THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2024-2: ETHICAL ISSUES ARISING FROM ADVICE TO CLIENTS ON CLIENT-FUNDER LITIGATION FUNDING AGREEMENTS

TOPIC: **LITIGATION FUNDING**

DIGEST: Clients who would like to obtain, or who have obtained, litigation funding (usually referred to as "client-directed litigation funding") sometimes ask a lawyer representing them in the litigation that is to be the subject of the funding to review the litigation funding agreements on the client's behalf. Many times, a funder will ask the lawyer to become a party generally to the funding agreement, acknowledge it, or acknowledge and agree only to portions. Lawyers must consider not only the relevant substantive law, but their ethical obligations when advising on, agreeing to, or acknowledging an agreement. This opinion addresses some of the most common ethical issues and offers guidance. This opinion is divided into four sections: (1) an introduction to litigation funding, (2) pre-contractual issues, (3) contractual issues, and (4) post-contractual issues.

RULES: **1.0, 1.1, 1.2, 1.4, 1.6, 1.7, 1.8, 1.9, 1.15, 1.16, 5.4, and 5.7**

QUESTION: What are a lawyer's ethical duties when advising a client about litigation funding agreements the client intends to enter with a funder?

OPINION:

Introduction

Litigation funding is when a third party – someone with no legal or equitable interest in a claim – provides money or anything of value in exchange for a promise for some payment if the claim is settled or resolved in the claimholder's favor.[1] "Lawyer-directed funding" refers to a situation where the third party contracts directly with a lawyer. "Client-directed funding" which is the subject of this opinion, refers to a situation where there is a contract between a third party and a claimholder in which the parties agree that funds provided by the third party will be used by the claimholder to pay for a lawyer's fees and litigation expenses in exchange for a promise by the claimholder to pay the third party a sum of money sourced from the proceeds of the claim if and

* *Originally issued in April 2024; revised June 2024*

[1] Litigation funding is considered to be "champerty" in some parts of the United States, but litigation funding, as that term is used in this Opinion, is not champerty in New York. New York Judiciary Law (which defines the misdemeanor of champerty) prohibits the assignment of certain choses-in-action. N.Y. Judiciary Law §§ 488 & 489. In the typical litigation funding transaction in New York, no chose-in-action is assigned. Litigation funding contracts may employ the language of assignment (although they need not), but even when they do, usually all that is assigned are the proceeds from a chose-in-action.

only if the claim generates proceeds.[2] The last major review of client-directed funding by this Bar Association, which this opinion updates, was in 2011.[3]

Litigation funding is a rapidly growing area of financial activity. It has the potential to increase access to justice by creating new opportunities for access to capital for claimants and their lawyers. But lawyers with clients who seek litigation funding may be confronted by novel issues of law and professional responsibility.

I. Pre-Contractual Issues

A. Sharing of Fees with Non-Lawyers

Rule 5.4(a) prohibits lawyers from "shar[ing] legal fees with a nonlawyer." It is intended to prohibit "*any* financial arrangement in which a nonlawyer's profit or loss is directly related to the success of a lawyer's legal business."[4] It has various rationales, but it is clear that it is intended to serve two overarching purposes – to protect clients from non-lawyers' interference with their lawyers' independence of professional judgment and to prevent the unauthorized practice of law by non-lawyers. New York City Opinion 2018-5 stated that "Rule 5.4(a) forbids a funding arrangement in which the lawyer's future payments to the funder are contingent on the lawyer's receipt of legal fees or on the amount of legal fees received in one or more specific matters." The Committee explicitly noted that client-directed funding – where the payments to the funder flow from the client's recovery and not the lawyer's fee – does not implicate Rule 5.4(a) and thus does not violate the Rules of Professional Conduct because such funding does not involve a sharing of fees.[5]

---

[2] There is also a variation of "client-directed funding" in which the parties agree that funds provided by the third party will be used by the claimholder to pay for lawyers' fees and litigation expenses and where the third party requires the claimholder to repay the third party up to the original sum advanced if the claim generates proceeds. This is typical of client-directed funding by non-profit organizations.

[3] N.Y. City Op. 2011-2. This Committee considered lawyer-directed funding in N.Y. City Op. 2018-5.

[4] HAZARD, ET. AL., THE LAW OF LAWYERING (4TH ED.), at 155.

