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N.Y. Bar's litigation funding group recommends against mandatory disclosure rule

(Reuters) - In 2018, the New York City Bar's Committee on Professional Ethics issued a very controversial advisory opinion on litigation funding. The non-binding opinion concluded that New York's prohibition on fee sharing with non-lawyers precludes attorneys from entering into litigation funding agreements that are contingent on the receipt of fees in a particular case or cases. The controversy prompted the bar to appoint a truly blue-ribbon Working Group to study litigation funding and issue recommendations to the City Bar's president.

The group, led by Lynn Neuner of Simpson Thacher & Bartlett and Debra Raskin of the plaintiffs' firm Vladeck Raskin & Clark, was notable for representing a diversity of views: private practitioners from both the defense and plaintiffs side; ethics experts, law professors, litigation funding executives, in-house counsel, arbitration specialists and former federal judge Katherine Forrest. In a debate dominated by the U.S. Chamber and other business groups on one side and litigation financiers on the other, the New York bar's working group promised to bring nuance to the discussion.

The group's report came out Monday, and as my colleague Caroline Spiezio reported, it recommends loosening New York's ethics rules to acknowledge the reality that litigation funding is an increasingly common phenomenon. "We conclude that lawyers and the clients they serve would benefit if lawyers have less restricted access to funding," the group wrote.

But the group didn't limit their analysis and recommendations to the ethics question. They also looked at the red-hot fight over the extent to which litigation funding must be disclosed to courts and counterparties. As you're probably aware, the Chamber and its allies have been pushing for years in Congress and state legislatures and before the Federal Judiciary's rules committee to require plaintiffs to disclose if they are backed by third-party funders. The litigation finance industry has met the Chamber's campaign with equal force.

The New York City Bar report contains the most comprehensive discussion of the state of play on the disclosure question that I've Seen. The report surveys the status quo dispassionately, outlining the arguments both sides have Offered to justify their positions on disclosure. Disclosure advocates, for instance, liken litigation funding for plaintiffs to defendants' insurance policies, which must be disclosed. Litigation funders, on the other hand, argue that their agreements are generally irrelevant to the underlying litigation – a view shared by most courts that have issued ruling, according to the N.Y. working group's report – and that their disclosure might lead to unnecessary collateral litigation over privilege issues.

The report noted that Congress has failed to pass Republican-introduced litigation finance disclosure bills and only one state legislature, Wisconsin, has so far mandated disclosure. The Advisory Committee on Federal Civil Rules has deferred acting on proposals to beef up litigation funding disclosure requirements, the group report said. But six federal appellate courts and 24 district courts, according to the group, "currently mandate some form of disclosure that may require revealing the identity of the litigation funder (in the context of disclosing interested parties for judicial conflict-of-interest purposes)." Very few courts have required parties backed by litigation funders to produce their actual agreements, the report found.

The N.Y. working group concluded, after its painstaking review of case law, legislative proposals and arguments by both sides that "there should not be a mandatory disclosure requirement in federal and state courts with respect to the funding of commercial litigation at this time." Funding arrangements may be discoverable in special circumstances, the group said, but there's no need right now for universal disclosure mandates. (The working group carved out a discussion about disclosure in class actions, in

which judges have a heightened obligation to oversee the fees awarded to class counsel, and opted to not recommend a model form of disclosure.)

As the N.Y. group's report acknowledged, policy-makers are just beginning to grapple with the consequences of the litigation finance boom. Disclosure rules, they said, "are still nascent and have been adopted only to a limited degree or in response to specifically-identified needs, such as to inform judicial recusal and disqualification decisions." In the context of the broader discussion of litigation funding disclosure, this report's recommendation is just a data point, and a non-binding one at that.

But I do think it's significant that lawyers representing such a wide diversity of experience and perspectives concluded - after conducting a deep investigation of the pros and cons – that courts should not impose mandatory disclosure requirements. If you care about the future of litigation funding, and especially if you care about the regulation of such funding, you should really read the report.

(Reporting by Alison Frankel)

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