RULES SUGGESTION
to the
ADVISORY COMMITTEE ON CIVIL RULES
and its
TPLF SUBCOMMITTEE

A SECRET DISCLOSURE RULE? HOW THE HISTORY OF THE FEDERAL RULES OF CIVIL PROCEDURE SUGGESTS THE METHOD FOR THE ESSENTIAL DISCLOSURE OF NONPARTY FINANCIAL INTERESTS TO COURTS AND PARTIES

September 8, 2026

Lawyers for Civil Justice ("LCJ")[1] and the U.S. Chamber of Commerce Institute for Legal Reform ("ILR")[2] respectfully reiterate the suggestion that the Advisory Committee on Civil Rules ("Advisory Committee") and its TPLF Subcommittee amend the Federal Rules of Civil Procedure ("FRCP") to require disclosure of nonparty litigation funding contracts.[3]

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[1] LCJ is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. Since 1987, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] A program of the U.S. Chamber of Commerce (the "Chamber"), ILR's mission is to champion a fair legal system that promotes economic growth and opportunity. The Chamber is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more that 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

[3] Lawyers for Civil Justice and the U.S. Chamber Institute for Legal Reform, *A Revised Proposal: Amend Rule 26(A)(1)(A) to Guide Courts and Parties on TPLF Disclosure while Preserving Judicial Discretion and Protecting Parties' Assertions of Privilege*, Mar. 10, 2026, https://www.uscourts.gov/sites/default/files/document/26-cv-8_suggestion_from_lcj_ilr_-_rule_26.pdf. *See also* Lawyers for Civil Justice and US Chamber of Commerce Institute for Legal Reform, Rule Suggestion, *It Is Time to Address the Patchwork of Inadequate Practices: How the Lack of FRCP Guidance Is Failing Courts and Parties Who Need a Uniform and Credible Procedure for Understanding Third-Party Litigation Funding Agreements*, Oct. 2, 2024, https://www.uscourts.gov/sites/default/files/24-cv-v_suggestion_from_lcj_and_ilr_-_rule_26_tplf.pdf.

INTRODUCTION: DISCLOSURE TO WHOM?

As the Advisory Committee contemplates a possible rule requiring disclosure of nonparty participation in litigation through third-party litigation funding (TPLF), it is seeking to answer the question, "disclosure to whom?"[4]

The history of the FRCP informs the answer in two ways. First, all FRCP-required disclosures are made available to parties (subject to motions for protective order). In stark contrast, not a single FRCP affirmatively calls for *ex parte* communications with the judge. Such a rule would be entirely unprecedented.

The second principle is that FRCP-required disclosures are not *discovery* and thus are not constrained by relevancy to issues being litigated. The Advisory Committee firmly established this distinction in resolving the court split over insurance contracts in 1970. Before then, some courts denied "discovery" of insurance contracts under Rule 26(b)'s relevance standard, while other courts ordered disclosure of insurance contracts so courts and parties could know which financial interests were participating in decisions about the litigation and settlement. The Advisory Committee concluded that the policy considerations necessitating disclosure transcended "relevancy" and required disclosure of insurance agreements.[5] Because the preferable policy allowed "counsel for both sides" to "make the same realistic appraisal of the case,"[6] the Advisory Committee provided disclosure to parties rather than only to the court.

Today's "rules problem"[7] regarding TPLF disclosure is closely analogous to the rules problem with insurance agreements prior to 1970: courts are split, with some denying *discovery* of TPLF contracts due to Rule 26(1)(b) while other courts are granting *disclosure* as necessary to parties' ability to manage and resolve litigation. Judges need guidance, parties need disclosure, and the federal judiciary needs a uniform procedure. This problem does not need an unprecedented new solution requiring *ex parte* communications. Rather, the Advisory Committee can and should honor its precedent by providing disclosure to courts and parties. A rule requiring disclosure of nonparty funding contracts (a proposed draft is pending before the Advisory Committee[8]) is

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[4] Memo from Hon. Sarah S. Vance, Chair, Advisory Committee on Civil Rules, to Hon. James C. Dever III, Chair, Committee on Rules of Practice and Procedure, Agenda Book, Committee on Rules of Practice and Procedure (June 3-4, 2026), 360, https://www.uscourts.gov/sites/default/files/document/2026-06-standing-committee-meeting-agenda-book.pdf.