[5] N.Y. City Op. 2018-5. This is true even if the lawyer is a signatory to the agreement between the client and the funder. Shortly after the publication of Opinion 2018-5, the New York City Bar Association formed a working group, tasked with evaluating "whether Rule 5.4, as interpreted in Opinion 2018-5, well serves the professional community and the public, or whether the Rule should be revised to reflect contemporary commercial and professional needs and realities." REPORT TO THE PRESIDENT BY THE NEW YORK CITY BAR ASSOCIATION WORKING GROUP ON LITIGATION FUNDING (February 28, 2020), at 23, http://documents.nycbar.org/files/Report_to_the_President_by_Litigation_Funding_Working_Group.pdf (All websites last accessed on March 26, 2024). The working group proposed two versions of revisions to Rule 5.4, both providing that lawyers could engage in lawyer-directed legal finance, albeit under different conditions. The New York City Bar Association Professional Responsibility Committee issued a report on April 5, 2024 on lawyer-directed funding and Rule 5.4 incorporating various aspects of the Working Group proposals but differing from both of them. The proposal would allow a lawyer or law firm to pay, assign, pledge or give a security interest in earned or unearned legal fees to a nonlawyer for representing one or more specific clients provided that the lawyer provides the client(s) with (1) written notification and (2) an opportunity to inquire. *See* NYCBA Committee on Professional Responsibility, *Proposed Amendments to New York Rule of Professional Conduct 5.4 as Concerns Non-Party Litigation Funding*, (April 2024) https://www.nycbar.org/reports/proposed-amendments-to-ny-rule-of-professional-conduct-non-party-litigation-funding/?back=1.

B. Scope of Representation

Lawyers may advise clients about litigation funding. If a client has decided to secure funding but does not have a particular funding company in mind, a lawyer may refer the client to one or more companies.[6] New York City Opinion 2011-2 opines that, for a lawyer to make a referral, the lawyer "should conduct a reasonable investigation to determine whether particular providers are able and willing to offer financing on reasonable terms." If the lawyer wishes to provide the recommendation as a nonlegal service, Rule 5.7(a)(4) requires the lawyers to advise the client in writing that "the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services," or the client may presume that the services are to be the subject of the lawyer-client relationship. Thus, unless the lawyer satisfies the requirements of Rule 5.7(a)(4), the Rules of Professional Conduct, including the duty of competence, will apply to the making of the referral.

Lawyers may also represent existing clients in transactions with litigation finance companies and may charge clients a fee for such representations in addition to the fee agreed to for the underlying representations.[7] Litigation funding agreements often include complicated waterfall financing provisions and securitization terms. The litigation funding contract may involve terms of art and there may be questions about the clients' underlying legal matter and the potential obligations of the client to the funder based on the covenants in the contract, including whether the contract is enforceable. As with any advice that lawyers are asked to provide, a lawyer who offers advice to clients about litigation funding, or who communicates with litigation funding companies on behalf of a client concerning litigation funding agreements already in existence, must do so competently and advise the client if the lawyer is unable to do so.[8]

C. Conflicts of Interest

When clients seek advice about potential funding, lawyers must think carefully about the potential conflicts involved in providing this advice.

First, may a lawyer represent both a funder and a litigant (whom the lawyer is representing) in evaluating a pending or potential lawsuit? Such a joint representation arrangement, while atypical, would serve to provide privilege protections for the lawyer's advice to the joint clients. While both the funder and the litigant have aligned interests in understanding the strengths and weaknesses of the matter, they may also have differing interests. Comment 8 to Rule 1.7 states that differing interests exist where there is "a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected." If the client's goal is to obtain funding even for a weak claim, and the funder's goal is to fund only strong claims, these interests may conflict. Notwithstanding differing interests, such a joint representation may be consentable under Rule 1.7(b), depending on its specific facts, and the consent would need to include an agreement by both the litigant and the funder that there are no confidences or privileges as between joint clients

[6] N.Y. State Op. 666 (1994).

[7] N.Y. State Op. 769 (2003).

[8] Rule 1.1.

with respect to the joint representation. However, if a lawyer wants to subsequently represent the funder or the litigant in connection with the negotiation of the funding agreement after a limited joint representation to provide an evaluation, that would likely require a conflict waiver under Rule 1.9(a). This is because the other former client would be materially adverse in what is likely a substantially related matter; *i.e.*, the terms of the funding agreement will likely be informed by the evaluation that the lawyer jointly performed for the funder and the litigant.

