May 30, 2019

Litigation Funding Working Group
New York City Bar
42 West 44th Street
New York, New York 10036

Re: Working Group Call for Comments on Litigation Funding

To the Litigation Funding Working Group:

"Thou shalt not ration justice," Judge Learned Hand told the Legal Aid Society of New York in 1951.[1] Yet today, the United States ranks 99th out of 126 countries for affordability and accessibility of civil justice.[2] Litigation costs and attorneys' billable rates continue to increase each year.[3] Seventy percent of companies have abandoned potentially meritorious litigation because of cost.[4]

These discouraging facts help us understand why, as this Working Group correctly acknowledged, "[l]itigation funding is a burgeoning field that appears destined to be an ever-present part of the legal profession going forward."[5] Litigation funding helps solve the crisis of affordability that afflicts our civil justice system.

As a 13-year industry veteran, and the founder and CEO of a commercial litigation funding company, I see first-hand why lawyers and clients embrace litigation funding. Funding allows claimants to bring meritorious cases they otherwise might have to abandon, and it permits them to choose counsel based on skill and trust, not only affordability or willingness to work on contingency. Funding enables lawyers to finance firm operations and smooth cash flows without subjecting them to personal recourse—removing major stressors from a profession facing chronic struggles with mental health and substance abuse.[6] And it empowers firms and clients to break free from the worst incentives of the billable hour (which can encourage unnecessary motion practice or redundant staffing) and the full contingency fee (which can encourage under-staffing or early settlement to produce a revenue event for the lawyer).

In light of these benefits, it is unsurprising that 98% of those who have used funding say they would use it again, according to a forthcoming survey conducted by Validity Finance and ALM Intelligence.[7] The ethics rules should be interpreted to support, rather than dismantle, this highly beneficial innovation. Happily, the ethics rules already allow significant flexibility to address clients' financial needs, and they have long accommodated innovations that disable economic barriers to justice. As other committees have suggested, these existing rules are sufficient to guide attorney independence and protect the attorney-client relationship when clients accept funding.[8]

The Working Group should make clear that litigation funding is fully consistent with lawyers' duties, and indeed is an integral tool that lawyers should familiarize themselves with to best serve their clients' legal needs.

I. The Ethics Rules Exist to Serve Clients and Promote Access to the Courts — Which Is Precisely What Litigation Funding Does.

Rather than proceed directly to the particular rules that govern specific aspects of funding, the Working Group's consideration of litigation finance should start with first principles: What is the purpose of the ethics rules, and how can we best achieve those purposes?

A. The Legal Community Has a Duty to Facilitate Clients' Access to the Courts, Even in the Face of Financial Barriers.

The legal system in general, and the New York Rules of Professional Conduct in particular, exist to benefit clients. The Preamble to the Rules declares that (i) lawyers have a duty "to promote access to the legal system and the administration of justice," and that (ii) the Rules "should be interpreted with reference to the purposes of legal representation and of the law itself." N.Y. R. Prof. Conduct, Preamble [1] and [6].

The Rules further recognize that, to best assist clients, lawyers may take into account the client's financial resources. For example, Rule 2.1 recognizes that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as … economic … factors that may be relevant to the client's situation." Rule 2.1 (emphasis added). This Rule makes sense because, as a Comment recognizes, "[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant." Rule 2.1, Cmt. [2]. No matter how strong the legal claim may be, a lawyer offers little if she suggests that a bankrupt client vindicate its rights by paying counsel $1,200 an hour for five years to bring a case to trial.

The Rules' keen concern for the cost of litigation is mirrored in New York's civil procedure law and the Federal Rules of Civil Procedure, both of which require that those bodies of law be construed "to secure the just, speedy *and inexpensive* determination of every" civil action and proceeding. N.Y. CPLR § 104 (emphasis added); FED. R. CIV. P. 1 (emphasis added).

