



U.S. Chamber of Commerce
Institute for Legal Reform

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

**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**

March 10, 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 promulgate a rule requiring disclosure of the presence of third-party litigation funding (“TPLF”) in federal civil litigation and the underlying contracts,³ and propose an amendment to Rule 26(a)(1)(A).

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 than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

³ See 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*

INTRODUCTION

Rule 26(a)(1)(A) is the appropriate place for TPLF disclosure guidance. The suggested rule text (“Proposed Rule”) and note language (“Proposed Note”) included herewith would resolve two “rules problems” because (1) federal courts lack uniform procedures for addressing TPLF disclosure, and (2) courts are divided as to the meaning of Rule 26(b)(1)—specifically, whether the rule’s “relevance” standard bars disclosure of TPLF.⁴ It would do so by defining nonparty financial interests in a commonsense manner, protecting judicial discretion, minimizing judicial burden, allowing flexibility over what is to be disclosed, and protecting parties’ ability to seek protective orders under Rule 26(c). This proposal answers the nine questions posed by the Subcommittee (the “Subcommittee Questions”)⁵ and delivers much-needed TPLF disclosure while avoiding unintended consequences.

The reasons for adopting a rule are compelling. Federal courts are deeply split on TPLF disclosure. According to a study conducted by the litigation funders’ lead lobbying group, federal district courts grant 40 percent of TPLF disclosure motions and deny the other 60 percent.⁶ Some federal appellate and district courts have adopted local rules requiring automatic disclosure of TPLF usage or of any persons with financial interests in a case, but they vary.⁷ In

Agreements, Oct. 2, 2024, https://www.uscourts.gov/sites/default/files/24-cv-v_suggestion_from_lcj_and_ilr_rule_26_tplf.pdf.

⁴ *Id.* at 5-6.

⁵ Memo to Hon. James C. Dever III, Chair, Committee on Rules of Practice and Procedure, from Hon Sarah S. Vance, Chair, Advisory Committee on Civil Rules, Dec. 5, 2025, 10-11, (“TPLF Subcommittee Questions”), Agenda Book, Committee on Rules of Practice and Procedure, Jan. 6, 2026, 203-04, https://www.uscourts.gov/sites/default/files/document/2026-01_standing_committee_agenda_book_final_0.pdf.

⁶ Letter from the International Legal Finance Association to the Committee on Rules of Practice and Procedure, Oct. 1, 2025 (“ILFA letter”), 22, (“Regarding disclosure, we identified over 100 relevant court orders resolving motions to compel, quash, or strike. Approximately 60% denied disclosure in its entirety and approximately 40% provided some form of disclosure based on a case-specific analysis.”), https://www.uscourts.gov/sites/default/files/document/25-cv-o_suggestion_from_international_legal_finance_association_tplf.pdf.

⁷ Most recently, the U.S. Court of International Trade adopted a mandatory TPLF disclosure requirement. *See* CIT Form 13, Question 4, <https://www.cit.uscourts.gov/sites/cit/files/Form%2013.pdf>; CIT Specific Instructions, Form 13, <https://www.cit.uscourts.gov/sites/cit/files/Form%2013%20Specific%20Instructions%20251211.pdf>. *See also* N.D. Cal. L.R. 3-15 (dictates identification of “an individual or entity . . . that provides funding for the litigation and that has a financial interest in the outcome”); D.N.J. L.R. 7.1.1 (mandates disclosure of filing of “any person or entity that is not a party and is providing funding for some or all of the attorneys’ fees and expenses for the litigation on a non-recourse basis in exchange for” either a contingent financial interest in the results of the litigation or a non-monetary result). A fuller list of such local rules can be found on the Federal Judicial Center website, <https://www.fjc.gov/content/333092/third-party-litigation-financing-local-rules-and-forms>.

In addition, some individual district court judges have issued standing orders requiring TPLF disclosure as to matters on their respective dockets. *See, e.g.*, Rule 26(f) Report of the Parties (Judge Calabrese, N.D. Ohio), <https://www.ohnd.uscourts.gov/sites/ohnd/files/Rule%2026%28f%29%20Report%20of%20the%20Parties%20%281.2.2026%29.pdf>; Standing Order Requiring Disclosure of Third-Party Litigation Funding (Judge Moe (M.D. Fla.)), <https://www.flmd.uscourts.gov/judges/anne-leigh-gaylord-moe>; Standing Order Regarding Third-Party Litigation Funding Arrangements (Chief Judge Connolly (D. Del.)),

sum, our courts are employing disparate approaches and reaching different conclusions due to the lack of FRCP guidance.⁸

TPLF contracts typically give a nonparty funder the right to benefit, directly or indirectly, from the outcome of a lawsuit and provide tools for such funders to exercise varying degrees of control or influence over litigation and settlement decisions⁹—and this is unrefuted.¹⁰ Repeatedly, funders have flatly told the Advisory Committee that they exercise no control over the lawsuits they finance.¹¹ But they say exactly the opposite to their investors¹² and to courts.¹³

<https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf>

⁸ 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-1_suggestion_from_lcj_-_rule_26_tplf.pdf.

