December 22, 2025

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
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RE: Third Party Litigation Funding

Dear Members of the Committee on Rules of Practice and Procedure:

The American Association for Justice ("AAJ") submits the following, expressing its general opposition to rulemaking related to third party litigation funding ("TPLF"), as most recently suggested by Lawyers for Civil Justice ("LCJ") and opposed by the International Legal Finance Association ("ILFA") and commercial litigation funding practitioners.[1] With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. Members primarily represent plaintiffs in personal injury and wrongful death actions, employment rights cases, consumer cases, class actions, and other civil actions and regularly use the Federal Rules of Civil Procedure in their practice.

AAJ previously expressed its opposition to rulemaking related to TPLF during consideration of the multi-district litigation rule, and its position remains unchanged.[2] A rule requiring disclosure of TPLF agreements would be unfair, because it would provide corporate defendants with an unjustifiable litigation advantage by revealing information about the financial wherewithal of plaintiffs and their attorneys, who disproportionately use funding that is contingent on monetary recovery. A rule is unnecessary, because there is no existing impediment to judges managing the use of TPLF agreements in their courtrooms, including on an *ex parte* and *in camera* basis. A rule is not warranted, because proponents have offered nine cherry-picked agreements to support a request for a sweeping rule that would apply to all agreements, regardless of the number of parties and the types of claims. A rule could result in unnecessary recusals by judges based on purported conflicts of interest unrelated to matters before the courts.

This comment addresses TPLF provided to attorneys and law firms, whether for the purpose of supporting a case, a specific portfolio of cases, or to cover general business expenses.[3]

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[1] Lawyers for Civ. Just. Rules Suggestion 25-CV-L (Sept. 3, 2025) [hereinafter LCJ Suggestion], https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/lawyers-civil-justice-25-cv-l; Int'l Legal Fin. Ass'n Rules Suggestion 25-CV-O (Oct. 1, 2025) [hereinafter ILFA Suggestion], https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/international-legal-finance-association-25-cv-o; 12 Attorneys and Advisors Rules Suggestion 25-CV-R (Oct. 15, 2025) [hereinafter Commercial Litigation Funding Practitioners Suggestion], https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/12-attorneys-and-advisors-25-cv-r.

[2] Am. Ass'n for Just. Rules Suggestion 18-CV-B (Jan. 17, 2018), https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/american-association-justice-18-cv-b.

[3] TPLF Subcommittee Report, *in* Advisory Committee on Civil Rules Agenda Book 271 (Apr. 1, 2025), https://www.uscourts.gov/sites/default/files/2025-03/2025-04-civil-rules-committee-agenda-book-final-updated-3.28.25.pdf (discussing financing used by law firms to "pay the rent, pay salaries, hire expert witnesses, etc.," and

I. Mandatory Disclosure Provides an Unfair Litigation Advantage to Which Corporate Defendants Are Not Entitled

TPLF agreements lay bare the financial wherewithal of an attorney to pursue a case and a firm to continue to operate, providing a roadmap of dollar amounts provided, the schedule of repayment, and even milestones upon which more funding becomes available.[4] The absence of funding from TPLF agreements is just as useful in evaluating the financial wherewithal of an attorney or law firm. A rule patterned on Rule 26(a)(1)(A)(iv) requiring disclosure of TPLF agreements would provide an unfair advantage to corporate defendants because plaintiffs' attorneys disproportionately use funding that is contingent on monetary recovery as compared to defendants. Moreover, TPLF agreements can reveal litigation strategies that would not be available to defendants, expose information unrelated to the pending matter, and stymie new entrants into complex litigation.

A. A rule would result in one-sided, unnecessary, and overly broad disclosure

Requiring disclosure of funding that is contingent on the outcome of a case would result in one-sided disclosure by plaintiffs to defendants. While the most recent LCJ Suggestion omits model rule language, previous submissions from LCJ have offered the following:

> "any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action."[5]

Plaintiffs bring claims and most funding used to bring those claims will be, in some way, contingent on the damages recovered. A rule relying on a broad definition risks ensnaring traditional bank loans and lines of credit used by plaintiff attorneys and firms, because the fees a firm uses to repay those loans would be sourced from clients the firm represents on a contingency basis.