This same sentiment comes forth in the recent introduction of a proportionality requirement to discovery in Federal Rule of Civil Procedure 26. "[I]n many cases civil litigation has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts," Chief Justice John G. Roberts, Jr., wrote in explaining the rule change, before calling on the bar to "chart a cost-effective course of litigation … to achieve just results."[9]

And all of this is consonant with the New York City Bar's own mission to "promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest …."[10]

These rules and guidance statements provide essential context for the rise of litigation funding and its fit with the ethics rules. Litigation funding helps clients have their cases resolved on the merits—it allows lawyers to "promote access to the legal system," in the words of the New York Rules of Professional Conduct, and to "chart a cost-effective course of litigation," in the words of Chief Justice Roberts. Before litigation funding, clients had to abandon meritorious cases; now, they can vindicate their legal rights and choose the best counsel. The value that litigation finance provides to clients should be carefully considered when defining ethics for the legal profession.

B. To Provide Competent Representation, Lawyers Should Educate Themselves and Their Clients About Funding.

Litigation funding is not simply consistent with pre-existing ethics rules. Fairly read, the New York Rules of Professional Conduct strongly suggest that lawyers should familiarize themselves with litigation funding to best serve their clients.

Rule 1.1 requires lawyers to provide "competent representation to a client," Rule 1.1(a), and it prohibits lawyers from intentionally "fail[ing] to seek the objectives of the client through reasonably available means permitted by law and these Rules." Rule 1.1(c)(1). The comments explain that an attorney must "keep abreast of changes in substantive and procedural law relevant to the lawyer's practice," and must "engage in continuing study and education" about the law. Rule 1.1, Cmt. [8].

Litigation funding is nothing if not another "reasonably available means" by which clients may achieve their objectives. Litigation funding is a vital way in which clients—especially cash-poor claimholders—may pursue meritorious cases and vindicate their legal rights. It empowers clients to spend the necessary resources on counsel, experts, and the many other costs that must be met to vigorously pursue their rights. This is why the industry has grown not only in the United States, but also in the United Kingdom, Australia, and elsewhere.

The Working Group should make clear that Rule 1.1 may require commercial litigators to maintain a basic familiarity with litigation funding transaction structures and ethical issues, and it may require them to advise clients about the availability of funding. Indeed, the American Bar Association has already concluded that lawyers involved with funding "should become familiar with the terms of the transaction and explain its risks and benefits to the client in terms the client can understand."[11] Moreover, the ABA has recognized that "[c]ompetent and reasonable communication may also require the lawyer to compare the proposed transaction with other available means of obtaining funding, and possibly to recommend alternatives."[12]

This is no watershed requirement. The Rules already recognize that lawyers should advise clients about less-costly alternative means to accomplish their objectives. Not only does Rule 2.1 require lawyers to consider "economic" factors when rendering advice, but a comment to that Rule emphasizes that "when a matter is likely to involve litigation, it may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." Rule 2.1, Cmt. [5].

Just as clients should know that arbitration and mediation are possible substitutes for litigation, so too should they know that litigation funding is a possible substitute for the increasingly unsustainable billable-hour model that prices many out of our civil justice system.

II. The Ethics Rules Allow Standard Litigation Funding Agreements.

Litigation funding is not only fully consistent with the ethics rules' first-order priority of promoting clients' access to the courts, it is also consistent with more specific regulations on attorney conduct, including Rule 5.4's prohibition against fee sharing and Rule 1.6's confidentiality requirement.

A. Litigation Funding Does Not Violate Rule 5.4's Prohibition Against Fee Sharing.

Litigation funding is consistent with Rule 5.4's proviso that lawyers generally "shall not share legal fees with a nonlawyer." Rule 5.4(a).

As an initial matter, many (indeed, probably most) funding agreements are between the funder and *claimholder*, not the lawyer. These agreements do not implicate Rule 5.4's prohibition against fee sharing, for the simple reason that they do not involve the sharing of fees between lawyers and nonlawyers.

What about when a funder provides financing directly to law firms in exchange for a return paid out of firm receivables? The answer is rooted in Rule 5.4's purpose of "protect[ing] the lawyer's professional independence of judgment." Rule 5.4, Cmt. [1]. Litigation funding agreements between funders and law firms do not violate Rule 5.4 so long as the attorney's professional independence of judgment is not compromised. At a minimum, this independence is preserved when the funder's return is secured by a portfolio of three or more cases of sufficient size and scope. Such a "portfolio" approach attenuates the risk to professional independence that might be posed if the funder's return were backed only by a single case.