[5] The Advisory Committee rejected Rule 26(b)'s "relevancy" analysis as a limit to disclosure of insurance agreements when it promulgated Rule 26(a)(1)(A)(iv). Fed. R. Civ. P. 26 advisory committee notes to 1970 amendment. At the time, many courts were denying discovery requests for insurance agreements "reason[ing] from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence." *Id*. Those courts "avoid[ed] considerations of policy, regarding them as foreclosed." *Id*.

[6] Disclosure of insurance agreements "will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation." Fed. R. Civ. P. 26 advisory committee notes to 1970 amendment.

[7] The Advisory Committee's test for acting is: (1) is there a problem? (2) is it a rules problem? and (3) is there a rules solution whose benefits outweigh any unintended consequences?

[8] Lawyers for Civil Justice and the U.S. Chamber Institute for Legal Reform, *A Revised Proposal: Amend Rule 26(A)(1)(A) to Guide Courts and Parties on TPLF Disclosure while Preserving Judicial Discretion and Protecting Parties' Assertions of Privilege*, Mar. 10, 2026, 5-6, https://www.uscourts.gov/sites/default/files/document/26-cv-8_suggestion_from_lcj_ilr_-_rule_26.pdf.

essential for furnishing clear, uniform guidance to judges, illuminating potential conflicts of interest, helping parties make informed litigation and settlement decisions, and honoring the judicial tradition of transparency.

I. FRCP DISCLOSURES ARE PROVIDED TO PARTIES, NOT CONCEALED IN *EX PARTE* COMMUNICATIONS

All of the FRCP's required disclosures—including real parties in interest,[9] corporate ownership of parties,[10] and insurance agreements[11]—provide information to the parties. The same is true for *amicus curiae* disclosures required by the Federal Rules of Appellate Procedure ("FRAP").[12] This transparency reflects the history and tradition not only of the federal rules of procedure, but also of the judiciary: litigants should know who has a financial stake in their case, particularly where it affects litigation and settlement decisions. No procedural rules use *ex parte* communications as the default means for accomplishing mandatory disclosures. The FRCP mention "*ex parte*" in only three places, none of which concerns an *ex parte* method of disclosure.[13]

Two recent rulemaking efforts are illustrative. The Advisory Committee recently recommended an amendment to FRCP 7.1 that will broaden corporate disclosure requirements to include business organizations (not just corporations) owning 10 percent or more (not just of stock) of a party. The purpose is to identify nonparty companies with a financial interest in the case.[14] The amendment was "sparked by concerns that judges are not sufficiently informed" that "they might hold an interest in a business organization that is a 'grandparent' or 'great-grandparent' of a party."[15] Even though the articulated purpose of disclosure is to allow *judges* to make informed recusal decisions, the Advisory Committee did not even entertain the possibility that an *ex parte* communication would suffice. The amended rule, like the present Rule 7.1, will require disclosures to the court, parties, and the public.

