To: "clerk_of_court@cand.uscourts.gov" <clerk_of_court@cand.uscourts.gov>
From: Andrew Bridges <abridges@fenwick.com>
Date: 07/20/2016 11:54PM
Subject: Comment on proposed change to LR 3-15

I very much like the specific reference to litigation funders as interested parties needing disclosure.

The rule is vague (like many other analogous rules about interested persons) about where to draw the line in identifying persons who may have a financial interest. For example, for a party that is a limited partnership, must one identify all the partners in it? And when one partner is itself a partnership, must one list all the partners in the partnership that is itself a partner? Must one identify all shareholders in a publicly traded corporation whose market value could change because of a litigation outcome? I think the answer to this question is "obviously not," but there is a continuing problem of line-drawing and inconsistency of practice among practitioners on his point. Perhaps the point is to identify all persons with financial interests that *do not flow directly from an interest in the party itself* AND to identify major owners of the parties themselves (publicly traded or other 10% parents, etc.).

Thanks for your attention to this comment.

Best regards,

Andrew P. Bridges

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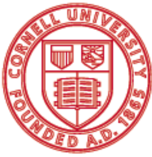

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21 July 2016

SENT VIA E-MAIL

Susan Y. Soong, Clerk of Court
United States District Court, Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102-3489

Re: Proposed Amendment to Civil Local Rule 3-15

Dear Committee Members:

I write to offer a professional responsibility perspective on the proposed amendment to the Northern District's Civil Local Rule 3-15. By way of disclosure, from time to time I have provided paid legal services to law firms entering into litigation financing transactions, as well as to commercial litigation funders Bentham IMF and Longford Capital Management on legal ethics. In my academic work at Cornell Law School, I also study and write on judicial ethics and authored a casebook entitled *The Law and Ethics of Lawyering*, which covers judicial conduct.

The ABA Commission on Ethics 20/20 Report on Alternative Litigation Finance

Perhaps more relevantly, I served as co-Reporter to the Working Group on Alternative Litigation Financing, which was part of the American Bar Association's Commission on Ethics 20/20. Members of the Commission were drawn from a diversity of practice settings, including plaintiffs' lawyers, members of large law firms, judges, and academics. The Commission was formed to consider changes to the Model Rules of Professional Conduct arising from the globalization of the legal profession, including alternative litigation financing, among other topics.

After receiving comments and testimony, and following extensive deliberation, the Working Group concluded that the existing Model Rules of Professional Conduct, and other applicable law governing the lawyer-client relationship, were adequate to address the professional responsibility issues related to litigation financing. The Working Group concluded that litigation financing does not create new duties for lawyers, nor should the Model Rules be amended in response to the emergence of litigation financing. It considered amendments to the Model Rules and comments to

remind lawyers of their obligations under existing law, but decided that any additional language would be so general as to be unhelpful.

Instead, the Working Group issued a Report to the ABA House of Delegates, known as the White Paper on Alternative Litigation Financing, released on December 27, 2011.[1] It includes several hypothetical case studies, illustrating the professional responsibility issues that may arise in connection with third-party litigation financing. The White Paper has since been cited hundreds of times in law reviews and national, state, and local bar publications.

The Proposed Amendment to the Local Civil Rules

The proposed Local Civil Rule requiring disclosure of litigation funding is not, in my opinion, justified by the interest in ensuring that attorneys' independent judgment is not compromised by the presence of litigation funders in a case. A significant motivation for the Ethics 20/20 Commission producing the White Paper as opposed to amended rules or comments is the necessarily fact-specific analysis of ethical issues raised by litigation financing. Rules on conflicts of interest and independent judgment are similarly, and necessarily, context-specific.

As the Commission acknowledged in its Report, although some funders state they take an entirely passive role in litigation, funders "may seek to exercise some measure of control over the litigation, including the identity of lawyers pursing the claims, litigation strategy to be employed, and whether to accept a settlement offer or refuse it and continue to trial."[2] However, the Commission concluded that the issues raised by litigation funding are not necessarily unique, and that Model Rule 5.4(c), which requires a lawyer to exercise independent professional judgment, adequately addresses those issues.

