March 9, 2020

<u>VIA EMAIL</u>

Global Legal Practice Committee
District of Columbia Bar
901 4th Street NW
Washington, DC 20001
Attention: Adriana Goss-Santos
agoss-santos@dcbar.org
202-780-2774

RE: *<u>D.C. Bar Global Legal Practice Committee Request for Public Comment on Rule of Professional Conduct 5.4</u>*

To Ms. Goss-Santos,

On behalf of the U.S. Chamber Institute for Legal Reform, the Advanced Medical Technology Association, the American Tort Reform Association and the National Association of Mutual Insurance Companies, we write in response to the D.C. Bar Global Legal Practice Committee's ("GLPC") request for comments on possible modifications to D.C. Rule of Professional Conduct 5.4.[1] These comments are focused on responding to the possibility of amending Rule 5.4 in a manner that would allow "external investment in a law firm [or] nonlawyer ownership of a law firm" and/or permit the sharing of fees between lawyers and nonlawyers, as well as the GLPC's explicit request for feedback on "third-party litigation funding" ("TPLF").[2] "The D.C. Bar's rules are already the most lenient in the nation because they allow lawyers and nonlawyers to jointly own law firms that only provide legal services."[3] As explained in more detail below, relaxing Rule 5.4 any further to

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1 *See* Press Release, D.C. Bar, *D.C. Bar Global Legal Practice Committee Seeks Public Comment on Rule of Professional Conduct 5.4* ("Request for Comments") (Feb. 27, 2020), https://www.dcbar.org/about-the-bar/news/DC-Bar-Global-Legal-Practice-Committee-Seeks-Public-Comment-on-Rule-of-Professional-Conduct-5-4.cfm. Descriptions of each of the aforementioned organizations are attached as Appendix A.

2 *Id.*

3 Debra Cassens Weiss, *DC Bar considers relaxing its already-lenient rules to allow nonlawyer ownership of law firms*, ABA Journal (Jan. 27, 2020),

permit fee-sharing with, or ownership of, law firms by TPLF companies would pose deleterious ethical and normative consequences for D.C.'s civil justice system and should be strongly rejected.

TPLF is a business model under which third parties provide money to a litigant or his/her counsel in exchange for a contingent interest in any proceeds from the litigation. In short, TPLF companies invest in (that is, buy) parts of litigation matters. Third-party litigation funding, once a small industry in the United States, is now a ubiquitous feature of civil litigation, with some analysts estimating that it is "at least a $10 billion industry."[4] By all indicators, the industry is thriving and increasingly counts billion-dollar businesses in its ranks.[5] But with the expanding reach of TPLF into our civil justice system comes great potential for serious abuse. The below comments proceed in two parts: first, we chronicle the fundamental incompatibility between Rule 5.4 and TPLF; and second, we detail some of the most pernicious adverse effects of TPLF on the civil justice system, demonstrating why TPLF should not be accommodated, let alone formally countenanced, by D.C.'s Bar.

Our more detailed comments are as follows:

First, Rule 5.4, in any form, and TPLF are fundamentally incompatible. While Rule 5.4 is designed to safeguard the professional independence of attorneys and protect the attorney-client relationship, TPLF threatens those precepts by inviting officious meddling in key litigation decisions and potentially subordinating the interests of clients to those of the entities bankrolling the litigation. This is so because an attorney – who owes his or her client a fiduciary duty of loyalty – simply cannot be expected to faithfully discharge that fundamental obligation when ***someone else is paying the bills***.

Perhaps it is reasonable to assume that the interests of the funder and client align in many respects; after all, both want to win the lawsuit. But what happens when there is a strategic decision about which the TPLF funder and litigant disagree

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http://www.abajournal.com/news/article/dc-bar-considers-relaxing-its-already-lenient-rules-to-allow-nonlawyer-ownership-of-law-firms.

4 Matthew Goldstein & Jessica Silver-Greenberg, *Hedge Funds Look to Profit From Personal-Injury Suits*, N.Y. Times (June 25, 2018), https://www.nytimes.com/2018/06/25/business/hedge-funds-mass-torts-litigation-finance.html.