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9 FED. R. CIV. P. 17 ("An action must be prosecuted in the name of the real party in interest.").
10 FED. R. CIV. P. 7.1.
11 FED. R. CIV. P. 26(a)(1)(A)(iv).
12 FED. R. APP. P. 29.
13 FED. R. CIV. P. 6(c)(1)(A) (excluding motions for extension of time that may be heard *ex parte* from 14-day notice requirement); FED. R. CIV. P. 53(b)(2)(B) (requiring that orders appointing masters include the circumstances, if any, in which the master may communicate *ex parte* with the court or a party); and FED. R. CIV. P. 77(b) (excluding *ex parte* hearings from prohibition against hearings being conducted outside the district).
14 The premise of the amendment is that 10 percent ownership in *a party* should trigger an inquiry into whether there is a material interest in *the lawsuit*. "Such a direct or indirect owner is presumed to hold a sufficient interest in a party to raise a rebuttable presumption that a judge's financial interest in the owner extends to the party, warranting recusal." Committee on Rules of Practice and Procedure, Agenda Book, June 3-4, 2026 ("Standing Committee Agenda Book"), 389, https://www.uscourts.gov/sites/default/files/document/2026-06-standing-committee-meeting-agenda-book.pdf. Nonparty litigation funders often hold much more substantial financial interests, 30, 40, 50 percent or even more (including 100 percent when contractual provisions allow the nonparty to step into the shoes of the plaintiff), and those financial interests are directly valued in the lawsuit. The Committee on Rules of Practice and Procedure approved the Advisory Committee's proposed Rule 7.1 amendment on June 3, 2026. If the rule proceeds as expected, the amendment will take effect December 1, 2027.
15 Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, & Criminal Procedure, and the Federal Rules of Evidence (Aug. 2025), https://www.uscourts.gov/sites/default/files/document/preliminary_draft_of_proposed_amendments_final.pdf.

Similarly, the forthcoming amendment to FRAP 29 will expand disclosures about *amicus curiae* to provide courts, parties, and the public "information about possible reasons for the filing other than those explained by the amicus itself."[16] The proposed Committee Note explains that "disclosures about an amicus are important to promote the integrity of court processes and rules," in part because "the public interest in knowing about an amicus" requires sufficient information "to evaluate its argument and a court's consideration of those arguments."[17] During its multi-year rule making process for FRAP 29, the Advisory Committee on Appellate Rules never entertained any possibility that the expanded amicus disclosures be made only *ex parte* to the court, and kept secret from the parties to the case and the public.

Just as there is no reason for rules to conceal information about corporate ownership of parties or *amicus curiae* filers from the parties, there is no basis for creating a first-ever FRCP *ex parte* rule for the purpose of hiding from the litigants a nonparty's disclosures of financial stake in, and decision-making power over, a court case. An *ex parte* disclosure rule would not only be a radical departure from the FRCP's transparent approach to disclosure, but also would conflict with the Advisory Committee's well-accepted differentiation between disclosure and discovery.

II. DISCLOSURE OF FINANCIAL INTERESTS IS NOT "DISCOVERY"

In the late 1960s, the Advisory Committee studied the split among federal courts concerning disclosure of insurance agreements. Many courts were denying disclosure based on Rule 26(b)'s definition that discovery is allowed "only of matters which will be admissible in evidence or appear reasonably likely to lead to such evidence."[18] Other courts were ordering disclosure so parties would know who had a financial stake in their case and a level of control over the litigation and resolution. Because "[i]t appears difficult if not impossible to obtain appellate review of the issue," the Advisory Committee determined that "[r]esolution by rule amendment is indicated."[19]

Examining and weighing the caselaw, the Advisory Committee rejected the applicability of Rule 26(b) to insurance contracts, pointing out that the courts focusing on "relevance" were "avoid[ing] considerations of policy, regarding them as foreclosed."[20] Instead, the Advisory Committee "resolved this issue in favor of disclosure" by promulgating Rule 26(a)(1)(A)(iv), explaining that access to insurance contracts enables "counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation."[21] This conclusion was informed by caselaw analysis that is just as applicable to TPLF disclosure.