In addition, various forms of financing may have an impact on attorneys' independence and capacity to exercise judgment on behalf of their clients. As is well understood, contingent fee financing may, in some cases, create a serious misalignment of interests between lawyers and clients. In those cases, however, there are not additional rules prescribing specific actions by lawyers. Rather, attorneys are expected to fulfill their obligations to clients, including that of competent and diligent representation, notwithstanding the financial pressure to do otherwise.

Here is how the Supreme Court described the duties of an attorney when faced with a situation in which his or her personal financial interest would be at odds with the best interests of the client:

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[1] Available from the ABA Ethics 20/20 Commission website at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf

[2] *Id.* at 22-23.

> [A] lawyer is under an ethical obligation to exercise independent professional judgment on behalf of his client; he must not allow his own interests, financial or otherwise, to influence his professional advice. Accordingly, it is argued that a lawyer is required to evaluate a settlement offer on the basis of his client's interest, without considering his own interest in obtaining a fee; upon recommending settlement, he must abide by the client's decision whether or not to accept the offer.

Evans v. Jeff D, 475 U.S. 717 (1986). This is self-regulation in action. Lawyers have obligations under the rules of professional conduct to seek the best result for their client, and to provide independent advice. If there is a potentially interfering adverse financial incentive, that's just tough luck for the lawyer, and one way in which the obligations of being a professional can occasionally be demanding.

For similar reasons, whether the Court removes the policy statement regarding judges' conflicts from the Local Civil Rule or not, mandatory disclosure of litigation financing is not needed to ensure that judges comply with applicable rules of judicial ethics. Although the parties may, in an appropriate case, file a motion for a judge's disqualification, in most cases judges are expected to recuse themselves when their impartiality may reasonably be questioned.

Just as the ABA Model Rules of Professional Conduct rely on attorneys to comply with their ethical responsibilities, the ABA Model Code of Judicial Conduct, as adopted by state courts, and the Code of Conduct for United States Judges rely on judges to be aware of their ethical obligations and take appropriate steps to comply with the Code. Canon 3(C)(1) of the U.S. Judicial Code, for example, states that "[a] judge shall *disqualify himself or herself* in a proceeding in which the judge's impartiality might reasonably be questioned," including cases in which the judge has a financial interest that might affect the judge's impartiality. The italicized language indicates that judges are expected to engage in self-monitoring for compliance with the rule, and in fact Canon 3(C)(2) further provides that "[a] judge should keep informed about the judge's personal and fiduciary financial interests."

Moreover, there is no need to impose a rule requiring disclosure of litigation financing on the off chance that a judge may have a financial interest in a litigation financing firm, because Canon 3(C)(3)(c)(i) defines "financial interest" to exclude passive ownership of shares of a mutual fund or similar common investment fund. It seems unlikely that judges would have investments in anything other than a common investment fund, given what would otherwise be the hassle of complying with Canon 3(C).

For all of these reasons, I submit that the proposed amendment is not likely to be needed, and should in any case be the product of a more considered process of research and inquiry, similar to that employed by the ABA Commission on Ethics 20/20.

Very truly yours,

Brad Wendel

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July 22, 2016

Susan Y. Soong, Clerk of Court
United States District Court—Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102-3489

RE Response to Proposed Revision to Local Rule 3-15

Dear Ms. Soong:

Burford Capital is one of the world's largest providers of commercial litigation finance, publicly listed on the London Stock Exchange with a market capitalization of more than $1 billion. While Burford does provide various forms of financing to single litigation matters, the business of litigation finance is substantially broader and more complex than just single-case funding, which amounted to less than 15% of our investment activity last year.

We write in response to the Notice Concerning Revision of Civil Local Rule 3-15 (Disclosure of Non-party Interested Entities or Persons) recently posted on the Court's web page.

The Revision Is Unnecessary and Discriminatory

The Local Rules of the Northern District of California already have a much broader disclosure obligation than most U.S. federal courts, requiring disclosure of "any persons, associations of persons, firms, partnerships, corporations (including parent corporations), or other entities other than the parties themselves known by the party to have either: (i) a financial interest (of any kind) in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding." Civil L.R. 3-15 (emphasis added). By contrast, both federal trial and appellate rules currently require the identification only of a party's parent corporations and any public shareholder owning more than 10% of the party's stock.[1] Providers of financing to a party or case—whether those providers are banks, insurers or "litigation funders"—are not required to be disclosed under the federal rules. The comments to the Federal Rules of Civil Procedure perfectly encapsulate the balancing test that the Judicial Conference took when adopting the rule:

> Although the disclosures required by Rule 7.1(a) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect. Framing a rule that

[1] See Sup. Ct. R. 29.6; Fed. R. App. P. 26.1; Fed. R. Civ. P. 7.1.

> calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a).

Fed. R. Civ. P. 7.1 (2002 Committee Notes).

The Judicial Conference Advisory Committee on Civil Rules recently took up a proposed revision to Rule 26(a)(1)(A) that would have required disclosure of third-party litigation financing agreements. The Committee decided in its October 2014 meeting not to act on the proposal. The proposal was renewed at the April 2016 meeting, and once again the Committee chose not to act.

Local Rule 3-15 already requires broader disclosure than the Federal Rule. The existing rule already requires disclosure of litigation funders (*e.g.*, as entities that have an interest that could be substantially affected by the outcome of the proceeding). Singling out "litigation funders" in the rule is peculiarly discriminatory – why emphasize disclosure of a litigation funder over that of the law firm providing financing via a contingent fee arrangement, or some other economically interested party? Instead, the rule should be left as is, relying on the existing definition to require disclosure of entities with a financial interest in the litigation.

Indeed, the proposed amendment strays from the purpose of disclosure rules in the first place – to ensure that judges know facts to permit them to address potential conflicts. That purpose is already achieved by the existing local rule (indeed, to an extent already well beyond the scope of Rule 7.1). Nothing more is needed for that purpose. Instead, the proposed amendment has a scent of issue advocacy to it: it is no secret that the U.S. Chamber of Commerce is opposed to litigation financing (despite many of its members making use of it), and singling out "litigation funding" would enter the Court into that political fray – a course rejected repeatedly by the Judicial Conference Advisory Committee following Chamber lobbying.

"Litigation Funding" Is Not a Defined or Easy-to-define Term

The term "litigation funding" has no common or accepted meaning – and the scope of Burford's business illustrates that. Burford engages in both single-case and multi-case funding. That funding is sometimes used to pay the fees or expenses associated with pursuing the litigation, but it is more often used as a means for corporate clients to use part of the expected asset value from a claim as a source of corporate financing. Burford is on record providing as much as $100 million in a single financing transaction to a client collateralized by dozens of separate litigation matters. This is a complex and rapidly evolving area.

To Protect Against Discriminatory Effects, Litigation Funding Documents Should Be Protected from Discovery

Fundamentally, Burford believes in fair play and a level playing field. It's not appropriate to single out litigation financiers like Burford for some sort of special regulation or rule-making. Rather, rules applicable to our civil justice system must apply even-handedly. For example, if our participation in a matter is to be disclosed, we believe that all economic interests should be

disclosed (just as the IBA guidelines require), and that all of those interests should have the same protection from the kind of tactical mischief lawyers sometimes like to play. Today, for example, insurance companies often benefit from greater protections against intrusive discovery requests than do litigation financiers in similar circumstances. There is no basis for narrow discriminatory treatment against specialty litigation finance firms while leaving litigation finance as practiced by others untouched.

If the proposed revision to Local Rule 3-15, which singles out litigation funders for disclosure, is to be adopted, we would recommend a concomitant Local Rule 26-2 that would include all litigation funding documents within the scope of Fed. R. Civ. P. 26(b)(3)(A), especially given the overwhelming precedent that has been developed to protect litigation funding materials from "gotcha" discovery. This rule would insure against the fact of litigation funding being used to launch a discovery sideshow, increasing the costs of litigation for the funded party and the burdens on the court. Indeed, such protection is warranted whether the LR 3-15 is amended or not.

We hope these comments demonstrate that the proposed revision to Local Rule 3-15 is unnecessary and, at the very least, in need of redrafting before being adopted. We would be delighted to discuss these points further with the court.