5 John H. Beisner, Jessica D. Miller & Jordan M. Schwartz, *Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding A Decade Later* at 6-8, U.S. Chamber Institute for Legal Reform (Jan. 2020); *see also* Burford Capital, Burford Annual Report 2018 at 3, https://www.burfordcapital.com/media/1526/bur-31172-annual-report-2018-web.pdf.

– for example, to settle a claim early or to not settle a claim in hopes of securing a substantial, albeit unlikely, jury verdict? Maybe the funder – whose primary goal is to maximize its return on investment – is more willing to roll the dice to see if a risky investment pays off big by going to trial. To whom does the attorney listen? The client or the company footing all of the legal bills? Pronouncements by the funders themselves strongly suggest the latter. Indeed, as an executive of a prominent TPLF company recently acknowledged, litigation funders "make ***it harder and more expensive to settle cases***."[6] The clear import of this statement is that funders are – at least, to some extent – pulling the strings in the cases they finance, potentially putting attorneys at odds with the interests of their clients. In light of this thorny ethical minefield, any modification to Rule 5.4 inviting or expanding TPLF involvement in the legal industry should be flatly rejected. In short, the D.C. Bar should strongly resist any efforts to weaken Rule 5.4 by allowing TPLF funders to own law firms or share fees with lawyers.

D.C. Rule of Professional Conduct 5.4(b) is ***already*** the "most lenient in the nation because [it] allow[s] lawyers and nonlawyers to jointly own law firms that only provide legal services."[7] It nonetheless places certain important limits on such nonlawyer ownership of law firms. Specifically, a nonlawyer may own part of a law firm ***only if***: (1) the "nonlawyer . . . performs professional services which assist the organization in providing legal services to clients"; (2) the organization's "sole purpose [is] providing legal services to clients"; (3) the nonlawyer "undertake[s] to abide by the[] Rules of Professional Conduct"; (4) "[t]he lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1"; and (5) "[t]he foregoing conditions are set forth in writing."[8]

The carefully circumscribed limitations on nonlawyer ownership outlined above highlight precisely why TPLF ownership is fundamentally at odds with Rule 5.4. Those limitations are deliberately designed to prevent a nonlawyer from interfering with the independent professional judgment of a lawyer. As noted above,

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6 Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, Wall St. J. (Mar. 21, 2018), https://www.wsj.com/articles/lawsuit-funding-long-hidden-in-the-shadows-faces-calls-for-more-sunlight-1521633600 (emphasis added).

7 Weiss, *supra* note 3; *see also* Request for Comments, *supra* note 1 ("The District of Columbia is the only jurisdiction in the United States that has adopted a modified Rule 5.4(b), which permits lawyers to form partnerships with nonlawyers in limited circumstances.").

8 Rules of Professional Conduct: Rule 5.4--Professional Independence of a Lawyer, D.C. Bar, https://www.dcbar.org/bar-resources/legal-ethics/amended-rules/rule5-04.cfm.

subsections (b)(1) and (b)(4) of Rule 5.4, for example, require that nonlawyer owners provide a ***service*** to the clients of the law firm, not merely invest in the law firm or its cases, and that the lawyer owners "undertake to be responsible for the nonlawyer participants" to ensure that they abide by the Rules of Professional Conduct.[9] The comments to the current Rule 5.4(b) confirm this principle, clarifying that the Rule "does ***not*** permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for ***investment*** . . . [s]ince such an investor would not be an individual performing professional services within the law firm."[10] These limitations expressly envision a dynamic by which the lawyers of the firm are in control of the nonlawyers and directly supervise them as they provide services to their clients. In short, under the current Rule, it is clear that the nonlawyer owners of the law firm – whether that owner be a lobbyist, economist or accountant – are controlled by the lawyer owners of the law firm, not *vice versa*.

If, however, Rule 5.4 is modified to permit TPLF funders – mere ***investors*** – to buy ownership stakes in law firms, then this dynamic is turned on its head. The nonlawyer investors will control the lawyers, which is exactly the situation that Rule 5.4 is meant to prevent, because where a nonlawyer holds a position of power over a lawyer, that attorney's independent professional judgment in inevitably compromised. As some legal commentators have warned, "any nonlegal entity likely to be attracted to making . . . an investment [in a law firm] would want to be financially dominant in the law firm, and it is reasonable 'to assume that financial dominance confers control, either through outright ownership, or through the functional equivalent of outright ownership.'"[11] Moreover, lawyers are likely to capitulate to such investors in matters of control because lawyers "with outside investors are likely to be concerned about the enterprise's reputation within the investor community. The failure to meet a projected financial target can lead to a drop in stock price or the loss of a needed private equity investor. Such concerns about reputation may make these enterprises more likely to focus on meeting investors' targets" rather than furthering the best interests of the attorneys' clients.[12]

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9 *Id.*

10 *Id.* cmt. [8] (emphasis added).