⁹ See, e.g., *In re Broiler Chicken Antitrust Litig.*, 167 F.4th 430, 444-45 (7th 2026) (Maldonado, J., concurring) (“it bears stating the obvious: Sysco and Pilgrim’s were on the cusp of finalizing a settlement agreement before the intervention of Sysco’s litigation funder, Burford Capital Limited.... Carina’s—that is, Burford’s—appeal before us is motivated far more by its speculative financial investment than by a desire to seek justice for Sysco, the true injured party. Having turned the courtroom into a trading floor, and calculated that continued litigation was more profitable than settlement, Burford wrested total control over the settlement of Sysco’s claims. And but for this legal maneuvering, this litigation could have been resolved long ago.”). See also, Samir Parikh, *Opaque Capital and Mass Tort Financing*, 133 Yale L.J.F. 32, 47-56 (2023), https://yalelawjournal.org/pdf/ParikhYLJForumEssay_ugvhskwa.pdf; and Emily Siegel, *Fortress Billions Quietly Power America’s Biggest Legal Fights*, Bloomberg Law (Oct. 16, 2024), <https://news.bloomberglaw.com/business-and-practice/fortress-billions-quietly-power-americas-biggest-legal-fights>; Emily Siegel, *Mass Tort Lawyers Trapped in a Cycle of Debt as Cases Drag On*, Bloomberg Law (Nov. 18, 2024), <https://news.bloomberglaw.com/business-and-practice/mass-tort-lawyers-trapped-in-cycle-of-debt-as-cases-drag-on>; LCJ Examination of TPLF Contracts, *supra* note 8, at 4-10.

¹⁰ Although opponents of TPLF disclosure assert that the nine contracts in LCJ’s Examination of TPLF Contracts are “cherry picked,” no one has questioned the authenticity of the contracts attached to LCJ’s Examination of TPLF Contracts or LCJ’s, disputed LCJ’s analysis of their control provisions, or produced a large trove of actual TPLF contracts that are unlike the ones LCJ examined.

¹¹ See Letter from Christopher P. Bogart, Chief Executive Officer, Burford, to Ms. Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure, Sept. 1, 2017 (“Burford’s practice—and, to the best of its knowledge, the practice of other large litigation finance companies—is that it does not obtain any contractual right to control the decisions of the litigant and its counsel with respect to the litigation”); ILFA Letter at 4 (“Litigation funders do not control litigation strategy.”).

¹² See Burford Investor Day Slides, Slide 76 (enumerating respects in which funder is involved in “case management”), https://s206.q4cdn.com/737820215/files/doc_presentation/2025-04-03-Burford-2025-Investor-Day-FINAL-1543020-1.pdf.

¹³ See, e.g., *In re Pork Antitrust Litig.*, 2024 WL 511890, at *1 (Mag. D. Minn. Feb. 9, 2024) (describing litigation), *adopted*, 2024 WL 2819438 (D. Minn. June 3, 2024) (describing Burford’s assertions of contractual rights in litigation).

Opponents of TPLF disclosure adamantly disavow any role in litigation, insisting that they are neither parties nor lawyers.¹⁴ They ask the Advisory Committee not for uniformity, clarity, and predictability in procedural rules, but rather for a special favor: to give their industry a unique pass as to the basic transparency required of everyone else who has an economic interest in or influence over proceedings in public courts—and even some who do not.¹⁵ They ask special treatment for their contracts (presumably, arms-length business agreements with nonparties to litigation) with a categorical presumption of protection that does not apply even to the most sensitive documents courts routinely handle, be they health records, intellectual property, or employment documents.¹⁶ The opponents of disclosure further insist that, because their industry arguably could benefit some litigants, it should be exempt from identifying its involvement in cases and excused from the normal processes by which courts determine whether some or portions of documents are protected. And they assert that, without this special treatment, those benefits would evaporate, as if revealing the content of a TPLF contract would render the arrangement impossible.¹⁷

In reality, the Advisory Committee has already considered the arguments against disclosure of nonparty contracts affecting litigation—and rejected them. It did so in 1970, by adopting Rule 26(a)(1)(A)(iv) requiring automatic disclosure of insurance contracts, which is the appropriate model for TPLF disclosure. At the time, just like now, courts were split between granting disclosure of insurance contracts and denying it.¹⁸ The Advisory Committee defined the problem both as a lack of uniformity and also as a disjunction with Rule 26(b)(1)'s “relevancy” standard:

¹⁴ Letter from Christopher P. Bogart, Chief Executive Officer, Burford, to Ms. Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure, Sept. 1, 2017 (“litigation funders are not “parties” as defined by Rule 17, and they do not serve as the litigant’s counsel”), https://www.uscourts.gov/sites/default/files/17-cv-xxxxx-suggestion_burford_0.pdf.

¹⁵ The procedural rules require various types of disclosures from parties and all manner of nonparties with a connection to the litigation—even from nonparties with no direct participation, including amicus filers and corporate parents. *See* FED. R. CIV. P. 17. (actions must be prosecuted in the name of the real party in interest); FED. R. CIV. P. 7.1. (parent companies and public companies holding 10% of a party’s stock must file disclosure statements regardless of any role in the litigation); FED. R. CIV. P. 26(a)(1)(A)(iv) (insurance agreements must be disclosed); FED. R. APP. P. 29 (filers of amicus briefs must disclose their name, their lawyer, their funding, and who wrote the brief); and numerous local rules require disclosure of anyone with a financial interest in a case.

¹⁶ None of these categories of information enjoys a presumption against disclosure. Rather, parties seeking to withhold some or all such documents may pursue stipulations or protective orders. If necessary, courts often review such documents *in camera* to determine the presence and extent of protected information. The presence of protected information within a document typically does not render an entire document privileged. In contrast, ILFA seeks a rule that would establish a novel and unprecedented procedure of *ex parte* review of TPLF contracts, not for determining whether there is a basis for protection, but rather for substantive contract interpretation “to confirm that control of litigation remains where it belongs.” ILFA letter at 25. The Code of Judicial Conduct strongly admonishes against the use of *ex parte* communications for substantive legal determinations such as contract interpretation, *see, infra*, and many judges would lack expertise to interpret complicated TPLF contracts in the absence of adversarial briefing.

¹⁷ FED. R. CIV. P. 26(a)(1)(A)(iv)’s requirement to disclose insurance contracts has not stopped insurance companies from providing liability insurance.