The legal community has long navigated theoretical conflicts that might be presented by alternative compensation structures, and litigation funding should be treated no differently. Indeed, as one ABA commentator recently pointed out, "*[a]ny departure* from an hourly rate creates a potential conflict between lawyer and client."[13] Concerns surrounding the use of litigation finance might justify emphasizing the fundamental principle that attorneys must always exercise independent professional judgment. But they do not justify an outright ban on a valuable means of promoting access to the courts. Indeed, such a ban would be contrary to the ethics' rules overriding purpose—"to promote access to the legal system and the administration of justice," N.Y. R. Prof. Conduct, Preamble [1]—as well as to the New York City Bar's own mission of furthering access to the courts. As one New York court has explained, "[p]roviding law firms access to investment capital where the investors are effectively betting on the success of the firm promotes the sound public policy of making justice accessible to all, regardless of wealth."[14]

The rules have long taken this sensible approach when dealing with similar alternative-compensation structures. For example, Rule 1.5(c) generally allows lawyers to work on contingent fees, despite the fact that such arrangements might incentivize lawyers to minimize time spent on a matter or settle it early for a fee return. (Indeed, historical scholarship indicates that contingent fees have been around in the United States since the nineteenth century and perhaps even colonial times,[15] indicative of a longstanding belief that claimholders should have their day in court even if they cannot afford to pay counsel up front.) Rather than ban the contingent fee, the rules simply require that lawyers exercise independent professional judgment and put their clients' interests above their own. Notably, funding agreements can actually mitigate any perverse incentives created by contingent fee arrangements by paying some or all of the attorney's fee.

Similarly, Rule 5.4—the very rule prohibiting fee sharing—also *permits* lawyers to be paid their fee by someone other than the claimholder, notwithstanding the potential conflict of interest where the client's interests may diverge from the interests of the third party paying those legal fees. Rule 5.4(c). The rules do not ban these potentially beneficial arrangements—they simply require that, in this circumstance, there may be "no interference with the lawyer's professional judgment …." Rule 5.4, Cmt. [2].

To the extent the Working Group believes litigation funding agreements present a theoretical threat to a lawyer's professional independence of judgment, that threat too should be addressed by emphasizing the importance of attorney independence, not by depriving litigants and lawyers of an essential tool to access the courts.

B. Litigation Funding Does Not Violate the Confidentiality Requirements of Rule 1.6.

Lawyers sometimes cite compliance with Rule 1.6 as a concern when dealing with litigation funders. However, as the New York City Bar Association's Committee on Professional Ethics previously acknowledged, Rule 1.6 expressly *permits* lawyers to share such information whenever the client provides informed consent.[16] Thus so long as the client consents, information may be shared with litigation funders.

More complicated issues might arise when the confidential information at issue constitutes an attorney-client communication or, in a related but distinct concern, attorney work product. However, reputable funders do not request attorney-client communications. And with respect to attorney work product, Rule 1.6(c) emphasizes that lawyers must act with reasonable care to avoid inadvertent disclosure of the confidential information. There is a clear national trend toward recognizing that communicating and sharing materials with litigation funders under the protection of a confidentiality agreement does not increase the risk of inadvertent disclosure to adversaries, and that work product protection thus is preserved in these circumstances.[17] This is also true with respect to the litigation funding agreement itself, which is typically considered protected work product.[18]

Likewise, recent decisions make clear that how a party is financing litigation is typically irrelevant to the claims and defenses at issue, and thus unlikely to give rise to a "substantial need" that justifies lifting fact work product protection.[19] The convergence of these trends means that sharing work product with a funder should almost never open the door to discovery.