11 David P. Miranda, *Say No to Nonlawyer Ownership (NLO)*, 88 N.Y. St. B.A. J. 5, 6 (2016) (citation omitted).

12 Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership*, Access, and Professionalism, 29 Geo. J. Legal Ethics 1, 49 (2016) (footnote omitted).

To be sure, funders have repeatedly maintained that they do not seek to exercise control over the lawsuits they finance.[13] However, the agreements that have come to light (which are few and far between because such agreements are not yet required to be disclosed in most jurisdictions)[14] tell a very different story.

For example, in *White Lilly, LLC v. Balestriere PLLC,* a TPLF company asserted that it had the right to exercise control over a litigation in which it had acquired a financial interest.[15] In its complaint, the TPLF company alleged that its funding agreement required that specified counsel, who had an existing relationship with the TPLF company, serve as one of the plaintiff's counsel in the funded lawsuit. Indeed, the TPLF entity alleged that its counsel breached her obligation to serve as its "'ombudsman' to oversee the cases it ultimately invested in, and to ***ensure*** that the [lawsuits] asserted viable claims and were litigated properly and efficiently."[16] Further, the funder asserted that it had been assured that the "proposed litigation" would settle "quickly."[17] The funding agreement also required that "[d]efendants obtain prior approval for expenses in excess of $5,000.00"[18] There can be no dispute that all of these provisions afforded the TPLF entity various means to control or influence the course of the litigation in which it invested.

Similarly, the U.S. Court of Appeals for the Sixth Circuit recently held that a series of agreements entered into between a litigant and a funder violated Kentucky's bar against champerty (i.e., the buying and selling of lawsuits) because, *inter alia*, the terms of those arrangements gave "***substantial control*** over the litigation" to the funder.[19] For example:

> [The] Agreements permit [the funder] to require [claimant] to execute documents or pay filing fees to protect [the funder's] interest. Those

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13 Burford Capital, https://www.burfordcapital.com/how-we-work/with-law-firms/ ("We act as passive investors and do not control strategy or settlement decision-making . . . .") (last visited Mar. 6, 2020).

14 Beisner et al., *supra* note 5, at 26-30.

15 Compl. ¶ 35, *White Lilly, LLC v. Balestriere PLLC*, No. 1:18-cv-12404-ALC, ECF No. 1 (S.D.N.Y. filed Jan. 2, 2019).

16 *Id.*

17 *Id.* ¶ 45.

18 *Id.* ¶ 124.

19 *Boling v. Prospect Funding Holdings, LLC*, 771 F. App'x 562, 579 (6th Cir. 2019) (emphasis added).

> Agreements provide that if [claimant] "intentionally and/or negligently defaults in the performance of any obligation required to protect and preserve the Litigation, [claimant] shall be liable to [funder]" for the full amount of the loan, including the interest. They also stated that [funder] could seek specific performance if [claimant] defaulted on any conditions required in the Agreement. ***All four Agreements limited [claimant's] right to change attorneys without [funder's] consent, otherwise [claimant] would be required to repay [funder] immediately***.[20]

The Sixth Circuit agreed with the district court that the agreements "raise[d] quite reasonable concerns about whether [the] plaintiff can truly operate independently in litigation."[21] As the appellate court warned, the agreements could "interfere with or discourage settlement."[22] Specifically, and in light of the provisions described above, the "injured party may be disinclined to accept a reasonable settlement offer where a large portion of the proceeds would go to the firm providing the loan."[23]

As with TPLF ownership of law firms, allowing lawyers to share fees with TPLF entities would likewise threaten the professional independence of lawyers. D.C. Rule of Professional Conduct 5.4(a) provides that "[a] lawyer or law firm shall not share legal fees with a nonlawyer."[24] "The prohibition against fee-sharing is intended 'to protect the lawyer's professional independence of judgment'"[25] and "ha[s] long been a feature of codes of legal ethics."[26] The prohibition is "motivated by a number of concerns, chiefly that nonlawyers might through such arrangements . . . control the activities of lawyers and interfere with the lawyers' independent professional judgment."[27]

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[20] *Id.* at 579-80 (emphasis added) (footnotes omitted) (citation omitted).