Disclosure of financing provided to support the general operations of a firm or a particular practice area could also reveal legal matters that are still under investigation and generate recusal issues unrelated to the pending matter. Overly broad disclosures would take time away from addressing the matter at hand while resolving none of the issues raised by the proponents of a rule.

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financing agreements that "permit[] the funder to acquire an interest in multiple lawsuits [which] one [may] say verges on a line of credit.").

[4] Financing offered to attorneys and law firms can be used to cover everything from the specific litigation expenses of a case or practice area to a firm's general operating expenses.

[5] U.S. Chamber Inst. for Legal Reform et al. Rules Suggestion 17-CV-O, at app. B (June 1, 2017), https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/us-chamber-institute-legal-reform-et-al-17-cv-o (including LCJ as signatory); U.S. Chamber Inst. for Legal Reform et al. Rules Suggestion 14-CV-B, at app. A (Apr. 9, 2014), https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/us-chamber-institute-legal-reform-american-insurance-association-american-tort-reform-association (including LCJ as signatory).

B. A rule would encourage gamesmanship

There is close to an unhealthy obsession with TPLF agreements by certain segments of the defense bar.[6] Although sometimes couched in concern about identifying a judge's possible conflict of interest, proponents' maximalist position, requiring disclosure of the entire agreement to defense counsel, is better explained by gamesmanship.[7]

The real purpose of requiring disclosure of the entirety of a TPLF agreement is to provide a strategic advantage to defendants: to understand when and how to pressure a plaintiff to settle, to obtain information that the defendant is not entitled to know, and to pit plaintiffs' attorneys against one another by revealing information about the financial resources of a firm that is not otherwise widely available. In multi-district and complex litigation, knowledge of funding available to a plaintiffs' firm could result in defendants advocating for a firm with fewer resources to lead the litigation to increase a defendant's chances of successfully defending against the claims.

Beyond the courtroom, corporate defendants and insurers have and would likely continue to leverage their market power to punish disclosed funders of and investors in claims they would rather not have to defend against. Chubb, one of the nation's largest insurers, has threatened to no longer do business with "asset managers, lawyers, banks and brokers" who are associated with the litigation financing industry.[8] Corporate defendants could do the same. While they are entitled to do business with whomever they wish, including by not choosing to support businesses they believe operate contrary to their interests, they are not entitled to the complicity of the Federal Rules of Civil Procedure in identifying targets for retribution.

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[6] The U.S. Chamber Institute for Legal Reform lists "eliminating TPLF in five years" as one of its "bold, long-term objectives." Board of Directors Meeting Agenda, U.S. Chamber Inst. for Legal Reform (Sept. 5, 2024), https://events.uschamber.com/ilr-boardofdirectors-september-meeting-2024/5682885. As early as 2012, it proposed a "prohibition on contracts between TPLF investors and lawyers." U.S. CHAMBER OF INST. FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION 11 (Oct. 2012), https://instituteforlegalreform.com/wp-content/uploads/2020/10/TPLF_Solutions.pdf. Earlier this year, the U.S. Chamber of Commerce, among others, supported legislation restricting the ability of plaintiffs' firms to access capital, including traditional loans and lines of credit, by imposing a punitive tax on litigation funding. ILFA Suggestion, *supra* note 1 at 8-9.