Respectfully submitted,

/s/

Christopher P. Bogart
Chief Executive Officer

BENTHAM IMF

July 22, 2016

SENT VIA E-MAIL
Susan Y. Soong, Clerk of Court
United States District Court—Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102-3489

Re: Proposed Revision to Civil Local Rule 3-15

Dear Committee Members:

I write on behalf of Bentham IMF, an Australian-based commercial litigation funder with US operations, to provide our view on the proposed revision to Civil Local Rule 3-15, "Disclosure of Non-party Interested Entities or Persons." I lead Bentham's San Francisco office. Prior to joining Bentham, I was a partner and practiced for fifteen years at Latham & Watkins LLP. I also took part in the hour-long panel on litigation funding at the recent Northern District of California Judicial Conference.

The impact of the revision is to make "litigation funders" subject to automatic disclosure in all civil proceedings before the Court. While Bentham welcomes the opportunity to comment, we respectfully submit that the proposed revision is premature and suggest that the Court initiate a study of commercial litigation funding before amending its Local Rules.

We believe that a study will help the Court ensure that any subsequent rule is appropriately tailored to avoid unintended and potentially harmful consequences to litigants and the Court. This comment letter briefly describes the recent growth of commercial funding, the reasons why the proposed revision is premature, and the other relevant bodies that have carefully looked at funding – including the Advisory Committee on Civil Rules of the Judicial Conference of the United States (the "Rules Committee") – and their respective processes.

Commercial Litigation Funding

Commercial litigation funding assists claimants with strong cases to achieve fair outcomes by removing the financial imbalance between parties. This imbalance can skew litigation results. Funders typically do not control litigation strategy, tactics or settlement. These are left to clients and their counsel.

Commercial funding is in its infancy in the United States. In our best estimation, of the hundreds of thousands of civil actions filed in federal district court each year, all commercial litigation funders combined invest in fewer than 75 individual cases throughout the United States. In the

Northern District of California, we believe that fewer than a dozen commercial cases have been funded in the past five years.

Despite these relatively small numbers, funding serves a real and growing need, as increasingly recognized by courts.[1] As one member of the Rules Committee put it: "[t]hird-party litigation financing makes it possible to bring cases that deserve to be brought."[2] Funding is necessary to ensure that the interests of *all* parties, including claimants rich in meritorious claims but lacking in financial resources, are protected.

Premature Adoption of the Proposed Revision Will Harm Litigants and the Court

Bentham respectfully submits that automatic disclosure of parties will very likely lead to a number of negative consequences for the Court and for civil litigants. Specifically, automatic disclosure threatens to:

- **Burden Litigants and the Court with Unnecessary and Wasteful Discovery**. Requiring automatic disclosure will almost certainly lead to unnecessary and wasteful discovery "sideshows" into funding arrangements.[3] Disclosure will invite defendants to probe sensitive and irrelevant financial information, the costs of which would fall on counsel and plaintiff. Of course, the additional discovery also would place significant further burdens on the Court's own scarce time and resources, just as the Federal Rules of Civil Procedure are moving in the direction of limiting such burdens under the doctrine of proportionality.[4]

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[1] *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 718 (N.D. Ill. 2014) ("Where a defendant enjoys substantial economic superiority, it can, if it chooses, embark on a scorched earth policy and overwhelm its opponent. . . . But even where a case is not conducted with an ulterior purpose, the costs inherent in major litigation can be crippling, and a plaintiff, lacking the resources to sustain a long fight, may be forced to abandon the case or settle on distinctly disadvantageous terms."); *Hamilton Capital VII, LLC, I v. Khorrami, LLP*, No. 650791/2015, 2015 WL 4920281 at *5 (N.Y. Sup. Aug. 17, 2015) ("Modern litigation is expensive, and deep pocketed wrongdoers can deter lawsuits from being filed if a plaintiff has no means of financing her or his case. Permitting investors to fund firms by lending money secured by the firm's accounts receivable helps provide victims their day in court."); *In re Int'l Oil Trading Co., LLC*, 548 B.R. 825, 835 (Bankr. S.D. Fla. 2016) ("[W]ithout litigation funders, parties owed money, or otherwise stymied by deep-pocketed judgment debtors, might have reduced or no ability to pursue their claims. Litigation funders may be essential to the provision of legal advice in such cases.").

[2] Minutes of the Civil Rules Advisory Committee (Oct. 30, 2014), at 13, *available at* http://www.uscourts.gov/file/17940/download (last visited July 22, 2016).