If a lawyer determines that a joint representation is not possible, or if either party refuses to consent, then the lawyer should only provide an evaluation of the claim(s) to the party or parties that retain the lawyer. Further, as discussed below, the lawyer should caution the client about the risks to privilege of sharing any such evaluation with a funder.[9] The decision of whether to share is the client's.[10]

Where lawyers are engaged directly by a funder to evaluate a claim or negotiate a contract, they may want to seek an advance conflict waiver to ensure that the litigation funder does not seek to disqualify them in unrelated lawsuits. Recurrently handling a certain type of matter for a former client does not preclude a lawyer from later representing another client in a factually distinct problem of that type under Rule 1.9.[11] But a litigation funder may argue that the lawyers obtained the funder's confidential information, including funding or contracting strategy, that could in certain circumstances be used in unrelated litigation to the funder's disadvantage when the lawyers advise clients on, for instance, how to seek contractual concessions from the funder.[12]

Lawyers also must consider potential personal interests that put the lawyers in conflict with the client when the client asks for legal advice about funding a litigation the lawyer has filed or been retained to file. Where a lawyer knows that funding is necessary for the client to proceed with the action or continue to pursue a matter handled by the lawyer, Rule 1.7 does not require the lawyer to advise the client of the existence of a personal conflict of interest. The lawyer's interests in the client's funding, while material to the lawyer's own personal interest, are no different than a case where lawyers know that the client will only retain them on an hourly basis to pursue a claim if they opine that the claim is likely to succeed.

On the other hand, after the initial funding contract has been executed, a lawyer may be faced with additional potential conflicts of interest if the funder and client decide to renegotiate or extend the funding agreement and the lawyer's receipt of payment for completed work depends on the continuation of the funding. At that point, the funder may wish to add new terms which, had they been proffered at the outset of the funding relationship, the lawyer may have felt free to advise the client to reject, but which, now that the lawyer is in the midst of the representation, the lawyer may be less willing to advise the client to reject. In this case, unless the client expressly waives

[9] N.Y. City Op. 2018-5.

[10] Rule 1.2(a).

[11] Rule 1.9, comment 2.

[12] Rule 1.9(b)(2); Rule 1.7(a)(1).

this additional conflict in writing after full disclosure by the lawyer, the lawyer should recommend to the client that separate counsel be retained to negotiate the revision of the funding agreement.[13]

A personal interest conflict under Rule 1.7 may arise because of lawyers' investment in, receipt of a referral fee from, or relationship with a litigation funder.[14] Neither lawyers nor their firms may represent clients in litigation funded by a litigation funder in which one of the firm's lawyers is an investor.[15] Nor may lawyers refer clients to a funder in which that lawyer or another lawyer in their firm owns an interest.[16] This prohibition is nonwaivable because it is much like the situation where lawyers may not refer a client to a title abstract company in which they own an interest.[17] In the context of a title insurance company owned by a lawyer, a lawyer may ask a client to waive a personal financial conflict of interest in connection to a nonlegal service only where a disinterested lawyer would "believe that the representation of the client will not be adversely affected."[18] Like title insurance, the economic interests of a funder and a client are sufficiently in conflict that the lawyer's representation of the client would be adversely affected. Furthermore, Rule 1.8(i) states that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client" except through a lien or reasonable contingent fee. The comments to this rule explain that it has its basis in the common law doctrines of champerty and maintenance, and that it is intended to "avoid giving the lawyer too great an interest in the representation."[19]

D. Special Considerations When the Funder is a Not-For-Profit.

There are no separate rules for funders that are not-for-profit.[20] However, special considerations must be taken into account when a firm represents a client on a pro bono basis and a not-for-profit funder related to the firm provides funds to the client to pay for litigation-related expenses.

There, even if the firm has a financial interest in or controls the not-for-profit funder (directly or indirectly), the not-for-profit may provide the client with funds so long as the purpose of the financing is not to make a profit and the funding is limited to payments to cover expenses of

---

[13] Although outside the scope of this opinion, the Committee observes that the lawyer may want to propose to the client that, in this circumstance, it may be equitable for the funder to pay for the cost of the client's separate counsel.

[14] "[T]he lawyer is barred from accepting a referral fee from the company if the fee would impair the lawyer's exercise of professional judgment in determining whether a financing transaction is in the client's best interest and would compromise the lawyer's ethical obligation to provide candid advice regarding the arrangement; even where the fee is permitted, the lawyer may be required to remit the fee to the client." N.Y. City Op. 2011-2.