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[16] Standing Committee Agenda Book at 244. The Committee on Rules of Practice and Procedure approved the proposal on June 3, 2026. If the rule making process proceeds as expected, the amendment will take effect December 1, 2027.
[17] *Id.*
[18] FED. R. CIV. P. 26(a)(1)(A)(iv) advisory committee's note to 1970 amendment.
[19] *Id.*
[20] *Id.*
[21] *Id.*

A. The "Discovery" View of Disclosure is "Too Narrow"

The Advisory Committee's thinking about the relationship between disclosure of insurance contracts and the scope of discovery was informed by the *Cook v. Welty*[22] opinion, which explained:

> The objections to requiring a disclosure of liability insurance are that the purposes of discovery are either to obtain evidence to be introduced at the trial, or to secure information as to where such evidence may be found, or to narrow the issues to be tried. Information concerning liability insurance coverage is irrelevant to any of these topics….
>
> As a matter of strict logic such reasoning is invulnerable. Nevertheless, it is too narrow a view.[23]

The Advisory Committee ultimately concluded that the "discovery" view of insurance disclosure was too narrow, and that the courts denying disclosure of insurance contracts based on the Rule 26(b) definition of the scope of discovery were mistaken.[24] A key reason for the Advisory Committee's thinking was the importance of knowing the role of nonparties.

B. Key Reason for Disclosure: A Nonparty's Role in Litigation and Settlement

The Advisory Committee's rationale for requiring disclosure of insurance contracts included enabling "counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation."[25] The foremost element in that appraisal is allowing the parties to know who is actually making litigation and settlement decisions. The Advisory Committee agreed with this explanation by the Illinois Supreme Court:

> In determining whether liability insurance is discoverable by pretrial interrogatories, we must also take cognizance of the role of insurance companies in such litigation against their insured, for as Justice Holmes noted, "Judges need not be more naive than other men." Inasmuch as the insurance company is virtually substituted as a party … as far as the investigation and conduct of the defense is concerned, it would seem to be relevant, if not indispensable, that plaintiff's attorney have knowledge of the existence of insurance in order to prepare for the case he has to meet and be apprised of his real adversary. Such knowledge, furthermore, would also lead to more purposeful discussions of settlement, and thereby effectuate the dispatch of court business.[26]

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[22] *Cook v. Welty*, 253 F. Supp. 875 (D.D.C. 1966). This case was prominently cited in the Advisory Committee's note to the 1970 amendment.
[23] *Id*. at 876-77.
[24] FED. R. CIV. P. 26(a)(1)(A)(iv) advisory committee's note to 1970 amendment.
[25] *Id*.
[26] *People ex rel. Terry v. Fisher*, 12 Ill.2d 231, 145 N.E.2d 588, 592-93 (Ill. 1957), *quoted in Cook v. Welty* at 878.

Also prominent was the importance of a nonparty insurance company's role in litigation. The Advisory Committee concurred in the landmark opinion, *Johanek v. Aberle*,[27] in which Judge Jameson wrote:

> It is a well recognized fact … that where there is insurance coverage the insurer takes control of the defense of any action brought against one of its insured. The insurer not only defends the suit, but also makes such investigation, negotiations and settlement as it deems expedient…. This fact may properly be taken into consideration in determining whether plaintiff should be permitted discovery relative to insurance information.[28]

The reasoning in these cases convinced the Advisory Committee that disclosure should not only be allowed, but affirmatively required; it explained in the Committee Note that "[t]he cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation." The Advisory Committee further found that disclosure could help protect the insured from conflicts with its insurance company,[29] an issue that echoes today's concerns about TPLF contracts creating conflicts of interest between named parties, their lawyers, and their funders.[30]

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[27] *Johanek v. Aberle*, 27 F.R.D. 272, 278 (D. Mont. 1961). *Johanek* was prominently cited in the Advisory Committee's note to the 1970 amendment. The reasoning in this opinion, written by Judge William J. Jameson, who served as president of the American Bar Association in 1953-54, was cited by many other federal courts reaching the same result. C. Wright, A. Miller & R. Marcus, *Federal Practice & Procedure*, Relevancy to the Subject Matter—Existence & Limits of Insurance, 8 Fed. Prac. & Proc. Civ. §2010 n.5 (3d ed. 2010 & 2026 Supp.).