¹⁸ FED. R. CIV. P. 26(b)(2), advisory committee’s note to 1970 amendment (“Both cases and commentators are sharply in conflict on the question whether defendant’s liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue on the case.... The division in reported cases is close.”).

should insurance coverage be disclosed “when the insurance coverage itself is not itself admissible and does not bear on another issue in the case”?¹⁹ The Advisory Committee considered both sides of the argument and “resolve[d] this issue in favor of disclosure.”²⁰ The same decision is appropriate today. The courts that deny disclosure based on the 26(b)(1) “relevance” standard “avoid considerations of policy, regarding them as foreclosed”²¹ as did the pre-1970 decisions denying disclosure of insurance agreements. Like insurance agreements, TPLF contracts can give nonparties a stake in the litigation and some degree of influence over the conduct and resolution of litigation that is not expressly contemplated by Rule 26(b)(1)’s test of “relevant to any party’s claim or defense.”²²

No one disputes that courts and parties must know “who is in the courtroom”—that is, who benefits directly from court judgments and has a role in litigation and settlement decisions—in order to manage cases effectively and avoid conflicts. Although courts have inherent authority to obtain and provide this information to parties, they lack the tools and guidance for doing so efficiently and consistently. The Proposed Rule would relieve courts of having to expend judicial resources to decipher on an *ad hoc* basis whether a particular agreement should be disclosed in a particular case. It would provide judges and parties with clear guidance while helping all parties make informed strategic and settlement decisions based on a “realistic appraisal of the case.”²³

I. THE PROPOSAL AND HOW IT WILL WORK

A. Text of the Proposed Amendment

The Advisory Committee should add the following provision to the list of required “initial disclosure[s]” in Rule 26(a)(1)(A):

(v) 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

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² The Advisory Committee rejected the notion that the Rule 26(b) “relevancy” analysis should limit the disclosure of insurance agreements when it promulgated Rule 26(a)(1)(A)(iv). Fed. R. Civ. P. 26 advisory committee’s note to 1970 amendment. At the time, “most of the decisions denying discovery (of liability insurance coverage), some explicitly, reasoned 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.* The Advisory Committee concluded that the policy considerations transcend “relevancy” and necessitate the disclosure of insurance agreements.

²³ As the Advisory Committee said about disclosure of insurance contracts, a rule requiring disclosure of TPLF contracts “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’s note to 1970 amendment.

34, any agreements or other documentation concerning the terms of the funding for the action or the financial interest therein.

This Proposed Rule, together with the Proposed Note, is attached as Exhibit A.

B. Commonsense Definition of Nonparty Financial Interests

The Proposed Rule requires identification of nonparties who are (a) “providing funding for” and (b) have “a financial interest” in a case. This language, which is taken from N.D. Cal. Local Civil Rule 3-15, is sufficiently broad to include the key nonparty stakes in the case without risking over-particularization that would obfuscate the issues and invite gamesmanship in the parsing of terms.²⁴ The Proposed Rule does not require the court to determine the purpose of the funding or whether the nature of the nonparty’s financial interest is contingent on the outcome. The language thus achieves the commonsense result of identifying material nonparty interests in the litigation and answers Subcommittee Question #1 of how to describe the arrangements that trigger disclosure. The Proposed Note²⁵ explains that the term “funding” includes both past payment and future obligation to pay some or all attorney’s fees, costs, or expenses (including client recruitment expenses) related to the action, whether directly or through an intermediary nonparty. It also clarifies that the rule does not apply to funding in the nature of contingency-fee arrangements, insurance, or ordinary personal and bank loans. These concepts are drawn from the TPLF disclosure requirement recently adopted by the U.S. Court of International Trade.²⁶ The Proposed Note also explains that the disclosure requirement does not extend to individuals or entities that are pre-existing donors to, shareholders of, members of, or investors in a party to the action.

C. Flexible Definition of What Is To Be Disclosed

The Proposed Rule requires disclosure of the identity of the interested nonparty and the operative documents that provide and define their interest in the case.²⁷ The phrase “any agreements or other documents concerning the terms of the funding” or financial interest is sufficiently flexible to reach the information necessary to understand the nature of the nonparty’s involvement in the case while foreclosing fishing expeditions for peripheral correspondence and materials that are not central to defining the nonparty interests.

²⁴ In answer to the Subcommittee Questions #2 and #3, the Proposed Rule does not limit disclosure to certain types of litigation or to certain dollar amounts because TPLF may exist in all types of civil cases and the problems of non-disclosure exist at any dollar amount. The Proposed Rule answers the Subcommittee Question #5 because contracts for “inventory funding” would qualify as “providing funding” and “a financial interest” in the case.

²⁵ See Exhibit A. The Proposed Note is styled to track the Advisory Committee Note to the 1970 amendment to FED. R. CIV. P. 26(b)(2) that added the liability insurance disclosure requirement.

²⁶ See CIT Form 13, Question 4, <https://www.cit.uscourts.gov/sites/cit/files/Form%2013.pdf>; CIT Specific Instructions, Form 13, <https://www.cit.uscourts.gov/sites/cit/files/Form%2013%20Specific%20Instructions%2051211.pdf>. The specific reference to “client recruitment expenses” is particularly important because funders increasingly appear to be securing interests in cases by supplying money to locate and sign up plaintiffs, which some may not consider to be a cost of prosecuting the litigation.

²⁷ This answers the Subcommittee Question #6 about what is to be disclosed.