[15] N.Y. State Op. 1145 (2018).

[16] N.Y. State Op. 666 (1994); N.Y. State Op. 769 (2003).

[17] N.Y. State Op. 595 (1988).

[18] N.Y. State Op. 731 (2000).

[19] Rule 1.8, comment 16.

[20] Not-for-profit litigation funding has been recognized by the U.S. Supreme Court as protected by the First Amendment against certain exercises of the state's police powers. *See NAACP v. Button*, 371 U.S. 415, 442 (1963) (holding that not-for-profit's support of civil rights litigation was a "constitutionally privileged means of expression to secure constitutionally guaranteed" rights).

the litigation. In New York State Opinion 1145 (2018), the committee found that neither a lawyer nor the lawyer's firm may represent a client in litigation funded by a litigation financing company in which the lawyer is an investor. The opinion was driven by concerns with conflict-of-interest rules related to the lawyer's financial interest, and those concerns are not implicated where there is no profit motive. In addition, Rule 1.8(e)(1) allows a lawyer to advance "court costs" or litigation expenses for a client's litigation, repayment of which is contingent on the outcome of the matter. Therefore, because a lawyer may do indirectly what they may do directly, it follows that New York State Opinion 1145 does not prohibit a firm from representing a client in a matter where the court costs and litigation expenses are advanced by a not-for-profit funder related to the law firm providing the pro bono representation.

This does not mean, however, that a law firm providing pro bono services may represent a client in a matter where the firm's fees (hourly or otherwise determined) are advanced by a not-for-profit funder related to the firm. A lawyer may not provide "financial assistance" to a client except under the limited exceptions set out in Rules 1.5 and 1.8, and because paying a firm's fees on behalf of a client are not within those exceptions, the fees cannot be advanced to the client by a not-for-profit funder that is related to the firm.

II. Contractual Issues

A. Consistency with New York and other law

Rule 1.2(d) states that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client." While litigation finance contracts are generally enforceable in New York, the same litigation finance contract may not be enforceable under the law of another jurisdiction.[21] A lawyer may assist a client by preparing a contract that employs terms that may prove to be voidable (so long as the lawyer does not "know"[22] that the client intends to accept the benefits of the contract but then use the voidability to avoid any burdens), but then the lawyer must advise the client of the risks connected to adopting those contract terms.[23] Assuming the client is provided adequate information to make such a decision, the client may instruct the lawyer to employ those terms.[24]

---

[21] For example, a litigation funding agreement that would have been enforceable under New York law would not have been enforceable under Minnesota law until 2020. A litigation funding agreement that would have been enforceable had it been performed in New York would not have been enforceable had it been performed in Minnesota, even if it contained New York choice of law and choice of forum selection clauses. *See Maslowski v. Prospect Funding Partners LLC*, 890 N.W.2d 756, 767 - 68 (Minn. Ct. App. 2017) (holding that facts of transaction require contract law of Minnesota, not New York, apply); and *Prospect Funding Holdings L.L.C v. Maslowski*, 146 A.D.3d 535, 535 (1st Dep't 2017) (deferring to Minnesota courts on question of choice of law in this matter).

[22] *See* Rule 1.0(k) for the definition of "know."

[23] *See* N.Y. State Op. 584 (1987) ("If the lawyer is satisfied that the contract or activity is not illegal but instead determines that it is, at worst, voidable or unenforceable, there is nothing in Canon 7 or elsewhere in the Code of Professional Responsibility to prohibit the lawyer from drafting such a contract or assisting in such conduct, provided the risks inherent therein (that the contract may be voidable or unenforceable or the conduct may otherwise be challenged) are discussed with the client.").

[24] Rules 1.2(a) and 1.4(b).

B. Funder Payment and Withdrawal

Lawyers sometimes structure their funded engagements to allow clients to fulfill their payment obligations by using their own funds or third-party funds.