[7] Lawyers for Civil Justice acknowledged "that [it] is probably true" that "ascertaining potential judicial conflicts of interest probably only requires identification of the funder as opposed to disclosure of the terms of the funding agreement," while arguing that the other issues it raised would require "disclosure of the terms themselves." U.S. Chamber Inst. for Legal Reform, et al. Rules Suggestion 17-CV-GGGGGG, at 4 n.21 (Nov. 3, 2017), https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/us-chamber-institute-legal-reform-et-al-17-cv-gggggg. *Compare* LCJ Suggestion, *supra* note 1, at 3 ("Simple disclosure of the TPLF contract provides . . . knowledge [of a non-party who may have significant control over litigation and settlement decisions], with no burden on judicial resources."), *with* ILFA Suggestion, *supra* note 1, at 18 ("In jurisdictions where courts have permitted discovery into funding, parties routinely seek sweeping production requests.") (citing appendix of subpoena exemplars).

[8] Adam McNestrie & Farhin Lilywala, *Chubb Threatens to Cut Off Suppliers If They Profit from Litfin Industry*, INS. INSIDER (May 7, 2025), https://www.insuranceinsiderus.com/article/2erqilzapip32rnu2y6m8/lines-of-business/casualty-gl/chubb-threatens-to-cut-off-suppliers-if-they-profit-from-litfin-industry; *see also* ILFA Suggestion, *supra* note 1, at 18 n.31 ("Defendants may also attempt to interfere with the funding agreement, either to circumvent counsel or disrupt the provision of capital.").

C. The comparison between TPLF and insurance agreements is inapt

TPLF and insurance agreements fulfill different purposes, and arguments from the corporate defense bar that TPLF agreements should be disclosed because insurance agreements are disclosed misconstrue the purpose of these products and the information the contracts contain. While insurance agreements reveal whether and to what extent a third party "may be liable to satisfy . . . a possible judgment" against a defendant, TPLF agreements reveal the financial resources available to a plaintiff to pursue a claim against a defendant and the valuation of that particular claim by the plaintiff, attorney, and funder.[9] Underwriting of insurance policies is generally done on a prospective basis. Knowledge of the availability of coverage would not provide a plaintiff with insight into a defendant's or insurer's perception of anticipated liability for a particular product or course of conduct. Knowledge of a defendant's insurance policies is relevant to the appraisal of a case because defendants often use the alleged absence of insurance coverage to encourage a plaintiff to accept less money in a settlement than they would otherwise.

In contrast, TPLF agreements are generally executed after the incident giving rise to a claim, incorporating an attorney's and a funder's appreciation of the relative strengths or weaknesses of a claim. The TPLF Subcommittee has recognized the sensitivity of this attorney work-product, involving "candid and complete disclosure regarding the strengths and weaknesses of the cases on which lawyers seek funding."[10] Knowledge of a TPLF agreement provides defendants with granular insight, inherent in the terms of the TPLF agreement itself, of a plaintiff's, attorney's, and funder's perception, of not only the value of a claim, but the time and resources necessary to vindicate the claim. This information can be further weaponized if defendants are able to discover communications related to funding.[11] Proponents of disclosure have not demonstrated that plaintiffs and their attorneys are using the presence of litigation funding to encourage a defendant to offer more money in a settlement than they would otherwise.

The Advisory Committee on Civil Rules ("Advisory Committee") distinguished between insurance agreements and "any other facts concerning defendant's financial status . . . because [among other things] insurance is an asset created specifically to satisfy the claim [and] the insurance company ordinarily controls the litigation."[12] The information contained in a TPLF agreement—the plaintiff's financial position—is exactly the kind of information that the Advisory Committee explicitly distinguished from the information the rule requires disclosed.[13] And, control is not a feature of litigation funding, unless the Advisory Committee were to adopt LCJ's expansive view of control, under which the mere fact of funding implicates control because future funding could be declined.[14] Meanwhile, insurers do ordinarily control litigation through the subrogation of claims.[15]

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[9] Fed. R. Civ. P. 26(a)(1)(A)(iv).

[10] TPLF Subcommittee Report, *supra* note 3, at 271-72.

[11] ILFA Suggestion, *supra* note 1, at 18 ("In jurisdictions where courts have permitted discovery into funding, parties routinely seek sweeping production requests.") (citing appendix of subpoena exemplars).