[21] *Id*. at 580.

[22] *Id.*

[23] *Id.* (citation omitted).

[24] D.C. Rule of Prof'l Conduct 5.4(a).

[25] *Lannan Found. v. Gingold*, 300 F. Supp. 3d 1, 17 (D.D.C. 2017) (quoting D.C. Rule of Prof'l Conduct 5.4 cmt. [1]).

[26] D.C. Bar Ethics Opinion 233, Payment of "Success Fees" to Nonlawyer Consultants, Jan. 1993, https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion233.cfm.

[27] *Id.*

Although all TPLF funding agreements have the potential to undermine the attorney-client relationship, this risk is heightened in contingency-based funding agreements entered into directly between a funder and an attorney, particularly because the agreement may exist without the attorney's client being fully aware of its ramifications (or perhaps even its existence). These quintessential fee-sharing agreements are *per se* violative of Rule 5.4(a).

The New York City Bar Association recently recognized as much when it issued an interpretation of New York's Rule 5.4(a), which is substantively similar to D.C.'s. The New York City Bar Association resolved that Rule 5.4(a) explicitly prohibits fee-sharing with a litigation funder where "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."[28] As that opinion explains, Rule 5.4(a) "presupposes that when nonlawyers have a stake in legal fees from particular matters, they have an incentive or ability to ***improperly*** influence the lawyer."[29] In so explaining, the City Bar noted that the bar associations of Maine, Nevada, Utah and Virginia reached a similar conclusion.[30]

A recently disclosed TPLF agreement in a putative class action illustrates the problem highlighted by these other bar associations. In *Gbarabe v. Chevron Corp.*,[31] the plaintiffs commenced a putative class action arising out of an explosion on an oil drilling rig off the coast of Nigeria. Under the agreement entered into by plaintiffs' counsel and the funder, counsel agreed that the funder would be repaid its $1.7 million investment in the case by way of a "success fee" of six times that amount ($10.2 million), to be paid from attorneys' fees – plus 2% of the total amount recovered by the putative class members.[32] The fact that the funder was to be paid as

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[28] N.Y. City Bar, Formal Opinion 2018-5: Litigation Funders' Contingent Interest in Legal Fees at 1.

[29] *Id.* at 6 (emphasis added). Earlier this month, a working group of the New York City Bar Association issued a report recommending that the State of New York abrogate the well-established bar against the sharing of fees between lawyers and non-lawyers. *See* Report to the President by the New York City Bar Association Working Group on Litigation Funding, at 24-33. ILR and NAMIC strongly opposes this recommendation for all of the reasons set forth in text.

[30] N.Y. City Bar, Formal Opinion 2018-5 at 5 & n.8 (citing Prof'l Ethics Comm'n Me. Bd. of Overseers of the Bar, Op. 193 (2007); State Bar of Nevada Op. 36 (2007); Utah Bar Ass'n Adv. Op. 97-11 (1997); Va. Bar Standing Comm. On Legal Ethics, Advisory Op. 1764 (2002)).

[31] *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 U.S. Dist. LEXIS 103594 (N.D. Cal. Aug. 5, 2016).

[32] Decl. of Caroline N. Mitchell in Supp. of Chevron Corp.'s Mem. in Opp'n to Mot. for Class Certification & Mots. to Exclude the Reports & Test. of Onyoma Research & Jasper Abowei, Ex. 13

a "success fee" after the collection of attorneys' fees (i.e., on a contingency basis) means this agreement directly violated Rule 5.4's prohibition on fee sharing. Moreover, apparently unbeknownst to the class members – and absent their consent and approval – the agreement contemplated that class members would be required to hand over part of any potential recovery to the litigation funder.