If the engagement is structured such that the only payment obligation is on the litigation funder, lawyers should be conscious of how this might affect their ability to withdraw upon non-payment. Rule 1.16(c)(5) provides that a lawyer may withdraw from a representation when "the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees." Therefore, if there is no obligation on the client to make payment to a lawyer, and the funder fails or refuses to make a payment, then the lawyer cannot rely on this provision of the Rules as the basis to withdraw. However, an engagement letter may specify that lawyers are permitted to withdraw should the funder fail to make payment (or decide to stop funding the litigation) so long as other requirements for withdrawal, such as ensuring that the withdrawal does not have a material adverse effect on the interests of the client and receiving permission from a tribunal where required, are followed.[25]

C. Confidentiality and privilege issues (Rule 1.6)

To evaluate a potential investment and then to monitor an investment after it is made, litigation funders typically seek information and analysis about claims and defenses from clients and the clients' lawyers. Litigation funding agreements often seek to specify the documents that clients and/or lawyers will provide, which may include requests for (a) legal evaluations of claims and defenses prior to or during litigation, (b) copies of material evidence, (c) drafts of filings, and (d) updates by the lawyers (written or oral).

Rule 1.6(a) provides that a lawyer shall not reveal a client's confidential information unless the client gives informed consent, the disclosure is "impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community," or for specified preventative and/or defensive purposes not implicated by this opinion.

A lawyer may not disclose client confidential information to a funder without client consent. Although obtaining funding may be "impliedly authorized to advance the best interests of the client," a lawyer should consider whether privilege likely will be waived by disclosure to the funder and whether attorney work product can be protected by the use of a non-disclosure agreement. And although litigation funding has become increasingly common, it is not "reasonable under the circumstances or customary in the professional community" to provide a funder with a client's confidences without the client's express consent.

Although a client may consent or ask for its information to be provided to a funder to secure funding, lawyers must ensure that the client's consent is "informed," as defined by Rule 1.0(j). That rule states that consent is only informed if it comes "after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has

[25] Rule 1.16(c)(10) and (d).

explained the material risks of the proposed course of conduct and reasonably available alternatives."

Here, the most important risk to discuss with the client is that sharing these materials with the funder may waive attorney-client privilege or work product protections. While the substantive laws of privilege and work product are beyond the scope of this opinion, there are cases on both sides of the issue.[26] The most cautious course of action is to disclose only non-protected and/or public materials. Where the funder requires more as a condition of funding, lawyers should seek to guide the client to minimize the risks to privilege to the greatest extent possible.

Whenever lawyers provide confidential information to funders, there should be a non-disclosure agreement with the funders through a standalone non-disclosure agreement during the diligence process or a non-disclosure provision in the litigation funding agreement, or both.

D. Control of litigation

The Rules of Professional Conduct protect both the client's ability to control litigation and lawyers' independent judgment. Funders sometimes seek to reserve for themselves, in the funding contract, rights and privileges related to the client's exercise of authority under Rule 1.2. The funder may require the client to inform it when a settlement offer has been made. The funder also may require the client to inform it if the client wishes to discharge its current lawyer. The funder may impose various remedies on the breach of these covenants, ranging from conversion of the agreement to a recourse loan at a defined interest rate, immediate rescission of the contract, or requiring the client to subject its decision to a review of an arbitrator. Lawyers have a responsibility to advise the client about the implications of such provisions.

Lawyers must abide by clients' decisions concerning the objectives of the matter; must abide by the clients' settlement decisions; and must consult with clients as to how the objectives of the matter are to be pursued.[27] Further, as Comment 2 to Rule 1.2 says, lawyers "usually" defer to clients regarding questions of expenses. Rule 5.4(c) prohibits lawyers from allowing a third party who "recommends, employs or pays" the lawyer to "direct or regulate" the lawyer's professional judgment.[28] There is no conflict between Rule 1.2(a) and Rule 5.4(c). Clients may, by contract, agree to instruct their lawyers in accordance with the wishes of the contract's counterparty, but that does not change the lawyers' obligations to the clients. Lawyers should not "confuse[] freedom of judgment with freedom of action. Lawyers must always have the former,

---

[26] *Contrast Miller UK Ltd. v. Caterpillar, Inc.* 17 F. Supp. 3d 711 (N.D. Ill. 2014) (holding that attorney-client privileged materials lost their protection when shared with litigation funders because a "shared rooting interest in the 'successful outcome of a case' . . . is not a common *legal* interest" (emphasis in original)) *with Elm 3DS Innovations LLC v Samsung Elecs. Co.*, 2020 US Dist LEXIS 216796, at *2 (D. Del. Nov. 19, 2020, No. 14-1430-LPS) (holding that documents shared with funders were prepared in anticipation of litigation, and thus protected by the work product doctrine).

[27] Rule 1.2(a).

