NEW JERSEY ASSOCIATION for JUSTICE Inc.
Formerly the Association of Trial Lawyers of America - New Jersey (ATLA-NJ)

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VIA REGULAR MAIL AND EMAIL *(localrules@njd.uscourts.gov)*

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

Re: Comments to the Proposed New Local Rule 7.1.1

Dear Mr. Walsh,

The New Jersey Association for Justice ("NJAJ"), previously known as the Association of Trial Lawyers of New Jersey ("ATLA-NJ"), offers these comments to the proposed Amendments to the Local Civil Rules, Civil Rule 7.1.1 Disclosure of Third-Party Litigation Funding.

I. Background

NJAJ is an organization of over 2,700 members dedicated to protecting the rights of workers, consumers, those wrongfully injured, and all who need access to the state and federal courts of New Jersey. Further, NJAJ's Mission Statement dedicates it to advancing diversity, equity and inclusion in the administration of justice.

NJAJ is a state affiliate of the American Association for Justice ("AAJ") which is separately tendering comments to this proposed rule, which comments NJAJ also adopts and incorporates by reference.

Third-party litigation funding in various forms has been available for many years and there are a wide variety of financial tools available for lawyers, who, by the nature of contingent fee practice, may not qualify for conventional funding. NJAJ does not know how many of its members utilize it, but certainly some do. A plaintiff harmed by the conduct or products of a major corporation is already facing an adversary with greater, if not unlimited legal resources to oppose plaintiff's claims. The proposed rule interposes another hurdle to the client's chosen counsel and the ability of that counsel to proceed on his behalf.

For the reasons that follow, NJAJ strongly believes that the proposed rule would serve to thwart and delay access to justice and deter efforts to diversify members of the bar who handle lengthy, complex and aggregate litigation. Further, it impedes, without demonstrating compelling need to do so, New Jersey's regulation of attorney ethics and the practice of law.

II. The Requested Information Lacks Any Demonstrated Relevance

The proposed rule is a solution in search of a problem that has not been demonstrated to exist. Absent genuine evidence of its negative impact on the conduct of and resolution of complex litigations, information about third-party litigation funding is not relevant, least of all on an across the board basis. In *In Re: Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig.*, 405 F. Supp. 3d 612 (2019) Magistrate Judge Schneider determined that the blanket discovery of third-party litigation funding of plaintiffs and their counsel was not relevant to the parties' claims and defenses. NJAJ commends attention to the authorities and arguments addressed in that thoughtful opinion.

Here, any alleged relevance is even further removed from the equation, because in contrast to the disclosure request in *In Re Valsartan*, the disclosures proposed here are focused not on a party, but instead on the funding of "some or all of attorney's fees and expenses." Thus, this is not designed to reveal a "real party in interest." Nor is it the equivalent of asking a party defendant to produce insurance information. It is targeted solely and wrongfully to plaintiff's counsel and does not meet the standards that apply to obtaining discovery from a party's attorney.

III. An Adversary Must Not Be Deputized to Police Its Opponent's Ethical Compliance

The proposed rule itself and comments made by the U.S. Chamber of Commerce and others in the media about it, reveal that the purported concern is the possibility of third-party litigation funding affecting the conduct and resolution of the litigation. Proposed Local Rule 7.1.1 (a)(2) requests disclosure of "whether the funder's approval is necessary for litigation decisions or settlement decisions in the action."

See https://www.law.com/njlawjournal/2021/04/23/follow-the-money-rule-would-require-nj-lawyers-to-disclose-litigation-funding/

NJAJ is unaware of any case where interference or delay by a third-party litigation funder has been a genuine issue. More importantly, if a third-party litigation funder insisted on approval of litigation or settlement decisions, such would run afoul of numerous Rules of Professional Conduct that ensure an attorney's independence in representing a client and guarantees a client's control over the decision to settle. New Jersey RPC 5.4 requires that a "lawyer shall not permit a person who … pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." The several conflict of interest rules also protect the attorney's professional independence in representing a client. A lawyer cannot undertake a representation if "(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to … a third-person or by a personal interest of the lawyer" RPC 1.7 (a)(2) (emphasis added). *See* generally RPC 1.7, 1.8. Fee sharing with non-attorneys is strictly prohibited by RPC 5.4(a) to protect the professional independence of the attorney. Agreements attempting to do so are void and unenforceable. *Infante v. Gottesman*, 233 N.J. Super. 310 (App. Div. 1989).