In fact, Federal Rule of Civil Procedure 26(b)(4)(D) already provides that consulting experts are generally off-limits from discovery absent a showing of exceptional circumstances.[20] The policy considerations underlying the rule apply equally in the litigation funding context. These considerations include the interest in allowing counsel to obtain services "without fear that every consultation … may yield grist for the adversary's mill," the view that a defendant should "prepare its own case at its own expense," the concern that services would be unavailable if the third party's testimony could be compelled, and the risk of prejudice to the party retaining services "as a result of the mere fact of retention."[21]

The Working Group can provide much-needed clarity by stating that communicating and sharing materials with litigation funders generally does not risk a violation of Rule 1.6. But this is just a start. Several states have gone further by enacting statutes that explicitly protect communications with consumer litigation funders under both the attorney-client privilege and the work product doctrine.[22] These states recognize that these protections promote the attorney-client relationship by enabling counsel to have frank and open discussions with clients and funders about how litigation fees and expenses will be covered, a question that is often as fundamental to a client's case as the merits. Similar statutory protections in New York for commercial litigation funding transactions would help lawyers and clients navigate these issues without fear of granting defendants an unfair advantage.

III. Mandatory Disclosure of Litigation Funding Is Neither Necessary Nor Prudent.

The Working Group also solicited comments on "issues of disclosure regarding litigation funding." This issue is notable because some opponents of litigation finance, especially the U.S. Chamber Institute for Legal Reform, have lobbied unsuccessfully in the past for mandatory disclosure of litigation funding agreements.

It is important to emphasize at the outset that, in the rare circumstance where a funding agreement is relevant to the case, longstanding discovery rules already permit parties to obtain discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case…." FED. R. CIV. P. 26(b)(1). *See also* N.Y. CPLR § 3101(a) (requiring "full disclosure of all matter material and necessary in the prosecution or defense of an action").

If the Rules already provide for discovery when funding is relevant, why the push for mandatory disclosure? The reason is that mandatory disclosure advocates seek to achieve disclosure of funding agreements in cases *when those arrangements are irrelevant to the merits*.

Unsurprisingly, mandatory disclosure would deeply (and asymmetrically) prejudice both funded and unfunded claimants. First, mandatory disclosure would reveal both the financial *strength* of litigants who have funding and the financial *weakness* of litigants who do not. This gives defendants the unfair advantage of targeting unfunded litigants with a scorched-earth defense policy, while also subtly hinting to judges which claims were not found to be meritorious enough to attract funding. Second, disclosure, as proposed, would also reveal *how much funding* a funded litigant has, providing invaluable information to their adversary throughout the litigation process. For example, a defendant would obtain a leg up during settlement negotiations if she could surmise that the funded plaintiff has just about exhausted its litigation budget.

In a letter to the Federal Rules Committee, the Chamber argued that mandatory disclosure is necessary because funding agreements "*may* violate ethical rules," may "create[ ] the *possibility* of conflicts of interest," and may "*threaten*[ ] the attorney-client relationship."[23]

Thankfully, such idle suspicion of wrongdoing has never been found to warrant discovery—much less mandatory disclosure—and there is no reason to start authorizing these fishing expeditions now. As the United States Supreme Court has explained, "[j]udges are trusted to prevent 'fishing expeditions' or an undirected rummaging through bank books and records for evidence of some unknown wrongdoing."[24] New York law specifically requires that discovery must be conducted in a way that "prevent[s] unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the court." N.Y. CPLR § 3103(a). A defendant's corporate financing agreements, its outstanding debts, or a civil rights plaintiff's receipt of pro bono funds from a third party may also conjure fact patterns where the ethics rules may theoretically be violated, but litigants have no automatic right to take discovery into these issues.[25] We should not punish funded plaintiffs by imposing upon them unreasonable disclosure obligations that we do not impose on other litigants.

Weaker still is the argument that disclosure of funding agreements is necessary to avoid a possible judicial conflict of interest.[26] The Judicial Canon of Ethics already prohibits judges from having financial or business relationships with "lawyers or other persons likely to come before the court on which the judge serves." Code of Conduct for United States Judges, Canon 4, ¶ D. New York law contains the same prohibition. N.Y. Judicial Law, Code of Judicial Conduct, Canon 4(D). Even were it not improper for judges to do so, it is incredibly unlikely that judges would find it prudent to invest in one of the handful of publicly traded litigation finance companies, much less in a privately-held litigation funder.