D. Preserving Judicial Discretion and Minimizing Judicial Burden

The Proposed Rule remedies the burdens of the status quo—where virtually all TPLF disclosure requests require individualized judicial attention—by establishing a regular process that requires disclosure without a motion but preserves judicial discretion to grant protective orders when requested and warranted. Its placement in Rule 26(a)(1)(A) means disclosure occurs either as specified (that is, automatic production at the indicated time without need for any request) or “as otherwise stipulated or ordered by the court.”²⁸ As with other initial disclosures, when litigants comply without objection or with a modified requirement by stipulation, the court will not be involved.²⁹ Moreover, the Proposed Rule’s language, “any agreements or other documentation,” provides courts and parties sufficient flexibility to customize disclosures depending on the complexity of particular TPLF arrangements.³⁰ Of course, the Proposed Rule does not impinge on the availability of *in camera* judicial review of materials should a protective order be sought.

E. Protecting Privileged Material in the Normal Course of Litigation

The Proposed Rule ensures that a party may move for a protective order before making disclosures. In this respect it is no different from other initial disclosures under Rule 26(a)(1) and the FRCP discovery rules generally. Whenever disclosure of materials could include protected material, Rule 26(c) provides the protective procedures that courts use every day. Stipulations, standard redaction procedures, and, if necessary, *in camera* review of contested material, will protect any genuinely privileged information in TPLF documents, just as with any other document. The possibility of protected material being implicated is no reason to eschew a default disclosure rule. The Proposed Note explains that normal court procedures govern the Proposed Rule.

Opponents of disclosure are wrong to equate TPLF disclosure with revealing funders’ case evaluations and investment decisions. Disclosure of the operative agreement does not encompass a funder’s internal analyses—even if such information were included in a contract, a remote possibility at best.³¹ Forestalling disclosure of TPLF contracts under this rationale is unsupported by customary practice or settled law. Attorney retainer agreements are discoverable³² even though attorney-client communications and work product may be protected.

²⁸ FED. R. CIV. P. 26(a)(1).

²⁹ This answers the Subcommittee Question #6 about to whom disclosure is made—it is made to the parties unless a stipulation or court order provides otherwise. It also answers the Subcommittee Question #8 about what the court is to do with the information—typically, nothing beyond informing case management, unless an unusual circumstance is brought to the court’s attention.

³⁰ This answers the Subcommittee Question #7 concerning whether disclosure will lead to “time-consuming discovery forays that distract from the merits of the underlying cases.” Such forays will occur only if the court allows it. By providing the operative documents, the Proposal will preclude discovery “forays” by answering the presently unanswered question of what disclosure is appropriate and requiring that such disclosures be made without need for discovery requests.

³¹ The opponents of disclosure have not asserted that any of the nine contracts appended to LCJ’s Examination of TPLF Contracts contain work product.

³² See, e.g., *Ayangbile v. Children’s Health Servs. of Texas*, No. 3:24-CV-01075-N, 2025 WL 1182089, at *6 (N.D. Tex. April 22, 2025) (“the retainer agreement is relevant because [plaintiffs] seek attorney’s fees and costs”; not privileged); *Adams v. Gissell*, No. CV 20-11366-PBS, 2022 WL 14772785, at *2 (D. Mass. Oct. 26, 2022) (ordering

Insurance policies are disclosed even though underwriting analysis is ordinarily protected. Corporate structures are disclosed despite acquisition strategies being protected. Documents conferring settlement authority provisions may be discovered, but not settlement strategy. Similarly, TPLF agreements should be disclosed (showing financial interest and control features) even if funders' internal investment memoranda or case evaluations remain protected.

II. WHY THE PROPOSED RULE IS NEEDED

A. The Proposed Rule Addresses Two Compelling “Rules Problems”

Courts are sharply divided on whether TPLF information and agreements are subject to disclosure.³³ The courts that require disclosure tend to do so to ensure necessary transparency (that is, to address conflicts, nonparty control, and issues of relevance to claims and defenses),³⁴ while many courts rejecting disclosure cite the Rule 26(b)(1) “claims or defenses” relevance standard as the reason.³⁵ This lack of uniformity is a “rules problem” because similarly situated parties in different geographic locations are being subjected to starkly different interpretations of the FRCP and inconsistent access to much-needed information. Because there is little if any avenue for appellate review of TPLF disclosure decisions, there is no plausible mechanism for achieving uniformity on TPLF disclosure procedures outside the rulemaking process.³⁶ Some federal courts are attempting to create clarity by adopting local rules or judge-specific mandates requiring TPLF disclosures³⁷—typically, without need for a request. Although those local rules

production as relevant to reasonableness of fees); *SPV-LS, LLC v. Transamerica Life Ins. Co.*, No. 4:14-CV-04092-LLP, 2016 WL 3923099, at *4 (D.S.D. July 15, 2016) (“the normal rule [is] that fee agreements are generally not privileged”; retainer allegedly forged); *Torres v. Toback, Bernstein & Reiss LLP*, 278 F.R.D. 321, 322 (E.D.N.Y. 2012) (retainer agreements “do not fall within the attorney-client privilege” and were relevant to reasonableness of fees; discovery ordered after *in camera* review); *Pugliese v. I. C. Sys., Inc.*, No. 2:09-CV-11831, 2010 WL 11545062, at *4 (E.D. Mich. July 21, 2010) (“claims that attorney retainer or fee agreements are protected from disclosure by the attorney-client privilege have repeatedly been rejected by the Federal courts”).

³³ ILFA letter at 22.

³⁴ See, e.g., *In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, No. 23-MD-03084-CRB (LJC), 2025 WL 2201056, at *2–3 (N.D. Cal. Aug. 1, 2025) (ordering disclosure of litigation funding arrangement to avoid judicial conflicts of interest); *MSP Recovery Claims Services, LLC v. Sanofi-Aventis U.S. LLC*, No. 2:18-CV-02211 (BRM) (RLS), 2024 WL 4100379, at *6 (D.N.J. Sept. 6, 2024) (affirming special master’s order requiring disclosure of litigation funding arrangements and documentation due to concerns about funder control of litigation); *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) (requiring production of third-party funding agreement, explaining that it “is relevant to the adequacy [of representation] determination” required for class certification).