[28] *Id*. at 278.

[29] The Advisory Committee explained that disclosure of insurance contracts could, in addition to helping plaintiffs, protect the insured from potential conflicts of interest between the insured and the insurance company. It quoted *Clauss v. Danker,* 264 F. Supp. 246, 248 (S.D.N.Y. 1967), as follows:

> There are circumstances where disclosure of insurance would more fully protect a defendant than non-disclosure, due principally to a potential conflict of interest between the insurer and the insured. For instance, in cases where liability is doubtful but potential recovery large, the insurer on a small policy might refrain from settlement and refuse disclosure of the policy limits for the reason that it would not lose a great deal by going to trial and it might win the case outright. Disclosure might pressure the insurance company into a settlement within the policy limits, whereas non-disclosure could lead to a judgment against the defendant in a sum far in excess of the limits.

Clauss denied the motion for disclosure of an insurance contract "with reluctance and with the desire that the Rules be amended to permit such discovery." *Id*. at 249. "Notwithstanding the desirability of disclosure of insurance coverage and the failure to show how such disclosure would prejudice the defendant or the insurer, its discoverability must depend upon whether it is permitted by the Federal Rules, and it seems clear that it is not." *Id*.

[30] *In re Depo-Provera*, 2025 WL 1860996, at *1 (N.D. Fla. July 1, 2025) (TPLF "is not only expensive for participants, but it also could create conflicts of interest between plaintiffs and their attorneys and may improperly deter plaintiffs from accepting a settlement offer because they may want to make up the amount they will be forced to repay the funder") (quoting U.S. GAO, GAO-23-105210, Third-Party Litigation Financing: Market Characteristics, Data, & Trends (Dec. 2022) (available at https://www.gao.gov/assets/gao-23-105210.pdf.). *Accord*, *e.g.*, *In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, 2025 WL 2201056, at *1-2 (N.D. Cal. Aug. 1, 2025); *MSP Recovery Claims v. Sanofi-Aventis U.S. LLC*, 2024 WL 4913662, at *13-14 (D.N.J. Apr. 2, 2024); *May v. Gladstone*, 562 F. Supp.3d 709, 713-14 (C.D. Cal. 2021); *Nunes v. Lizza*, 2021 WL 7186264, at *4 (N.D. Iowa Oct. 26, 2021); *Haghayeghi v. Guess?, Inc.*, 2016 WL 9526465, at *1-2 (S.D. Cal. Mar. 21, 2016); *Gbarabe v. Chevron Corp.*, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016); *Nelson v. Millennium Labs*, 2013 WL 11687684, at *5-6 (D. Ariz. May 17, 2013); *Calumet Cap. Partners LLC v. Victory Park Cap. Advisors, LLC*, 353 A.3d 88, 111 (Del.

During the Advisory Committee's deliberations, one idea that never gained plausibility, if it was discussed at all, was that insurance disclosures should occur *ex parte*.

III. A DISCLOSURE RULE FOUNDED ON *EX PARTE* COMMUNICATIONS WOULD FAIL TO MEET THE NEED

Like insurance agreements, TPLF contracts influence the conduct of litigation far beyond the "claims and defenses" of any particular case. Contracts for litigation funding give nonparty funders a financial stake in judgments and settlements, and a basis for influencing or controlling litigation and settlement decisions. Language is the key—contractual provisions provide nonparties with rights that alter litigation dynamics in ways courts and parties need to understand in order to manage their cases.[31] A rule that withholds this information from the parties would fail to meet the need.