In addition to violating the prohibition against improper fee sharing, the funding agreement contained several key provisions reflecting the funder's intent to influence the litigation. Specifically, the agreement referred to a "Project Plan" for the litigation developed by counsel and the funder with restrictions on counsel deviation, particularly with respect to hiring only identified experts.[33] The agreement expressly prohibited the lawyers from engaging any co-counsel or experts "without [the funder's] prior written consent."[34] Control over the litigation budget – how much is paid in expenses, when and to whom – has the ability to significantly affect litigation strategy. Further, the agreement required that counsel "give reasonable notice of and permit [the funder] where reasonably practicable, to attend as an observer at internal meetings, which include meetings with experts, and send an observer to any mediation or hearing relating to the [c]laim."[35]

Notably, the D.C. government has suggested that it might be open to embracing fee-sharing with TPLF companies as part of its own litigation efforts. Last year, the Office of the D.C. Attorney General issued a notice seeking private outside counsel to assist in a possible investigation and corresponding lawsuit against ExxonMobil for "potential violations of the Consumer Protection Procedures Act (CPPA) or other District laws in connection with Exxon's statements or omissions about the effects of its fossil fuel products on climate change."[36] The request sought outside counsel on a contingency-fee basis, with a total maximum potential payout of $26 million. Of most relevance here, the solicitation expressly provided that the lawyer "may assign to a bank, trust company, or other financing institutions funds

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at 5, *Gbarabe v. Chevron Corp.*, No. 3:14-cv-00173-SI, ECF No. 186-4 (N.D. Cal. Sept. 16, 2016) (Litigation Funding Agreement § 1.1, definition of "success fee").

33 *Id.* at 4, 12.

34 *Id.* at 12.

35 *Id.* at 13.

36 *See Outside Counsel for Climate Change Litigation, Solicitation, Offer, and Award: Government of the District of Columbia* at 2 (Feb. 28, 2019), https://oag.dc.gov/sites/default/files/2019-03/OAG-RFP-DCCB-2019-R-0011-Outside-Counsel-for-Climate-Change-Litigation-Issued-2-28-19_1.pdf.

due or to become due as a result of the performance of this contract."[37] This kind of arrangement would raise serious questions in any kind of lawsuit. But importing it into what essentially would be a quasi-criminal proceeding would raise even more questions, raising the specter that the government enforcement powers of the District of Columbia would be ceded to an outside funder interested in maximizing its profit as opposed to vindicating the public interest.

Needless to say, the kinds of interference with attorney independence described above would only become more ubiquitous – indeed, more blatant – if Rule 5.4 is modified to permit TPLF funders to actually own law firms or improperly share fees with lawyers. Lawyers will become beholden to their investors, which likely will compromise their ethical duty of loyalty to their clients. Although law is a business, it does not operate in secret and its members are subject to fundamental ethical limitations that ensure that the client retains ultimate control over his or her lawsuit. Introducing either fee-sharing with – or law firm ownership by – TPLF funders would inevitably disrupt that framework by vesting undue influence or control in the hands of outside TPLF funders whose primary interest is maximizing return on investment, ***not*** protecting the interests of the client.

In sum, any dilution of Rule 5.4 that would allow fee sharing with TPLF companies or ownership by funders themselves would spell the end of the attorney-client relationship as we know it. Accordingly, the D.C. Bar should strongly reject any efforts to relax the requirements of Rule 5.4, which have served attorneys, their clients and the broader D.C. civil justice system well for many years.

Second, any weakening of D.C.'s rules of professional responsibility would have the unintended consequence of dramatically expanding the role of TPLF in this jurisdiction, threatening to convert D.C.'s courts into "trading floors where people buy and sell lawsuits based on their perceived merit."[38] That is an unseemly outcome that the D.C. Bar should strongly resist, not invite. After all, apart from threatening the attorney-client relationship and implicating fundamental ethical principles, TPLF also promotes the filing of frivolous, sometimes fraudulent, lawsuits. As one Alabama court aptly recognized, such financial investments in litigation are nothing more than "gambling contracts."[39]

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[37] *Id.* at 15.

[38] John Beisner & Jordan Schwartz, *How Litigation Funding Is Bringing Champerty Back To Life*, Law360 (Jan. 20, 2017), https://www.law360.com/tax-authority/articles/882069/how-litigation-funding-is-bringing-champerty-back-to-life.