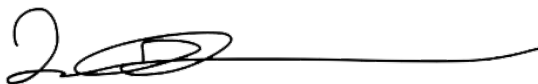
In any event, the corporate disclosure rules do not require disclosure of every single potential financial or personal conflict of interest, let alone conflicts as phantom as a judge investing in a litigation finance company. For example, the federal rules only require corporate parties to "identif[y] any parent corporation and any publicly held corporation owning 10% or more of its stock." FED. R. CIV. P. 7.1; *see also* FED. R. APP. 26.1(a). Thus a company need not disclose if another privately held company, or an investor such as a private equity fund or angel investor, has a financial interest in the company—notwithstanding the possibility that a judge might have investments in the private equity firm, or may be friends with the angel investor. The same rule of reason should apply to litigation funding agreements.

Proponents of mandatory disclosure have also emphasized that Federal Rule 26(a)(1)(iv) requires the disclosure of "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment." But the comment to Rule 26 rebuts any parallel between insurance and litigation funding when it states that insurance is unique because (1) "insurance is an asset created specifically to satisfy the claim," (2) "the insurance company ordinarily controls the litigation," (3) "information about coverage is available only from defendant or his insurer," and (4) "disclosure does not involve a significant invasion of privacy." Rule 26, Notes of Advisory Committee on Rules—1970 Amendment. Litigation funding is created *after* (not before) the claim exists. Funding does not exist to satisfy the claim. Funders do not control litigation. And for the reasons discussed, disclosure would involve a very significant invasion of privacy and disclose key strategic information about the plaintiff's litigation strength.

IV. Conclusion.

Lawyers and claimholders have rapidly embraced litigation funding because funding allows clients to access the legal system, furthering the central objectives of our legal system and ethics rules. Indeed, litigation funding is such an important tool in the legal arsenal that all trial lawyers should familiarize themselves with ethical issues and funding structures as part of the rules' competency requirements. At a minimum, the Working Group should recognize that litigation funding is perfectly consistent with both the ethics' rules high-level priority of serving clients, and the more specific regulations concerning fee-sharing and confidentiality. Finally, the Working Group should rebuff efforts to hobble litigation funding by opposing mandatory disclosure of irrelevant funding agreements.

Sincerely,



Ralph J. Sutton
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Endnotes

[1] *See In re Smiley*, 330 N.E.2d 53, 63 (N.Y. 1975) (Fuchsberg, J., dissenting) (quoting Learned Hand, *Thou Shalt Not Ration Justice*, address before the Legal Aid Society of New York (1951)).

[2] William C. Silverman & Madison Marko, *The Right to Counsel in Civil Proceedings: An International Perspective*, PROSKAUER ROSE LLP (Apr. 11, 2019), https://bit.ly/2Qf1ZQD.

[3] *See, e.g.*, BTI Consulting Group, *BTI Litigation Outlook 2019: Changes, Trends and Opportunities for Law Firms* at 4 (Oct. 8, 2018); Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: $1,500 an Hour*, WALL ST. J. (Feb. 6, 2016), https://on.wsj.com/2W2RwJH.

[4] Burford, *2018 Litigation Finance Survey* at 39 (Oct. 17, 2018), https://bit.ly/2I2kBQd.

[5] Litigation Funding Working Group, *Litigation Funding Working Group Seeks Comments*, N.Y.C. BAR (Apr. 1, 2019), https://bit.ly/30znSPB.

[6] National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Introduction to the Report* (Aug. 14, 2017), https://bit.ly/2H87Wfn.

[7] *See* forthcoming results of an ALM Intelligence/Validity Finance litigation finance survey.

[8] *See* ABA Commission on Ethics 20/20, Informational Report to the House of Delegates on Alternative Litigation Finance at 4 (Feb. 2012), https://bit.ly/2VSAyl5 ("ABA 20/20 Report"); Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, *Report on the Ethical Implications of Third-Party Litigation Funding* at 6 (April 16, 2013), https://bit.ly/2EkdHVl. *See also* New York City Bar Association Committee on Professional Ethics, Formal Opinion 2011-2: Third Party Litigation Financing (June 1, 2011), https://bit.ly/2MbyIIp ("NYC Formal Opinion 2011-2").

[9] Hon. John G. Roberts, Jr., *2015 Year-End Report on the Federal Judiciary* at 4, 11 (Dec. 31, 2015), https://bit.ly/2q73g1n.

[10] About Us, New York City Bar, https://bit.ly/2W1ErVG.

[11] ABA 20/20 Report, *supra* n.8, at 24.