A. An *"Ex Parte* Disclosure" Rule Would Not Give Adequate Guidance

Lack of an FRCP disclosure rule is causing judges to seek information about nonparty funding arrangements in cases including large MDLs,[32] class actions,[33] and patent cases.[34] Some courts have adopted local disclosure rules specific to nonparty funders.[35] Some judges are instituting similar standing orders.[36] As the Advisory Committee well knows, local rules are not working when it comes to nonparty funders.[37] This cacophony of local practices is inconsistent with the Advisory Committee's mandate to create uniform procedures. In addition, disclosure of nonparty financial interests is essential to the function of several key FRCP provisions.[38]

Ch. 2026); *Burkhart v. Genworth Fin., Inc.*, 2024 WL 3888109, at *3-4 (Del. Ch. Aug. 21, 2024); *S.D. v. St. Luke's Cornwall Hosp.*, 96 N.Y.S.3d 467, 486 (N.Y. Sup. 2019).

[31] Lawyers for Civil Justice, *Uniform Disclosure of Third-Party Litigation Funding Contracts Is Necessary to Inform Judges' and Parties' Key Case Management Decisions*, Sept. 3, 2025, ("LCJ Examination of TPLF Contracts"), 2-3, https://www.uscourts.gov/sites/default/files/document/25-cv-l_suggestion_from_lcj_-_rule_26_tplf.pdf.

[32] *E.g.*, *In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, 2025 WL 2968026 (N.D. Cal. Oct. 21, 2025); *In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, 2025 WL 2201056 (N.D. Cal. Aug. 1, 2025); *Depo-Provera*, 2025 WL 1860996.

[33] *E.g.*, *Corzo v. Brown Univ.*, 2026 WL 881598, at *24 (N.D. Ill. Mar. 31, 2026); *MSP Recovery Claims v. Sanofi-Aventis U.S. LLC*, 2024 WL 4913662, at *12 (D.N.J. Apr. 2, 2024).

[34] *E.g. Preservation Technologies LLC v. Mindgeek USA, Inc.*, 2020 WL 10965161, at *6 (C.D. Cal. Dec. 18, 2020); *Odyssey Wireless Inc. v. Samsung Electronic Co.*, 2016 WL 7665898, at *6-7 (S.D. Cal. Sept. 20, 2016).

[35] *See* Civ. L.R. 7.1.1 (D.N.J. June 21, 2021).

[36] Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022); Standing Order for All Judges of the North District of California, Contents of Joint Case Management Statement ¶ 17 (N.D. Cal. Nov. 30, 2023).

[37] *See* Memo from Patrick A. Tighe, Rules Law Clerk, to Ed Cooper, Dan Coquillette, Rick Marcus, and Cathie Struve, *Survey of Federal and State Disclosure Rules Regarding Litigation Funding* (Feb. 7, 2018), Agenda Book, Civil Rules Advisory Committee (Apr. 10, 2018) 209-29, https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf. *See also Depo-Provera*, 2025 WL 1860996, at *2 ("To the extent there is any doubt, the Court now confirms that such arrangements must be disclosed.").

[38] Lawyers for Civil Justice and the U.S. Chamber Institute for Legal Reform, *It Is Time to Address the Patchwork of Inadequate Practices: How the Lack of FRCP Guidance Is Failing Courts and Parties Who Need a Uniform and Credible Procedure for Understanding Third-Party Litigation Funding Agreements* (Oct. 2, 2024), 2, https://www.uscourts.gov/sites/default/files/24-cv-v_suggestion_from_lcj_and_ilr_-_rule_26_tplf.pdf.

A rule limited to *ex parte* disclosure would not solve courts' need for guidance. It would not help a court decide what to ask for, when to ask, how to ask, or on what basis if any to share the information and with whom. An *ex parte* process would deprive courts of insight about what provisions to look for and how they might be important in any given case. *Ex parte* disclosure would be tantamount to telling judges: "figure it out for yourself." It would burden the judiciary, not assist it.