[12] *See* Fed. R. Civ. P. 26 advisory committee's note to 1970 Amendment (Subdivision (b)(2)—Insurance Policies).

[13] *Id.*

[14] LCJ Suggestion, *supra* note 1, at 10 ("The funders' right to discontinue funding allows funders to control the case and resolution.").

[15] *See Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 729–30 (N.D. Ill. 2014) ("There is nothing in those [TPLF] agreements that remotely supports Caterpillar's attempt to equate Miller's funding agreement to the relationship between an insured and its insurer. Unlike an insurer, the funder in this case has not paid nor will ever pay Miller for any losses caused by Caterpillar's claimed misappropriation of trade secrets and breach of contract; it

A better analogy to requiring disclosure of a TPLF agreement would be to require a defendant to disclose its litigation budget or for an insurer to disclose the amount of money it has reserved to defend against a particular claim. The Advisory Committee likely would not indulge such a rulemaking request for good reason. Regulating a party's litigation strategy, including budgetary decisions executing that strategy, is neither amenable to a uniform rule nor within the scope of the federal rules. On the other hand, establishing (as an initial matter) whether a judgment could be satisfied, is. If the defendant does not have the wherewithal to pay a claim, then it is a waste of both court and party resources to litigate.

II. Rulemaking Is Unnecessary Because Judges Are Successfully Using *Ex Parte* and *In Camera* Review to Manage TPLF in Their Courts

There is no impediment to judges requiring disclosure of TPLF agreements, and the examples cited by LCJ and others demonstrate that judges are successfully balancing the need to maintain the integrity of litigation against providing one party with an undue litigation advantage, militating against the need for rulemaking.[16]

Judge Polster's Order in *In re National Prescription Opiate Litigation* required attorneys to:

> submit to the Court *ex parte*, for in camera review, the following: (A) a letter identifying and briefly describing the [third-party contingent litigation financing]; and (B) two sworn affirmations – one from counsel and one from the lender – that the [third-party contingent litigation financing] financing does not: (1) create any conflict of interest for counsel, (2) undermine counsel's obligation of vigorous advocacy, (3) affect counsel's independent professional judgment, (4) give to the lender any control over litigation strategy or settlement decisions, or (5) affect party control of settlement. [17]

The Order warned that "[t]he Court will deem unenforceable any . . . agreements that are not compliant" and that "any attorney or lender whose affirmations prove to be untrue will be subject to sanction."[18] Finally, "absent extraordinary circumstances," discovery would not be permitted into TPLF agreements, based on the work-product doctrine.[19]

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will never be a plaintiff seeking indemnification from Caterpillar. Rather, it is contractually obligated to provide Miller with an agreed amount of funds to assist Miller in defraying expenses incurred in suing Caterpillar to recover for its claimed losses. If Miller loses, that is the end of the matter. Abraham Lincoln once was asked how many legs a donkey has if you call its tail a leg. His answer was four: calling a tail a leg does not make it one. Just so here. Calling Miller's funder a subrogee does not make it one."); *see also* 16 Couch on Ins. § 222:5 (Definition and nature of subrogation).

[16] ILFA Suggestion, *supra* note 1, at 22-23 & app. B at 8 (*In Camera* Citations) ("Our research identified approximately 30 cases where courts ordered *in camera* review of funding materials. In the majority of these cases—as well as others where opposing parties receive some level of funding-related disclosure—there was no subsequent motion practice regarding funding at all, let alone any impropriety or negative impact of funding on the course of the litigation.").

[17] Order Regarding Third-Party Contingent Litigation Financing at 1-2, *In re National Prescription Opiate Litigation*, No. 1:17-MD-2804 (N.D. Ohio May 7, 2018) (ECF No. 383) (cited by Lawyers for Civ. Just. & U.S Chamber Inst. for Legal Reform Rules Suggestion 24-CV-V, at 3 n.13 (Oct. 2, 2024) [hereinafter LCJ-ILR Suggestion], https://www.uscourts.gov/sites/default/files/24-cv-v_suggestion_from_lcj_and_ilr_-_rule_26_tplf.pdf).