³⁵ See, e.g., *Akiane LLC v. Art & Soulworks LLC*, No. 19 C 2952, 2020 WL 5593242, at *5-6 (N.D. Ill. Sept. 18, 2020) (quashing discovery request on relevancy grounds); *V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 306, 313 (D. Nev. 2019) (same); *VHT, Inc. v. Zillow Grp., Inc.*, No. C15-1096JLR, 2016 WL 7077235, at *1 (W.D. Wash. Sept. 8, 2016) (same).

³⁶ The Advisory Committee observed that “It appears to be difficult if not impossible to obtain appellate review of the issue” when considering the amendment to require disclosure of insurance agreements. Fed. R. Civ. P. 26 advisory committee’s note to 1970 amendment.

³⁷ See, e.g., USCIT Form 13 (requiring identification of “each third-party litigation funder”); N.D. Cal. L.R. 3-15 (dictates identification of “an individual or entity . . . that provides funding for the litigation and that has a financial interest in the outcome”); N.J. L.R. 7.1.1 (mandating statement with information “regarding any person or entity that is not a party and is providing funding for some or all of the attorneys’ fees and expenses for the litigation on a non-

and standing orders are enhancing transparency where they apply, the courts' multifarious approaches only exacerbate the lack of uniformity.

That courts rely on Rule 26(b)(1)'s relevance standard as barring disclosure is another "rules problem." These holdings conflict with the widespread belief that courts have inherent authority to order disclosure of TPLF documents and that Rule 26(b)(1) does not circumscribe that authority. The Proposed Rule clarifies the important distinction between disclosure and discovery, and the Proposed Note explains that, because disclosure under the Proposed Rule is not "discovery," documents produced under the rule are not subject to Rule 26(b)(1) restrictions.

B. The Proposed Rule Serves Important Case Management Purposes

Courts and parties need TPLF disclosure to: (1) understand who is actually "in the courtroom"—who they are actually litigating against and negotiating with; (2) know who has settlement authority;³⁸ (3) identify potential conflicts of interest; (3) assess proportionality for discovery disputes; (4) understand the actual dynamics of the case before them, and (5) refute baseless "David vs Goliath" arguments.

None of these purposes is "unfair," as some opponents of disclosure assert.³⁹ Rather, non-disclosure is what leads to unfairness, including the following problems:

- Courts unable to manage settlement conferences effectively;
- Parties wasting time negotiating with purported "parties" who lack authority;
- "Zombie litigation" that continues at the behest of hidden TPLF despite all of the formal parties desiring to settle;⁴⁰
- Hidden conflicts of interest, often involving counsel;
- Inability to evaluate alternative litigation outcomes because hidden actors obscure benefit evaluations;
- Surreptitious violation of confidentiality orders;

recourse basis in exchange for" either a contingent financial interest in the results of the litigation or a non-monetary result). Numerous federal courts have adopted rules broadly requiring disclosure of nonparties with financial interests, which presumably would include litigation funders with direct or indirect revenue expectations attributable to a funded action. *See, e.g.*, 5th Cir. R. 28.2.1 (dictating identification of persons "financially interested in the outcome of the litigation"); C.D. Cal. L.R. 7-1.1 (requiring disclosure of persons who "may have a pecuniary interest in the outcome of the case"); N.D. Ga. L.R. 3.3 (mandating identification of persons with "either a financial interest in or other interest which could be substantially affected by the outcome"); S.D. Iowa L.R. 7.1 (requiring identification of persons with "a direct or indirect pecuniary interest in the plaintiff's outcome in the case").

³⁸ Subcommittee Question #9 asks whether judges should "be concerned that settlement decisions are controlled by funders whose involvement is not known to the court?" The Proposed Rule relieves that concern by providing that information to the court.

³⁹ American Association for Justice, Rules Suggestion, Dec. 22, 2025 ("AAJ Rules Suggestion"), 2, https://www.uscourts.gov/sites/default/files/document/25-cv-t_suggestion_from_american_association_for_justice_-_tplf.pdf.

⁴⁰ Maya Steinetz, *Zombie Litigation: Claim Aggregation, Litigant Autonomy & Zombie Litigation: Claim Aggregation, Litigant Autonomy & Funders' Intermeddling*, Cornell L. Rev. (2024) (forthcoming), available at: https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=4964&context=faculty_scholarship.

- Insulation of responsible hidden actors from court-ordered sanctions.

Some TPLF agreements expressly give the funder the right to control litigation and direct counsel.⁴¹ For example, the Burford/Sysco Agreement⁴² provides that, in the event of a breach by the funded plaintiff, the funder may take over the conduct and settlement of the litigation, including instructing or replacing counsel. The contract contemplates that the funder will “act in the name of” the plaintiff—and requires the plaintiff to continue to appear “at any hearings” at the direction of the funder.⁴³

Disclosure of TPLF contracts is particularly important where such provisions can, currently unbeknownst to judges, shape substantive outcomes and undermine court orders. Contracts that require the plaintiff to pay the funder the monetary value of any injunctive relief or specific performance awarded⁴⁴ impose strong disincentives against non-monetary relief that can skew what remedies are presented to, and ultimately ordered by, the court. Some contracts mandate that the plaintiff and counsel provide all documents obtained in the course of litigation to the funders,⁴⁵ a provision inconsistent with most protective orders. And some contracts undermine court orders to pay costs and sanctions by obligating plaintiffs to pay all such penalties⁴⁶—even where the sanctioned misconduct originated with the funder or its selected-and-controlled counsel, not with the funded party. Absent disclosure of TPLF contracts, courts and litigants remain unaware of such provisions and have no insight into how they might impact various aspects of their cases.