B. An *"Ex Parte* Disclosure" Rule Would Not Educate Judges

Requiring only *ex parte* communications about nonparty funding contracts would not be effective in educating judges about key issues. Courts are not—and should not be expected to be—experts in the intricacies of nonparty litigation funding agreements and how they operate in practice. The control provisions in these agreements can be complex, and boilerplate disclaimers of control can be misleading red herrings.[39] Lawyers for funded parties have every incentive (including direct financial incentives and ongoing commercial relationships) to emphasize boilerplate disclaimers of nonparty control while minimizing other provisions that create problematic litigation dynamics. Judges unfamiliar with how litigation funding actually works in practice may not understand on their own the implications of complex contractual provisions. Without opposing counsel to identify, develop, and brief the issues relevant to understanding how a funding agreement is affecting a particular case, courts may reach erroneous conclusions about nonparty funder's ability to influence or control litigation. An *ex parte* rule would only institutionalize delivery of nonobjective and one-sided perspectives to judges.

C. An *"Ex Parte* Disclosure" Rule Would Not Allow Case Law Development

A rule prescribing an *ex parte* process for assessing and interpreting nonparty funding contracts would deprive the judiciary and litigants of common law development on important and novel questions regarding TPLF, and make appellate review nearly impossible. Such a regime would involve no record, no briefing, and no explanation of a court's reasoning. It would hamper the judicial process by requiring every judge in every case to formulate their own approaches and answers without benefit of other judges' thinking and precedent.

D. An *"Ex Parte* Disclosure" Rule Would Impose New Burdens and Risks on Judges

A rule limited to *ex parte* communications about nonparty funding contracts could effectively require judges to examine all TPLF contracts (not just the ones parties bring to the court's attention) and could put judges in the uncomfortable position of knowing—or being expected to foresee—the various ways in which the contractual provisions could give rise to issues in the litigation, as well as serious questions involving the duties lawyers owe their clients under the Rules of Professional Conduct. An analogy to insurance disclosure is apt: because insurance agreements are disclosed to parties, courts need not bother with those contracts unless an issue arises, in which case the court receives the benefit of the parties' briefing that develops the relevant facts and law—but if that rule operated via *ex parte* disclosures, diligent judges would

[39] *See* LCJ Examination of TPLF Contracts.

feel the need to review every insurance contract to figure out if issues might arise, and would have to act *sua sponte* in deciding what to disclose to parties, bar authorities, or regulators.

E. An *"Ex Parte* Disclosure" Rule Would Not Provide Litigants the Information Essential to Litigating and Settling Cases

A key purpose of the Advisory Committee's promulgation of the insurance disclosure rule was to enable "counsel for both sides" to make the "same realistic appraisal" of a case. Obviously, that purpose could not be achieved if the insurance "disclosure" were kept secret from the parties—and the same is true for TPLF contracts. *Ex parte* disclosure of TPLF does not provide litigants what they need in order to navigate cases and negotiate settlements. As 124 corporations wrote to the Advisory Committee in 2024:

> We cannot make informed decisions without knowing the stakeholders who control the litigation—and we cannot understand the control features of a TPLF agreement without reading the agreement. Without this information, the settlement process often unravels when the nominal plaintiff or its counsel needs to obtain approval from undisclosed non-party funders or uses the non-party as an excuse to retract a commitment to settle.[40]

Ex parte communications about nonparty funding contracts are, at bottom, unfair. They deprive all other parties to litigation of any knowledge of nonparty interests affecting the case and of the opportunity to identify contractual provisions that are important to the case and potential resolution. A rule enshrining *ex parte* communications would also deprive the public of knowing who is using the public courts for what purposes, and how courts are adjudicating those interests.[41]

F. An *"Ex Parte* Disclosure" Rule Would Raise Judicial Ethical Problems

An FRCP rule enshrining *ex parte* communications would create serious tension with the Code of Conduct for U.S. Judges, which strongly cautions against *ex parte* communications.[42] The narrow exceptions are generally for ministerial matters including "scheduling, administrative, or emergency purposes"[43]—and those exceptions involve extreme urgency and require disclosure to the other parties as soon as practicable. Judicial examination and, necessarily, interpretation of TPLF contractual provisions to understand nonparty interests, influence, and control in particular cases falls well outside these limited ethical exceptions.

