



May 19, 2021

Mr. William T. Walsh, Clerk of Court  
United States District Court  
Martin Luther King Jr. Federal Building & U.S. Courthouse  
50 Walnut Street  
Newark, NJ 07101

Re: *Proposed Civ. Rule 7.1.1 Disclosure of Third-Party Litigation Funding*

Dear Mr. Walsh:

The Federation of Defense & Corporate Counsel (FDCC) is a not-for-profit professional association with national and international membership of 1,498 defense and corporate counsel working in private practice or as in-house counsel, and as insurance claims representatives. FDCC members practice in the trial and appellate courts in all 50 of the United States. The FDCC's efforts are focused on affording unfettered access to justice for all while also working to protect and advance the rule of law. Since 1936, its members have established a consistent and strong legacy of representing the interests of civil litigants, including publicly and privately owned businesses, public entities, and individual defendants. The FDCC also seeks to assist courts in addressing issues of importance to its membership that concern the fair and predictable administration of justice.

With that mission in mind, FDCC appreciates the opportunity to offer Public Comment in support the proposed Amendment of the Court's Local Civil Rules and the adoption of Third-Party Litigation Funding ("TPLF") Rule 7.1.1. FDCC believes that disclosure of TPLF promotes principles of justice, fairness, and transparency consistent with a lawyer's ethical obligations of candor and independent judgment.

We believe TPLF gives third-party financiers a vested interest into the litigation and distributes the risk inherently found in that litigation. While the structures vary from funding to funding, the financier may well have a say in strategy, including the overall scope and nature of the litigation to be pursued; approving the content of pleadings and discovery responses; who and how many experts are hired; how much discovery is conducted; the budget for the litigation and when and for how much a party might settle. It is, therefore, imperative for the court and parties to understand who the decision-makers are that influence such decisions. Without the disclosure, the true decision-influencer may well be shrouded in the darkness defeating the purpose of the Federal Rules of Civil Procedure that the rules be "employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." FRCP 1. The court should know who is truly in the courtroom, for a great many reasons.

One such reason for knowing who is in the courtroom is that the court cannot make accurate decisions about subjects such as discoverability, sanctions, and cost-shifting without that information. Proportionality, which defines discoverability, under FRCP 26 is assessed by considering “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, **the parties’ resources**, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b) (1) (emphasis added). TPLF cuts to the heart of a party’s resources and, without the disclosure, a court is misled as to the true facts of proportionality. In fact, failure to disclose TPLF may well violate FRCP 26. And likewise, a court is misled when making party resource decisions involved in discovery sanctions and cost-shifting requests. Without this information, a court cannot accurately make such decisions and orders may unintentionally be unfair.

As members of the bar, ethical responsibilities must always be a top consideration in behavior and actions. TPLF calls into question a number of ethical obligations that cannot be satisfied without disclosure. Some states do not allow an attorney to share a fee with a non-lawyer, and thus some TPLF structures may violate an ethical duty. *See* New Jersey Rules of Professional Conduct 5.4(a); Advisory Committee on Professional Ethics, Opinion 732 (concluding that a legal referral service Avvo violated this rule) (June 21, 2017). Further, conflicts of interest may arise that must be disclosed to the client or the court, especially where a funder has decision-making authority or where there is funding of multiple litigations that go beyond the single client. *See* American Bar Association Best Practices For Third-Party Litigation Funding (August 2020) (“When portfolio financing is involved, the possibility of tensions, and even concrete conflicts of interest, may arise if the lawyer or a single client begins to have difficulties with the funder involving one of a group of matters.”). In such instances, TPLF may violate an attorney’s duty of candid advice and independent professional judgment. *See* Ohio Sup. Ct. Ethics Opn. No. 2012-3 (concluding that a lawyer must ensure the funder “does not attempt to dictate the lawyer’s representation of the client.”).

Rule 7.1.1 would put New Jersey in line with the best practices suggested by the American Bar Association, at least six federal courts of appeals and 24 district courts requiring disclosure, and the Litigation Funding Transparency Act introduced and referred to the United States Judiciary Committee in February of 2019. Patrick A. Tighe, Memorandum: Survey of Federal and State Disclosure Rules Regarding Litigation Funding 209 (Feb. 7, 2018), <https://judicialstudies.duke.edu/wp-content/uploads/2018/04/Panel-5-Survey-of-Federal-and-State-Disclosure-Rules-Regarding-Litigation-Funding-Feb.-2018.pdf>; American Bar Association Best Practices For Third-Party Litigation Funding (August 2020).

For all of these reasons, FDCC encourages the adoption of Local Civil Rule 7.1.1.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Michael T. Glascott".

Michael T. Glascott  
President