The Proposed Rule would lead to disclosure of these types of provisions, helping courts and parties understand why the named plaintiff may not be directing—or even participating in—the litigation. It would inform case management by making courts and parties aware of any control exercised by a nonparty with separate financial interests and strategic objectives for the case. It would allow affected parties to seek protection from unethical and otherwise sanctionable litigation conduct.

C. The Proposed Rule Provides a Necessary Tool that “Inherent Authority” Lacks

The Proposed Rule gives courts important tools that they lack when forced to rely solely on “inherent authority”—despite assertions by opponents of disclosure that no rule is necessary because judicial discretion suffices.⁴⁷

⁴¹ LCJ’s Examination of TPLF Contracts at 4-14.

⁴² *Id.* at Exhibit C, Second Amended and Restated Capital Provision Agreement between The Counterparty and The Capital Providers, Dec. 22, 2020, §13.1.

⁴³ *Id.*

⁴⁴ LCJ’s Examination of TPLF Contracts at 8-9.

⁴⁵ *Id.* at 17-18.

⁴⁶ *Id.* at 18-19.

⁴⁷ AAJ Rules Suggestion at 5-7.

Despite having inherent authority to order TPLF disclosure, courts face uncertainty about when to order disclosure, what to look for in TPLF agreements,⁴⁸ and how to decide what standards for disclosure should apply. Courts can be confused by boilerplate disavowals of control and funder statements that contradict contractual provisions,⁴⁹ and thus overlook important provisions proving otherwise. Further, judicial examination of complex contracts without briefing is undoubtedly burdensome. Parties face unpredictability about disclosure obligations, expensive motion practice in every case, inconsistent treatment across jurisdictions, strategic gamesmanship about when/whether to disclose, and forum shopping.

No amount of inherent authority can avoid the documented problems that undisclosed TPLF can bring. In the *Sysco* case, the settlement that the parties wanted collapsed because undisclosed TPLF contracts controlled settlement authority, but that was revealed only after extensive litigation. In this type of “zombie litigation,” where the litigation continues despite the parties’ desire to settle,⁵⁰ courts have no idea that funders control decisions until it is too late to provide appropriate case management to prevent wasted resources. And in conflict situations, judges preside over cases without knowing that funders have relationships requiring recusal or cross-examination and may not discover the issues until after months or years of proceedings. These are problems caused by absence of rule guidance and are not addressed by inherent authority.

Before the 1970 amendment requiring insurance disclosure, judges had inherent authority to require disclosure of insurance information on a case-by-case basis—and in fact, many did so. Yet the Advisory Committee determined that a uniform rule was necessary because: *ad hoc* requests create uncertainty, inconsistency, and unnecessary motion practice; parties should not have to guess when disclosure is required; uniform rules promote efficient case management; and automatic disclosure is more efficient than case-by-case determination.

Inevitably, relying on inherent authority means that some judges order disclosure while others do not; standards vary across courts and jurisdictions; parties face uncertainty about disclosure obligations; extensive motion practice wastes time and resources; and forum shopping occurs based on disclosure practices and local rules.

Indeed, a fundamental problem is that many judges are not even aware that funding exists in their cases. Parties do not volunteer this information, often because TPLF contracts prohibit them from doing so.⁵¹ Without a rule, no trigger for inquiry exists. The result is that funding agreements remain hidden, and problems surface only after it is too late for judicial management.

Even when judges suspect funding, parties (and their funders) resist disclosure absent a clear rule requirement. If courts ask informally about “litigation funding,” parties may avoid disclosure due to the lack of a written definition. Or a funding contract may be entered into after the judge’s inquiry, with no express obligation to update any prior negative response absent a rule.

⁴⁸ *In re Fresh Acquisitions, LLC*, No. 21-30721-SGJ-11, 2025 WL 2231870, at *9 (Bankr. N.D. Tex. Aug. 5, 2025) (observing that even purported TPLF “experts” have “only seen a few actual litigation funding agreements”).

⁴⁹ LCJ’s Examination of TPLF Contracts at 14-16.

⁵⁰ *See supra* n. 40.

⁵¹ LCJ’s Examination of TPLF Contracts at 17.

Disputes over disclosure—and about the uncertain applicability of Rule 26(b)(1)’s “relevance” standard—consume time and resources.

When judges do obtain agreements, *ex parte* review to determine the meaning of contractual provisions (in order to decide whether those provisions justify disclosure) deprives courts and parties of the adversary process necessary for uncovering facts buried in complex documents. It also deprives courts and parties from the benefits of case law development. The resulting repetition of similar disputes uses more resources and leads to inconsistent analysis and results.

The proliferation of local rules and standing orders demonstrates two things: first that TPLF non-disclosure is a problem that necessitates a judicial response, and second that relying on individual judges’ discretion has yielded inconsistent outcomes and serious inefficiencies, highlighting the need for a clear, uniform rule.

D. The Proposed Rule Reduces Judicial Burdens

The Proposed Rule would provide guidance to judges that would largely eliminate the current burdens of managing TPLF disclosures on a case-by-case basis. The opposing argument that any rule should be discretionary and have only a limited scope⁵² fails to address that case-by-case management requires:

- Judges first guess when funding might exist;
- Motion practice about whether to require disclosure;
- Briefing on applicable disclosure standards;
- Review of conflicting caselaw untethered to a rule standard;
- *In camera* review of complex and often inconsistent contractual provisions to determine their meaning and practical effect; and
- Potential repeated analysis in each case.

In contrast, the Proposed Rule reduces the need for judicial engagement by providing:

- Defined initial disclosures, eliminating case-by-case adjudication;
- No judicial involvement unless disputes arise, reducing motion practice;
- Standard, familiar procedures for asserting and ruling on motions for protective order;
- A framework for developing interpretive precedent; and
- One-time rule execution in most cases.