Fortunately, the Advisory Committee can easily avoid all the risks that would accompany the invention of a new and unprecedented *ex parte* procedure for disclosure of nonparty funding interests by, instead, drafting a new disclosure rule in conformity with established rules and practices.

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[40] Letter from 124 companies to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure (Oct. 2, 2024), https://www.uscourts.gov/sites/default/files/24-cv-u_suggestion_from_124_companies_-_rule_26_tplf.pdf.

[41] States are starting to require internet disclosure to the public of information about TPLF arrangements. *See, e.g.*, Ohio Rev. C. §1357.05(D) and O.C. Ga. §7-10-2(h).

[42] Code of Judicial Conduct Canon 3(A)(4).

[43] *Id*.

IV. THE BETTER WAY: DRAFTING A SIMPLE DISCLOSURE RULE IN KEEPING WITH THE FRCP'S HISTORY AND PRACTICE

Drafting an appropriate rule requiring disclosure of nonparty litigation funding agreements in keeping with the history and practice of the FRCP would not be complicated. Not only has the Advisory Committee already written the highly analogous and uncontroversial rule regarding insurance contracts in Rule 26(a)(1)(A)(iv), but it also has received the proposed text of a general disclosure rule. The proposal would amend Rule 26(a)(1)(A) by adding the following provision:

> … the name, address, and telephone number of any nonparty individual or entity (other than counsel of record) that, whether directly or indirectly, is providing funding for the action and has a financial interest therein and, for inspection and copying as under Rule 34, any agreements or other documentation concerning the terms of the funding.[44]

This simple language, mirroring the style and function of existing rules, would provide the essential disclosures without inventing an unprecedented process or imposing any new judicial burdens or risks.

One important reason for this rule is that courts have ample experience and tools—including *in camera* review when necessary—to protect parties' privileged or confidential information. If a funded party were to seek protection from disclosure under this rule for a specific portion of a nonparty funding contract on the basis of work product (however unlikely such arguments are to be meritorious[45]) or some other basis, the court would already be well equipped to evaluate the claim and fashion an appropriate remedy. If any valid ground exists for protection of a particular portion of a litigation funding contract, it can be handled with redactions, privilege logs, or protective orders.

CONCLUSION

The Advisory Committee's answer to the question "disclosure to whom?" should be: courts and parties. This is the "rules answer" to the current judicial split over TPLF contracts that respects the history of the FRCP and the Advisory Committee's decision in the analogous situation with insurance agreements to "resolve[] this issue in favor of disclosure." The Advisory Committee should not contrive an all-new rule that, for the first time ever, would enshrine *ex parte* communications as the *modus operandi* for judicial handling of financial interests and potential conflicts. Such a novel rule would fail. In contrast, a rule that comports with the nature of the FRCP and is modeled on Rule 26(a)(1)(A)(iv) insurance disclosures, such as the proposal pending before the Advisory Committee, would serve the needs of courts and parties for a fair, simple, uniform procedure.

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[44] Lawyers for Civil Justice and the U.S. Chamber Institute for Legal Reform, *A Revised Proposal: Amend Rule 26(A)(1)(A) to Guide Courts and Parties on TPLF Disclosure while Preserving Judicial Discretion and Protecting Parties' Assertions of Privilege*, Mar. 10, 2026, https://www.uscourts.gov/sites/default/files/document/26-cv-8_suggestion_from_lcj_ilr_-_rule_26.pdf.

[45] Letter from Todd Presnell to Carolyn A. Dubay, Secretary, Committee on Rules of Practice and Procedure, Apr. 7, 2026, https://www.uscourts.gov/sites/default/files/document/26-cv-16_suggestion_from_todd_presnell_-_rule_26.pdf.