[18] *Id.* at 2.

[19] *Id.*

Judge Rosenberg's Pretrial Order #16 in *In re Zantac (Ranitidine) Products Liability Litigation* directed applicants for plaintiffs to provide to the Special Master answers to the following question, among others:

> e. Do you or your firm have any financing that is contingent upon this litigation? If yes, the following questions shall be answered:
>
> i. Does the litigation funder have any control (direct or indirect, actual or apparent or implied) over the decision to file or the content of any motions or briefs, or any input into the decision to accept a settlement offer?
>
> ii. Does the financing (1) create any conflict of interest for counsel, (2) undermine counsel's obligation of vigorous advocacy, (3) affect counsel's independent judgment, (4) give to the lender any control over litigation strategy or settlement decisions (as to either the common benefit work done by counsel or work for individual retained clients), or (5) affect party control of settlement?
>
> iii. Briefly explain the nature of the financing, the amount of the financing, and submit a copy of the documentation to the Special Master.[20]

The Order noted that, as it relates to litigation funding, the Court and the Special Master's review would "include but not be limited to obtaining an explanation of the nature of the financing, the amount of the financing, and a review of the contract/documentation."[21]

Even in *In re: Valsartan NMDA Contamination Litigation*, which the LCJ Suggestion cites with approval for the proposition that suggestions of funder control are "good cause for TPLF disclosure," Judge Schneider denied defendant's request for "automatic or carte blanche disclosure" of plaintiffs' TPLF agreements in favor of *in camera* review, "if good cause exists to believe a litigation financer has control or input into plaintiffs' litigation decisions."[22]

Suggestions that judges are unable to understand the terms of a TPLF agreement and "taking a significant risk to their credibility" by reviewing agreements *ex parte* are misplaced.[23] LCJ and the U.S. Chamber Institute for Legal Reform have accused judges who engage in *ex parte* and *in camera* review of "ceding day-to-day control over their case[s]" to lawyers by accepting their representations and violating the Code of Conduct for United States Judges, but reality reflects judges engaging in appropriate, case specific measures when they deem oversight is necessary. [24] Local rules and standing orders are similarly

[20] Pretrial Order #16 at 12, *In re Zantac (Ranitidine) Prods. Liab. Litig.*, No. 20-2924 (S.D. Fla. Apr. 3, 2020) (ECF No. 557), https://www.govinfo.gov/app/details/USCOURTS-flsd-9_20-md-02924/USCOURTS-flsd-9_20-md-02924-3 (cited by LCJ-ILR Suggestion, *supra* note 17, at 3 n.13).

[21] *Id.* at 13.

[22] LCJ Suggestion, *supra* note 1, at 5 n.27; *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig.*, 405 F. Supp. 3d 612, 620 (D.N.J. 2019).

[23] LCJ Suggestion, *supra* note 1 at 19.

[24] LCJ-ILR Suggestion, *supra* note 17 at 6-7 (citing the Code of Conduct for United States Judges, Canon 3(A)(4)). The allegation that judges violate the Code of Conduct by engaging in *ex parte* review of TPLF agreements gets the admonition against *ex parte* proceedings wrong. *Ex parte* communications are disfavored when they exclude a party with an interest in the matter being discussed. Corporate defendants are not a party to these agreements, so while they may very much want to know more about the contractual relationship between a plaintiff, plaintiff's attorney, and a funder, a defendant's exclusion does not implicate Canon 3(A)(4).

measured, declining to require automatic production of TPLF agreements to the opposing party or at least requiring good cause before allowing additional discovery.[25]