[28] Rule 5.4(c) cannot be waived by the client under any circumstance (informed consent is no cure), and so no lawyer may participate in the making of a legal funding agreement that requires the client to instruct the lawyer to allow the funder to interfere with the lawyer's independent professional judgment. *See, e.g.*, Mich. Op. RI-321 (2000) (finding that a financing agreement that placed restrictions on an attorney's ability to manage the litigation created an "impermissible conflict of interest" and interfered with the attorney's exercise of professional judgment).

but they rarely, if ever, have the latter, and no rule requires clients to give it to them."[29] This comment was made in response to concerns that lawyers would violate the duty of professional independence if they represented clients who give liability insurers the right to control how lawyers conducted the defense of the client. Rule 1.2's obligations upon lawyers are not affected by the terms of the contract the client has with a third party.[30] In other words, if a client in a litigation funding agreement agrees to accept the funder's instructions to the client about whether to accept or reject a settlement, the lawyer's ethical obligation is unchanged; Rule 1.2 requires the lawyer to follow the client's instructions about whether to settle, regardless of whether the client would be breaching the contract in doing so.[31] Thus, lawyers may not sign funding agreements requiring the lawyers to follow the instructions of the funders rather than lawyers' clients.

Finally, there are limits on lawyers' ability to make contracts with clients that limit the right to discharge the lawyers. "The unqualified right to terminate the attorney-client relationship at any time has been assiduously protected by the courts."[32] This is a principle of contract law drawn from New York public policy reflected in the law governing lawyers, including in the New York Rules of Professional Conduct. No lawyer may violate this principle directly or indirectly. Therefore, no lawyer may agree to a contract in which the client may not freely discharge the lawyer.[33] Nor may lawyers agree with a client not to withdraw from the representation under Rule 1.16(b).[34] By extension, no funder may cause a client to insist on such a promise from lawyers.

III. Post-Contractual Issues

If lawyers are aware of the assignment to the litigation funder of a portion of proceeds from a litigation, they have an obligation to notify the funder when they come into possession of the proceeds and to pay the proceeds out according to the assignment.[35] Rule 1.15(c)(4) requires that lawyers promptly pay to the "client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive." The comment to the rule notes that "[a] lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client" and specifies that "when the third-party claim is not frivolous under applicable law," as, for example, where there is a contractual assignment of which the lawyer is aware, "the lawyer must refuse to surrender the property to the client until the claims are resolved."[36] Lawyers should not decide the dispute themselves, but may represent their clients in resolving the dispute with the funder. If the

---

[29] Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205, 230 – 3 (1997) (footnotes omitted).

[30] *See* N.Y. State Op. 1154 (2018) at ¶ 11.

[31] Of course, when representing more than one client, lawyers can work with the clients to designate someone to make decisions on behalf of the client group. Likewise, clients may appoint agents.

[32] *Matter of Cooperman*, 83 N.Y.2d 465, 473 (1994) (citations omitted).

[33] The Committee does not address in this opinion whether lawyers may waive the right to permissive withdrawal.

[34] We do not address whether a lawyer may agree not to exercise the lawyer's right to withdraw under Rule 1.16(c).

[35] *Leon v. Martinez*, 84 N.Y.2d 83, 90 (1994).

[36] Rule 1.15, comment 4.

dispute cannot be resolved through negotiation, lawyers should file an action to have the dispute resolved by a court (or arbitrator if the funding agreement contains an arbitration provision).[37]

Lawyers may, but are not obligated to, agree to represent a client in negotiating a reduction of the payment owed by the client to a legal finance company upon the resolution of litigation if it is not within the scope of the original engagement letter.[38] Lawyers who assume the responsibility for negotiating with a funder on behalf of their clients at the end of the representation must do so competently.

CONCLUSION

Litigation funding is a developing area of law with complex ethical issues, and lawyers who advise clients on client-directed litigation funding should tread carefully.

[37] *Id.*

[38] *See Francis v. Mirman, Markovits & Landau PC*, N.Y. Sup. Ct. Kings County, No. 29993/10, Jan. 3, 2013. It is common for clients in the "consumer" sector of litigation finance to pay less to the funder than required under the contract. *See* Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third-Party Consumer Litigant Funding*, 104 CORNELL L. REV. 1133, 1157 - 58 (2019). Presumably these reductions are secured through the effort of a client's lawyer. The fact that such conduct may be common does not make it a necessary part of the representation unless the lawyer explicitly offers to provide this service.