[39] *Wilson v. Harris*, 688 So. 2d 265, 269 (Ala. Civ. App. 1996).

In *Wilson v. Harris*, the plaintiff entered into a funding agreement to cover her living expenses while her $4 million personal injury verdict was on appeal. To secure this funding, the plaintiff agreed to provide the funder with ***one-third*** of any monies recovered from the pending lawsuit.[40] At the conclusion of the appeal, which was decided in the plaintiff's favor, she refused to give the defendant any portion thereof, arguing that the funding agreement was void.[41] Agreeing with the plaintiff, the trial court ruled that the loan agreement was both unconscionable and an unenforceable gambling contract.[42] On appeal, the court affirmed, reasoning that "[t]he agreement here was that Harris would pay Wilson a sum of money upon the happening of an uncertain event over which neither party had control—Harris's recovery of damages after her personal injury lawsuit survived the appellate process."[43] In addition, the court found that "Harris and Wilson are not related to each other by consanguinity or affinity, and Wilson ***had no legitimate interest in the outcome of the lawsuit other than the recovery of money.***"[44] The court declared the agreement void and contrary to public policy, concluding that:

> The general tendency of the Wilson–Harris agreement is opposed to the public interest because it condones speculation in litigation, makes sport of the judicial process, and tempts the unscrupulous to prey upon the distress of the ignorant and unfortunate. We hold that the agreement violates public policy and is therefore void because it is supported by a gambling consideration and its speculative characteristics make it closely akin to champerty.[45]

As described by the *Wilson* court, third-party funding of litigation is nothing more than "gambling," which, as seen below, produces harmful – indeed, sometimes physically dangerous – effects. A recently published paper chronicles some of the most egregious examples.[46]

For example, the case of *Chevron Corp. v. Donziger*, suggests that TPLF funders may be used to facilitate marginal, frivolous, or perhaps outright fraudulent

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40 *Id.* at 266-67.

41 *Id.* at 268.

42 *Id.*

43 *Id.*

44 *Id.* at 269 (emphasis added).

45 *Id.* at 270.

46 Beisner et al., *supra* note 5, at 17.

litigation, so long as the potential payout is sufficiently lucrative. There, a TPLF funder helped sustain a lawsuit filed in an Ecuadorian court, alleging environmental contamination in Lago Agrio, Ecuador.[47] A fund associated with Burford, one of the largest TPLFs in the United States,[48] invested $4 million with the plaintiffs' lawyers in the suit in October/November 2010 in exchange for a cut of any award. In February 2011, the Ecuadorian trial court awarded the plaintiffs an $18 billion judgment. In March 2011, Judge Lewis A. Kaplan of the U.S. District Court for the Southern District of New York issued an injunction barring the plaintiffs from collecting their judgment because of what he observed was "ample" evidence of fraud on the part of the plaintiffs' lawyers.[49] Apparently agreeing with Judge Kaplan, sometime in 2011, Burford decided not to provide any additional funding to the case. "Nevertheless, its year-long involvement—and its initial decision to invest $4 million despite allegations of fraud in the proceedings—vividly shows that TPLF investors have high risk appetites and are willing to back claims of questionable merit."[50]

An even more glaring example of TPLF gone awry is the alleged use of TPLF to encourage plaintiffs to have unnecessary surgeries in order to drive up the value of their claims.[51] An April 2018 article in the *New York Times* describes the story of a woman who received a phone call from a stranger telling the woman that she has a defective mesh implant and that she needed surgery to remove it. "Just like that, she had stumbled into a growing industry that makes money by coaxing women into having surgery—sometimes unnecessarily—so that they are more lucrative plaintiffs in lawsuits against medical device manufacturers."[52] "While studies have shown that up to 15 percent of women with mesh implants will encounter problems" and that "removing the mesh is not always recommended," some TPLF funders, ***in furtherance of their own financial interest***, will apparently do anything to increase the potential return on investment, including pushing women to undergo unnecessary

47 *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011). For a fuller description of the case *see* Beisner et al., *supra* note 5.

48 Beisner et al., *supra* note 5, at 7.

49 *Donziger*, 768 F. Supp. 2d at 636. Although later vacated by the Second Circuit on jurisdictional and procedural grounds, Judge Kaplan's factual findings still stand. *See Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012).