States have also embraced the existing authority of judges to review agreements *in camera* and *ex parte*, either through statute or judicial rulemaking. In Louisiana and Colorado, statute explicitly defers to existing rules of civil procedure to govern the discovery of the existence of a TPLF agreement.[26] In Kansas, statute provides for *in camera* review of a TPLF agreement by the court, without requiring production of the entire agreement to the opposing party.[27] In August 2025, the Supreme Court of Arizona amended its Rules of Civil Procedure to allow for the *ex parte* submission and *in camera* review of TPLF agreements upon good cause shown, only providing for disclosure to other parties "if the court determines the disclosure will not run afoul of the work-product privilege, the party seeking the agreement shows a substantial need, and then only if no less intrusive option is feasible."[28]

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[25] D. N.J. L.R. 7.1.1(b) ("The parties may seek additional discovery of the terms of any such agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case"), https://www.njd.uscourts.gov/sites/njd/files/CompleteLocalRules.pdf; Standing Order for All Judges of the Northern District of California, Contents of Joint Case Management Statement § 17 (N.D. Cal. Nov. 30, 2023) ("identifying"), https://cand.uscourts.gov/sites/default/files/standing-orders/Standing_Order_All_Judges-11-30-2023.pdf; Standing Order of Chief Judge Connolly Regarding Third-Party Litigation Funding Arrangement § 2 (D. Del., Apr. 18, 2022) ("Parties may seek additional discovery of the terms of a party's arrangement with any Third-Party Funder upon a showing that the Third-Party Funder has authority to make material litigation decisions or settlement decisions, the interests of any funded parties or the class (if applicable) are not being promoted or protected by the arrangement, conflicts of interest exist as a result of the arrangement, or other such good cause exists."), https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf.

[26] H.B. 25-1329, 2025 Reg. Session (Colo. 2025) (to be codified at Colo. Rev. Stat. §13-16-126(7)), https://leg.colorado.gov/bills/hb25-1329; La. Rev. Stat §3580.13(B).

[27] S.B. 54, 2025 Session (Kan. 2025) (to be codified in relevant part at Kan. Stat. Supp. 2024 § 60-226(b)(3)(B)(i)-(ii)), https://www.kslegislature.gov/li/b2025_26/measures/documents/sb54_enrolled.pdf.

[28] Order Amending Rule 8 of the Rules of Civil Procedure, No. R-25-003, at 4 (Rule 8(j)(4)) (Ariz. Aug. 28, 2025), https://www.azcourts.gov/Portals/0/20/2025%20Rules/R-25-0003%20FinalRulesOrder.PDF?ver=LMqhxtC4uFvknf_TpWAgRg%3d%3d; *see also* Petition to Amend Rule 8, Rules of Civil Procedure, No. R-25-003, at 5 (Jan. 8, 2025), https://rulesforum.azcourts.gov/Rules-Forum/aft/1683 ("While some argue these agreements should be disclosed like insurance contracts, the Task Force believed they are different. Insurance contracts are often standard and relevant to settlement negotiations, whereas third-party litigation funding agreements involve internal business practices and litigation strategy, potentially protected by attorney work product privilege. However, courts can review these agreements *in camera* or disclose them to opposing parties if there is good cause.").

III. Rulemaking Should Not Proceed Based on Nine Cherry-Picked TPLF Agreements

Proponents seek a rule requiring production of all TPLF agreements, regardless of the number of parties and the types of claims, on the basis of nine agreements that practitioners of litigation finance law have characterized as an "an odd assortment of stale, foreign, and/or plainly idiosyncratic agreements . . . [that] do not reflect prevailing norms in the U.S. commercial litigation funding market" and whose "actual terms [do not] support LCJ's arguments."[29]

Seven of the agreements highlighted by LCJ are not representative of the kinds of cases AAJ members bring. Two were executed in foreign jurisdictions or concerned matters before foreign courts or international tribunals, which a Federal Rule of Civil Procedure could not address.[30] Two relate to specialized litigation, specifically patent and bankruptcy.[31] And the remaining three (really two, as one is an amendment to one of the other two agreements) concern commercial litigation between sophisticated parties.[32]