This is a commonsense solution reflecting the fundamental purpose of the civil rules. The FRCP do not require courts to make case-by-case decisions as to whether insurance disclosures, corporate disclosures, or expert disclosures are helpful. Rather, the FRCP provide regular procedures for these to ensure consistent practice, prevent gamesmanship, reduce motion practice, enable efficient case management, and create clear expectations. If judicial discretion based on inherent authority were always superior to rule guidance, none of these disclosure rules would exist or be needed.

⁵² AAJ Rules Suggestion at 9.

E. The Proposed Rule Allows Normal *In Camera* Review in Response to a Motion for Protective Order but Rejects Inappropriate Use of *Ex Parte* Communications to Determine the Meaning of Contracts

Courts are accustomed to reviewing documents *in camera* when necessitated by motions for protective orders. The Proposed Rule would ensure this “regular order” for TPLF contracts while rejecting the starkly different notion that courts should automatically review TPLF contracts *ex parte* to decide for themselves if the meaning of their provisions warrants discretionary disclosure.

Opponents of disclosure argue that any rule, if there is to be one, should mandate *ex parte in camera* review of all TPLF contracts to determine whether “the agreement presented a conflict of interest or that funders were exerting improper control over the litigation.”⁵³ That type of *ex parte* review would not only dramatically increase judicial workloads, but also and more fundamentally violate basic jurisprudential principles. The Code of Conduct for U.S. Judges (Canon 3(A)(4)) discourages *ex parte* communications, with exceptions limited to “scheduling, administrative, or emergency purposes.” Examining TPLF contracts to reach legal conclusions about control provisions falls well beyond the Judicial Code’s narrow exceptions because it:

- Deprives opposing parties of opportunity to respond on substantive legal issues;
- Violates adversarial system principles;
- Prevents parties from identifying problematic provisions for courts to consider;
- Creates no record, thereby making appellate review effectively impossible;
- Creates information asymmetries that distort settlement;
- Relies entirely on inherently biased presentations from the parties opposing disclosure;
- Makes the judge the sole possessor of knowledge about potential problems; and
- Deprives courts and future litigants of the development of precedential standards, including:
 - Other courts cannot learn from decisions,
 - No precedent establishing what TPLF provisions mean or matter,
 - Standards remain unclear, and
 - Each judge reinvents the wheel.

The notion of greatly expanded *ex parte* review of contracts is inconsistent with other disclosure requirements, including:

- Insurance agreements: disclosed to parties, adversarial briefing of disputes;
- Corporate disclosure: public filing;
- Discovery disputes: adversarial briefing creating a full record, potential interlocutory appellate review;
- Privilege and confidentiality claims: privilege logs, adversarial motion practice, and *in camera* review only as last resort, potential interlocutory appellate review.

TPLF agreements do not warrant special procedural treatment compared to all other types of discoverable or disclosable documents, none of which are reviewed *ex parte* in the first instance,

⁵³ *Id.*

absent a motion for protective order. TPLF agreements are no more sensitive than these other presumptively disclosable documents that might sometimes contain trade secrets, attorney-client privilege, work product, or other confidential material. Discovery disputes are uniformly handled through normal procedures.

F. The Proposed Rule Provides Optimal Disclosure, Not Under-Disclosure

The Proposed Rule provides courts and parties with an optimal level of TPLF disclosure. Without mandatory disclosure, parties under contract with nonparty funders have incentives, or sometimes obligations, to: avoid mentioning funding exists, argue funding is irrelevant when discovered, claim broad privilege over entire agreements, propose *ex parte* review to avoid party-to-party disclosure, and delay disclosure until problems arise. The result is that information remains hidden until it causes problems—exactly when disclosure is least helpful for case management. In contrast, the Proposed Rule makes information available from the outset of a case, gives courts the ability to structure case management appropriately, informs parties about settlement dynamics early, allows conflicts to be identified before they cause problems, and encourages efficient pro-active case management.

G. The Proposed Rule Addresses Problems with Parties’ Ability to Discuss Resolution, Enhancing Judicial Management

Some TPLF contracts expressly give the funder the right to accept or reject settlement offers—and some even forbid the plaintiff from having “any communication with any Defendant” or defense representative.⁵⁴

Most courts consider it good case management to ensure that all decision makers are in the room, or at least available, during settlement conferences. The Proposed Rule allows courts to involve third-party funders directly (as is routinely the case with insurers). Further, presiding judges will be able to appreciate why settlement discussions stall, why plaintiffs are unable to respond to seemingly reasonable offers, or why cases continue to be litigated despite apparent willingness by the named parties to resolve their disputes. The Proposed Rule also allows defense counsel to negotiate with those having actual settlement authority and understand the settlement dynamics created when, for example, funders have veto power over reasonable offers, minimum recovery requirements, or strategic reasons for prolonging litigation that have nothing to do with the underlying dispute (including interests in other “portfolio” cases that are part of the TPLF arrangement).

Moreover, when a court is called upon to ensure that a settlement is fair and reasonable—for example, as Rule 23(e) requires in class actions—the Proposed Rule will allow the court to incorporate in its analysis whether a significant portion of the proceeds is being paid to a nonparty, and on what terms. The Proposed Rule is necessary because a TPLF contract may preclude the plaintiff or counsel from disclosing the existence of funding or any details about the arrangement.

⁵⁴ LCJ’s Examination of TPLF Contracts at 6-7.

III. THE PROPOSED RULE IS CONSISTENT WITH THE ADVISORY COMMITTEE’S DECISION TO REQUIRE INSURANCE DISCLOSURE

Opponents of disclosure argue that the Advisory Committee’s decision to require insurance disclosure is irrelevant because insurance and TPLF are different financial products.⁵⁵ They essentially argue that disclosure should depend on the commercial purpose of the financial product, not on its effect on litigation dynamics. But the purpose of FRCP disclosure requirements is to promote judicial administration, not financial product regulation. What matters is not whether TPLF and insurance serve the same commercial purposes (which they do not), but whether both can create nonparty interests requiring disclosure for effective case management because both broadly affect the litigation.

