore be revised to resolve this ambiguity.

Nevertheless, the "non-recourse" distinction raises the question of *why* "recourse" funding arrangements do not trigger disclosure under the Proposed Rule. There is a long history in the United States of parties to litigation seeking outside financing from a diversity of sources. For example, parties that cannot afford or do not wish to pay their legal fees and expenses out of pocket: (1) regularly turn to law firms that work on contingency or conditional fee arrangements; (2) approach banks, private funds, or other financial institutions to secure loans, debt, or equity instruments; (3) secure financing in the form of risk-avoidance instruments from insurance companies, which may include a contingent recovery component for the insurance carrier in the form of a deferred premium; or (4) for the last decade or so, work with specialist providers of legal finance. Law firms also seek various forms of financing, most commonly bank loans, lines of credit, and portfolio arrangements. All of these sources of outside financing – contingent fee law firms, banks, insurers, and providers of specialty capital – could be considered providers of "funding," and there is no rational basis for choosing among them for differential treatment. A bank's security interest in the proceeds of a litigation claim is no different from a legal finance firm's security interest in the proceeds of that same claim. And a recourse lender, who could theoretically foreclose on any of a claimant's assets, may be able to exert more influence than a non-recourse lender who can only look to the litigation for proceeds. Further, the provision of non-recourse capital to lawyers and law firms (as opposed to full recourse capital, secured by law firm

[80] *See, e.g.*, Law360, *Hedge Funds Muscle In On Funding Big-Ticket Cases* (Apr. 21, 2021) (describing hedge funds "putting together relatively complex structures" that may include "building in warrants that give [the fund] the option to eventually buy into a company" and "mix in recourse and nonrecourse financing avenues, or tie to assets unrelated to the legal issue at the center of the deal").

assets or individual partner guarantees) arguably *decreases* the risk that funding creates conflicts of interest for the lawyers charged with protecting and advancing their clients' best interests.[81]

3. *The Definition of "Non-Monetary Results"*

The Proposed Rule requires disclosure where a non-party provides funding "in exchange for . . . (2) a non-monetary result that is not in the nature of a personal or bank loan, or insurance." "Non-monetary result" is undefined, and its meaning is further confused by references to loans and insurance. In addition, it is unclear what "non-monetary results" would be relevant to judicial recusal and disqualification decisions. The Proposed Rule should be revised to clarify what types of "non-monetary results" warrant disclosure.

III. Conclusion

For the foregoing reasons, ILFA submits that adoption of the Proposed Rule would not be in the best interests of the District of New Jersey or the parties and attorneys appearing before it. In the event the local rulemaking process continues, ILFA would welcome the opportunity to engage in a dialogue with the LAC to better understand its goals with respect to legal finance and find a just solution. ILFA and its members stand ready to assist the LAC in its efforts.

Respectfully submitted,

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[81] *See* Law360, *The Case For Lawyer-Directed Litigation Funding In NY: Part 2* (Jan. 11, 2019) ("Only nonrecourse funding avoids the risk of a substantial financial loss to the lawyer and is thereby more likely to allow the lawyer, consciously and subconsciously, to keep client interests first and foremost").