Two of the agreements concern personal injury and civil rights claims: (1) an agreement executed between a United Kingdom-based litigation funder and counsel, also licensed to practice in California, relating to a purported class action against Chevron for an oil rig explosion in Nigeria filed in the Northern District of California, and (2) an agreement executed between a litigation funder and an individual to support the individual's filing of claims for violations of the Americans with Disabilities Act.[33] The Northern District of California compelled discovery of the former, ultimately rejecting the proposed class.[34] The District of Colorado compelled discovery of the latter after *in camera* review of the TPLF agreement and related communications.[35] Both district courts used their existing authority to identify, review, and dispose of discovery issues related to the agreements, all without requiring initial disclosure of the entire agreement to defense counsel.

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[29] Commercial Litigation Funding Practitioners Suggestion, *supra* note 1, at 3.

[30] LCJ Suggestion, *supra* note 1, Exhibits A (relating to an Australian class action in the Supreme Court of Victoria) & F (relating to investor-state arbitral proceedings under the United States-Panama Bilateral Investment Treaty & U.S.-Panama Free Trade Agreement).

[31] *Id.* at Exhibits H (patent litigation) & I (bankruptcy proceedings).

[32] *Id.* at Exhibits C (commercial antitrust litigation involving Fortune 500 companies), D (an amendment to the Exhibit C agreement), & G (commercial litigation between a pharmaceutical company and a contract research organization).

[33] *Id.* at Exhibits B & E.

[34] Order Granting in Part Defendant's Motion to Compel, Denying Motions to File Under Seal and Denying Plaintiff's Motion for Sanctions, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) (compelling discovery, requiring production of agreement instead of *in camera* review); Order Denying Plaintiff's Motion for Class Certification, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2017 WL 956628 (N.D. Cal. Mar. 13, 2017).

[35] Order on Discovery Motions, *Mize v. Kai*, No. 17-cv-00915-NYW, 2018 WL 1035084, at *2, *9 (D. Colo. Feb. 23, 2018).

IV. Disclosure, If Necessary, Should be Made to the Court, Not Defense Counsel

AAJ's position is that the Advisory Committee should not proceed with rulemaking related to TPLF. There is no impediment to judges reviewing TPLF agreements and ordering production to other parties, and the purported concerns regarding improper control and influence raised by proponents are better addressed by other rules of civil procedure or other authorities, like state bar associations. A broad rule would not help courts manage specific issues of concern that may arise in limited situations; rather, it would hamper a court's ability to manage its caseload by forcing it to spend time reviewing the business and financial health of law firms instead of TPLF agreements directly related to the pending litigation.

Were the Advisory Committee to consider a TPLF disclosure rule, it should be discretionary and only apply to agreements specifically related to the pending matter, exclusively providing for *in camera* and *ex parte* review of an agreement upon request by the court or after the non-disclosing party were to demonstrate good cause that the agreement presented a conflict of interest or that funders were exerting improper control over the litigation. While AAJ maintains no such rule is necessary, a discretionary rule providing for *ex parte*, *in camera* review for good cause shown would allow courts to avoid: (1) being bogged down by mandatory review of TPLF agreements unrelated to the merits of pending claims, and (2) affording the non-disclosing party with access to information regarding the litigation that could significantly disadvantage the plaintiff, influence decision-making, delay settlement, result in failure to negotiate in good faith, or otherwise needlessly delay the litigation.

V. Conclusion

The American Association for Justice appreciates the opportunity to submit its views on rulemaking related to third party litigation funding. The Advisory Committee should not proceed with rulemaking on TPLF, as disclosure would provide defendants with a litigation advantage to which they are not entitled, judges are already able to review TPLF agreements and order production to other parties, and any rule would risk sweeping in traditional loans and lines of credit used by plaintiffs' attorneys and law firms. For any questions, please contact Sue Steinman, Senior Director of Policy and Counsel (susan.steinman@justice.org) or Geoffrey Louden, State Affairs Counsel (geoffrey.louden@justice.org).

Respectfully submitted,

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