



THE NEW ELLIS GROUP

Monday Monday

Connecting the Dots with Karen Kaplowitz



*Helping you create and reinforce the habits of successful career building,
gleaned from my work as a business development strategist, trainer and coach*

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Have You Mastered the Art of Litigation Funding? There have been two recent major news events in litigation funding. In mid-December, the Wall Street Journal reported that Burford Capital Ltd., the industry leader, acquired Gerchen Keller Capital, creating an entity with over a billion dollars available or committed for litigation funding. In mid-February, IMF Bentham Ltd. announced a transaction with a unit of Fortress Investment Group which increased Bentham's funds for investing in US litigation by up to \$200 million. Notably, Fortress itself was acquired the same week by Softbank, the Japanese investment giant. If you are competing to represent clients in major commercial litigation, your clients will expect you to be able to explain the suitability of litigation funding for their matters, to access litigation funders, and to negotiate a litigation funding agreement. To assess whether you are ready, consider these questions:

- Do you have experience with litigation funding or someone in your firm on whom you can rely?
- Do you have a policy about when to discuss litigation funding options with clients? Do you only suggest such financing when your client cannot otherwise afford the litigation and your firm is unwilling to handle the matter on a contingent fee?
- Have you established your credibility and reputation with entities like Bentham and Burford?
- Do you understand the differences among funders' criteria, process and timing for evaluating potential litigation matters or portfolios of matters?
- Have you helped to educate your firm about the expense and risk it may be asked to bear by a litigation funder in a co-investment scenario?
- Are you ready to advise your client to have litigation financing transactions reviewed by independent counsel to insure their enforceability?

Litigation funding changes a lot of the dynamics of commercial litigation. If you are not up to speed with respect to considering and accessing litigation funding, you will be at a competitive disadvantage in an already hyper competitive legal marketplace.

Example: A company with a significant patent portfolio charged its new general counsel with the task of reducing the company's legal spend. To evaluate the options, the general counsel invited each of the company's major outside counsel to make a presentation on the work they had handled over the past three years with a focus on the return on investment. The general counsel then put together a portfolio of pending and contemplated patent infringements suits and met with a litigation funder to consider outside funding. The litigation funder did a thorough assessment of the portfolio. The general counsel was impressed with the litigation funder's analysis which helped her conclude that certain matters were not worth pursuing. She also appreciated the insights the litigation funder provided about the quality of the various lawyers the company had used. At the end of the process, the company decided to continue to self-fund its pending patent litigation but agreed that for new matters, the company would finance the litigation and take recommendations from the litigation funder on which law firms to retain for each matter.

Sophisticated commercial litigation clients in 2017 would never consider hiring lawyers who were not experts in jury research and electronic discovery. Familiarity with litigation funding and access to litigation funders are quickly becoming similar core competencies. Can you be competitive if you have not mastered the art of litigation funding?

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