Nor could an attorney ethically give settlement authority over to a third-party when it belongs to the client. The decision to settle a matter is strictly the client's, RPC 1.2(a), and such cannot be modified by advance agreement. NJ Advisory Comm. on Professional Ethics Op. 666 (Oct. 5, 1992).

Because concerns about influence over litigation decisions or settlement decisions would only be realized in the event of multiple ethical infractions, the proposed rule seeks from the outset of litigation to enable defendants, without any cause or basis, to mine their opponent's counsel's financial arrangements searching for ethical infractions. This is not a role that should be afforded an opponent and should these issues ever become an actual concern, the Court has existing tools to address them.

IV. The Proposed Disclosures Provide a Unilateral Tactical and Strategic Advantage for Defendants Whether Third-Party Funding is Utilized or Not.

In failing to define the exact nature of the funding that needs to be disclosed, the proposed rule sets a trap for plaintiff's counsel. The choice becomes to either disclose out of an abundance of caution or risk being confronted with collateral evidence of an allegedly included agreement. The ambiguity of the rule potentially enlarges the tasks already upon the overburdened judges and magistrate judges to address what is and is not included under the rule, and the potential need to review documents *in camera* to determine same.

Further, part (b) of the proposed rule provides an unlimited opportunity for follow up discovery on this preliminary and collateral issue and thus can defer and delay attention to the merits of the claims and defenses, and resolution of actual core disputes.

Though there is no logical nexus between an attorney's decision to seek funding for fees and costs and the merits of an injured plaintiff's claim, once aware of counsel's financial arrangements, the issue can be, and unfortunately most likely will be, raised repeatedly in the litigation to question the positions of plaintiff's counsel.

Plaintiff's counsel who choose to use third-party litigation funding may be concerned that this public filing of such information puts them at a disadvantage in retaining clients, even though they are competent and experienced enough to handle the matter. Clients may be confused or misled as to the impact of this information. Accordingly, it could deter the commencement of meritorious federal cases and impair a client's choice of counsel.

However, plaintiff's counsel who do not use third-party litigation funding may fare no better upon disclosure of that fact. Then the adversary has the advantage of knowing that the lawyer or law firm is itself self-funding potentially lengthy litigation, without the safety net of non-recourse funding, potentially carrying costs for years and paying attorneys and staff without the benefit of billing it monthly as their defense counterparts do. Although it would not be appropriate for a party to unnecessarily protract litigation, an unscrupulous adversary will know the counsel without non-recourse funding has much at stake and may be subject to undue pressure to compromise.

V. The Proposed Rule May Inhibit the Diversity of Counsel Undertaking Complex and Aggregate Litigation

Over the last several years there has been a growing awareness that the leadership teams in MDL and other aggregate litigations were frequently the same attorneys over and over again and lacking the

diversity and inclusion as would reflect the bar, the clients being served, and as would ensure the best decision making.

U.S. District Judge Catherine Perry of the Eastern District of Missouri authored guidance for MDL's which appear on the U.S. Courts website, and she aptly described the benefits of diverse leadership:

> "In selecting a selection mechanism and in turn appointing a leadership team, courts should be mindful of the benefits of diversity of all types. In particular, the strong repeat player dynamic that has historically existed reduces fresh outlooks and innovative ideas and increases pressure to go along with the group and conform, all of which may negatively impact the plaintiffs whose cases are being pursued in the MDL."

See https://www.mow.uscourts.gov/sites/mow/files/MDL-CA-CLE-2019-Written-Materials.pdf

Judges in the District of New Jersey likewise have been mindful of these benefits. By way of example, in establishing the Leadership Committee in the *In Re: Elmiron (Pentosan Polysulfate Sodium) Products Liability Litigation*, Judge Martinotti found that:

> "The consensus recommendations present an array of highly skilled counsel with diverse backgrounds and experience which will provide the Court with an effective committee to advance this litigation in an efficient and just manner and will advance the Court's and the JPML's goal of introducing new and different counsel to this specialty area of practice."

See Case 2:20-md-02973-BRM-ESK, ECF No. 9

The qualified "new and different" counsel sought by the Court and the JPML, not having the prior financial remuneration of the frequent and well known attorneys who often litigate and settle these matters, may be the most likely to need and benefit from non-recourse funding to enable them to participate. The proposed rule could have unintended consequences of deterring this worthy goal.

VI. Conclusion

This proposed rule is not needed, not justified and provides defendants in civil cases with unfair advantages. The rule would have a disparate impact on plaintiff's counsel and inevitable disputes will add to the Court's workload.

We thank the Court for considering these comments and welcome the opportunity to address any questions and concerns.

Respectfully,

Edward P. Capozzi, Esq.
President