[12] *Id.*

[13] Mark A. Neubauer, *Attorney Fees: How to Avoid a Conflict with Your Client*, AMERICAN BAR ASS'N (Apr. 2, 2019) (emphasis added), https://bit.ly/2vOD1OF.

[14] *Hamilton Capital VII, LLC, I v. Khorammi, LLP*, 2015 WL 4920281, at *9 (N.Y. Sup. Ct. 2015).

[15] Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 234–48 (1998).

[16] NYC Formal Opinion 2011-2, *supra* n.8, at 6.

[17] *See, e.g.*, *Viamedia, Inc. v. Comcast Corp.*, 2017 WL 2834535, at *3 (N.D. Ill. June 30, 2017); *Odyssey Wireless, Inc. v. Samsung Electronics Co., Ltd*, 2016 WL 7665898, at *4-5 (S.D. Cal. Sept. 20, 2016); *In re Int'l Oil Trading Co.*, 548 B.R. 825, 838 (S.D.Fla. 2016); *United States v. Homeward Residential, Inc.*, 2016 WL 1031154, at *6 (E.D. Tex. Mar. 15, 2016); *Morley v. Square., Inc.*, 2015 WL 7273318, at *2 (E.D. Mo. Nov. 18, 2015); *Doe v. Soc'y of Missionaries of Sacred Heart*, 2014 WL 1715376, at *3 (N.D. Ill. May 1, 2014); *Devon IT, Inc. v. IBM Corp.*, 2012 WL 4748160, at *1 (E.D. Pa. Sept. 27, 2012); *Mondis Tech., Ltd. v. LG Elecs., Inc.*, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011).

[18] Alison Frankel, *Judges keep shielding litigation funding agreements, despite demands for transparency*, REUTERS (Jan. 23, 2018), https://reut.rs/2n8rg1y.

[19] A party's financial resources or arrangements typically have no relevance to the merits of its claims or defenses. *See, e.g.*, *Benitez v. Lopez*, 2019 WL 1578167, at *2 (E.D.N.Y. Mar. 14, 2019) (discussing at length ways in which plaintiff's financial arrangements are generally irrelevant to funded suit, and citing cases reaching the same conclusion). Counsel's funding has been held to be relevant under the particular facts of one class action where counsel's adequacy was at issue, *Gbarabe v. Chevron Corp.*, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016), but this is the exception rather than the rule even in the class action context, *see Kaplan v. S.A.C. Capital Advisors, L.P.*, 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015) (discovery into class counsel's funding arrangements not permitted absent non-speculative basis for relevance).

[20] FED. R. CIV. P. 26(b)(4)(D); *see also* N.Y. CPLR § 3101(d)(2) (attorney work product protection).

[21] *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 293 F.R.D. 568, 575 (S.D.N.Y. 2013) (quoting *Long-Term Capital Holdings, LP v. United States*, 2003 WL 21269586, at *2 (D. Conn. May 6, 2003)).

[22] NEB. REV. STAT. ANN. § 25-3306; IND. CODE ANN. § 24-12-8-1; VT. STAT. ANN. tit. 8, § 2255.

[23] *See* Letter from Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform, to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts at 13, 14, 16 (June 1, 2017) ("Chamber Letter") (emphases added).

[24] *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 531 (2009).

[25] The E.D.N.Y. *Benitez* decision recently embraced this point, rejecting a defendant's effort to pursue discovery of a funding agreement based on idle speculation that there may have been infirm "motives for Plaintiff's suit and for the litigation funding." *Benitez*, 2019 WL 1578167, at *2. The court emphasized that "there is no allegation, let alone evidence, that monies from litigation funders were funneled to witnesses as payoffs or that there was some impropriety in the litigation financing. To seek those documents in the hope that similar evidence would materialize in this case is not permissible …." *Id.* "If a court were to accept Defendants' premise," the court stated, in analysis that applies equally to the Chamber's arguments, "all defendants would be permitted to conduct discovery of all individuals who have spoken to the plaintiff to ask them if they counseled plaintiff to reject a settlement offer or if plaintiff ever expressed doubts or uncertainties in his case." *Id.*

[26] *See* Chamber Letter, *supra* n.23, at 15.