50 Beisner et al., *supra* note 5, at 13.

51 Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, N.Y. Times (Apr. 14, 2018), https://www.nytimes.com/2018/04/14/business/vaginal-mesh-surgerylawsuitsfinancing.html.

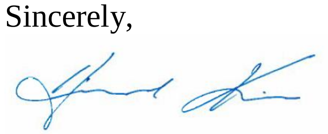
52 *Id.*

and dangerous surgeries.[53] Notably, approximately one year after the *New York Times*'s exposé, an indictment in the U.S. District Court for the Eastern District of New York alleged that a litigation funder bankrolling lawsuits in the sprawling pelvic mesh litigation "facilitated the coordination of removal surgeries and purchased and resold [the plaintiffs'] medical debts for profit."[54]

The first example came to light only because of a dispute between the funder and the plaintiff; the second was uncovered as a result of extensive discovery; and the third was revealed due to investigative reporting. Indeed, current court policy shielded this illegal activity from exposure. Existing rules are not resulting in automatic disclosure of TPLF arrangements, and courts often reject defendants' efforts to obtain such information through discovery. Our courts should not allow themselves to be used as instrumentalities for illegal or unethical activity. But that is likely to be the unintended consequence of weakening Rule 5.4 in ways that ***invite*** TPLF into this important jurisdiction.

At bottom, ethical rules should not be relaxed to accommodate TPLF. D.C.'s version of Rule 5.4 is already the most "lenient" in the country, and diluting it even further threatens to wrest control of litigation from the actual parties themselves. In addition, and particularly given that TPLF may facilitate frivolous and fraudulent lawsuits, the D.C. Bar should be looking at ways to limit (not expand) TPLF – for example, by requiring that such arrangements be disclosed in all civil cases. Accordingly, we strongly urge the D.C. Bar to reject any proposals that allow lawyers to share legal fees with non-lawyer TPLF funders or permit non-lawyer TPLF funders to acquire ownership interests in law firms.

Sincerely,



Harold Kim
President
U.S. Chamber Institute for Legal Reform

American Tort Reform Association

Advanced Medical Technology Association

National Association of Mutual Insurance Companies

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53 *Id.*

54 Indictment ¶ 2, *United States v. Barber*, No. 1:19-cr-00239-RJD, ECF No. 1 (E.D.N.Y. filed May 23, 2019).

APPENDIX A – SUMMARY OF SIGNATORY ORGANIZATIONS

- **U.S. Chamber Institute for Legal Reform.** The U.S. Chamber Institute for Legal Reform (ILR) is the most effective and influential legal reform organization in the United States. ILR's mission is to champion a fair legal system that promotes economic growth and opportunity. ILR does this by creating broad awareness of the impact of litigation on society, championing commonsense legal reforms, and effectively leveraging its reputation, resources, and network to execute advocacy campaigns at the state, federal and international levels. ILR is an affiliate of the U.S. Chamber of Commerce, the world's largest business federation representing approximately 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size.

- **Advanced Medical Technology Association.** The Advanced Medical Technology Association ("AdvaMed") is the world's largest trade association of medical device manufacturers. AdvaMed advocates on a global basis for the highest ethical standards, timely patient access to safe and effective products and economic policies that reward value creation. AdvaMed seeks to advance medical technology to promote healthier lives and healthier economies around the world. AdvaMed's members range from the largest to smallest medical technology companies doing business in the United States. These companies produce medical devices, diagnostic products and health information systems.

- **American Tort Reform Association.** The American Tort Reform Association ("ATRA") is the only national organization exclusively dedicated to reforming the civil justice system. The organization is a nationwide network of state-based liability reform coalitions backed by 135,000 grassroots supporters. ATRA's membership is diverse, and includes nonprofits, small and large companies, as well as state and national trade, business and professional associations.

- **National Association of Mutual Insurance Companies.** The National Association of Mutual Insurance Companies ("NAMIC") membership includes more than 1,400 member companies. The association supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC member companies write $268 billion in annual premiums. Our members account for 59 percent of homeowners, 46 percent of automobile, and 29 percent of the business insurance markets. Through our advocacy programs we promote public policy solutions that benefit NAMIC member companies and the policyholders they serve and foster greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.