[3] *See, e.g.*, *Miller UK Ltd.*, 17 F. Supp. 3d 711 (issuing lengthy ruling on discovery issues arising out of defendant's attempt to discover documents concerning and shared with third-party litigation funder).

[4] *See* Fed. R. Civ. P. 26(b)(1) (as amended in 2015 to state that the scope of discovery is limited to discovery that "is proportional to the needs of the case").

- **<u>Risk Intruding on Privileged Communications</u>**. In addition to burdening litigants and the Court, automatic disclosure and the additional discovery it would invite would seriously risk intruding upon privileged attorney-client communications and attorney work-product. Discovery of communications between counsel and funders, the funding agreement itself and other materials – almost all entirely irrelevant to the underlying case merits – will intrude upon and chill advocacy and communication by counsel.

- **<u>Disclose All Contingency Arrangements</u>**. There are two common litigation funding structures: (1) funding provided to a party in single cases; and (2) funding provided to a law firm for its own financing needs and secured by fee revenue. Automatic disclosure and follow on discovery would cause disclosure of the lawyer's contingency arrangement in every case in which a funded law firm appears. This intrusion on the law firm's decision to take up a client's cause on a partial or modified contingency is plainly an unintended consequence of the proposed rule, which will discourage excellent counsel from taking these engagements, to the detriment of litigants and the Court.

- **<u>Give Defendants an Unprecedented and Unfair Advantage</u>.** Automatic disclosure will give defendants in all cases the unprecedented and unintended advantage of knowing which claimants lack the resources to weather a lengthy litigation campaign. Defendants will know not merely when a party is well funded but when the reverse is true – that a party has no deep reserves with which to battle. This asymmetrical discovery arms defendants with the knowledge of when and how to leverage their economic power in the litigation, despite the merits of the case, hampering the interests of justice.

At a minimum, these negative consequences warrant careful study by committee or other procedure.

In addition to better understanding the potential negative consequences of automatic disclosure, a more formal review of the proposed revision could also help to identify the specific concerns raised by commercial funding or clarify that these concerns are, in fact, not present. For example, a more narrowly crafted rule, rather than applying broadly to all "litigation funders," could distinguish among the myriad types of "funders," including consumer, commercial and non-profit organizations funding impact litigation, labor unions, family members of claimants and others. All of these actors could be viewed as "funders" of litigation, but not all may be at the center of the Court's concern.

A tailored rule could also either specify that only those litigation funders with control over settlement decisions be disclosed or require disclosure to a judicial officer conducting settlement negotiations near the time of a settlement conference. The judicial officer could then identify parties who should participate in settlement negotiations. A formal review of the proposed revision could better answer both the extent to which funders actually participate in settlement decisions and, if such participation is sufficiently widespread, how best to address it.

Funding Rules Are Typically Preceded by Careful Review of Funding

The Rules Committee was asked in 2014 to consider automatic disclosure of third-party funding. Finding any such requirement "premature"[5] for many of the same reasons outlined in this letter, the Committee stated: "no one has argued that these questions are unimportant. Nor has it been argued that they should be ignored. ***But third-party financing practices are in a formative stage. They are being examined by others. They have ethical overtones. We should not act now***."[6]

Other bodies and entities such as the American Bar Association, the California Bar, the New York State Bar, the Association of the Bar of the City of New York, and even the respective governments of Singapore and Hong Kong have all undertaken or are undertaking careful review of funding before issuing reports, opinions and draft legislation. These deliberative reviews have served courts, litigants, lawyers and other stakeholders well.

For these reasons, Bentham believes that the Court should establish a formal committee to study commercial litigation funding and disclosure. A more cautious approach will ensure that if any revision is necessary, it is appropriately tailored and timed to the Court's concerns.

Sincerely,

Matthew D. Harrison
Investment Manager/Legal Counsel
Bentham IMF

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[5] Minutes of the Civil Rules Advisory Committee (Oct. 30, 2014), at 12 ("The question whether to provide for automatic initial disclosure may be premature."); W.J. Kennedy, *Still No Movement On Disclosure of Third Party Litigation Financing*, Legal NewsLine (Apr. 21, 2016), *available at* http://legalnewsline.com/stories/510718034-still-no-movement-on-disclosure-of-third-party-litigation-financing.

[6] Minutes of the Civil Rules Advisory Committee (Oct. 30, 2014), at 14.