A. The “Different Purposes” Argument Misunderstands Why Insurance Must Be Disclosed

Opponents of disclosure claim that TPLF and insurance serve different purposes.⁵⁶ True, but irrelevant for FRCP purposes. When the Advisory Committee considered whether to require insurance disclosure, it did not concern itself with the purposes of insurance, but rather focused on what mattered when creating a disclosure rule: litigation dynamics—who has financial interests and who controls decisions affecting case resolution. The Advisory Committee determined that disclosure enables parties to “make the same realistic appraisal of the case, so that settlement and litigation strategy are based upon knowledge and not speculation.” This rationale applies identically to TPLF because: (1) parties need to make realistic case appraisals, and doing so requires knowledge of how funding affects settlement dynamics; (2) settlement strategy must be based on knowledge, which means the court and parties must know who controls settlement authority; and (3) eliminating speculation requires courts and parties to know who benefits from judgments and settlements.

Thus, the “purpose” of disclosing insurance and TPLF is the same, even if the “purposes” of the underlying products differ in other, extraneous ways.

B. Timing of Execution Is Irrelevant to the Need for Disclosure

Opponents of disclosure also argue that TPLF contracts differ from insurance agreements because they are created post-incident. This distinction is often false as a matter of fact and always irrelevant as a matter of jurisprudence.

Some nonparty funding of litigation, particularly in the mass tort context, is on a portfolio basis.⁵⁷ New plaintiffs making the same claims simply become additional fodder for existing TPLF arrangements. Funding arrangements thus frequently predate the lawsuit, and indeed are predicated on generating additional lawsuits. The opposition argument is thus factually erroneous.

⁵⁵ ILFA Letter at 19-20; AAJ Rules Suggestion at 4-5.

⁵⁶ AAJ Rules Suggestion at 4-5.

⁵⁷ LCJ’s Examination of TPLF Contracts at 13-14.

Nor does it matter. If an insurance policy were obtained or modified post-incident, the timing would not seem to exempt it from disclosure under Rule 26(a)(1)(A)(iv). Moreover, the timing of insurance agreements was nowhere mentioned as a factor for the 1970 rulemaking in the Committee Note.

No other disclosure rule is dependent on when the information at issue came to be. Corporate disclosures under Rule 7.1 do not exempt entities from disclosure based on when ownership was acquired. Rule 17's requirement for cases to be litigated in the name of the real party in interest cannot be evaded based on when the interest was obtained or transferred—for example, when assignment of claims occurs.⁵⁸

C. The “Case Evaluation” Distinction Actually Supports Disclosure

Opponents of disclosure also claim that TPLF agreements contain attorney and funder evaluation of case strengths and weaknesses, making them more like work product. This argument ignores that, like insurance policies, many TPLF agreements are form contracts, and that some insurance contracts may also contain an insurer's evaluation of risk.

When the Advisory Committee concluded in 1970 that insurance disclosure allows the parties to “make the same realistic appraisal of the case, so that settlement and litigation strategy are based upon knowledge and not speculation,” it surely contemplated that courts and parties need to know what financial pressures the contracts create, and whether settlement positions reflect case merits or some nonparty's financial calculations.

Even supposing that case evaluation information were to appear in a contract—which is unlikely⁵⁹—it would not make the entire agreement privileged. The existence of funding and basic terms (control, financial interest) are not privileged. In an unusual case, courts would be capable of protecting genuinely privileged portions through standard Rule 26(c) procedures.

D. The “Reserve Amount” Analogy Fails

Opponents of disclosure claim that TPLF disclosure would be like requiring insurers to disclose reserve amounts. The argument is fundamentally flawed because reserve amounts are internal financial accounting, not contractual terms with nonparties affecting litigation control. An insurer's reserve is not determinative of its settlement authority. The factually appropriate analogy is to an insurer's policy limits – specifying the amount of nonparty financial exposure, just as does the amount of TPLF contingent investment.

In contrast, TPLF contracts contain contractual provisions specifying who controls settlement decisions, terms establishing who benefits from judgments and resolutions, and creating enforceable rights of nonparties. Thus, disclosing TPLF agreements is exactly equivalent to disclosing insurance policies—both are contracts with nonparties affecting litigation control and

⁵⁸ *E.g., Winn v. Amerititle, Inc.*, 731 F. Supp. 2d 1093, 1099 (D. Idaho 2010) (Rule 17 “real party in interest” status can be created by an “assign[ment . . .] after the action has been instituted”).

⁵⁹ None of the nine contracts in LCJ's Examination of TPLF Contracts did so.

participation in litigation outcomes. Both sides need to know the contractual terms and exposure limits that affect case control and resolution.

CONCLUSION

The Proposed Rule will provide the information necessary for good case management, and it will do so while protecting judicial discretion and maintaining well-established procedures of stipulations, motions for protective orders, and, when necessary, *in camera* review. It will create a uniform procedure and provide clear guidance for courts and parties. Rule 26(a)(1)(A) is the appropriate place for TPLF disclosure guidance. As with other initial disclosures, when litigants comply with no objection or by stipulation, the court will not be involved. When a motion for protective order is filed under Rule 26(c), it will be adjudicated in the normal course.

The opponents of disclosure are not asking the Advisory Committee for uniformity, clarity, or predictability in procedural rules. They are asking for special treatment. Although their contracts allow them to share in court judgments and settlements, and often include specific provisions by which they influence or control litigation decisions, settlements, and even counsel, they ask to be exempt from the disclosure requirements that generally apply to real parties in interest, insurers, nonparties who may or may not influence litigation, such as corporate parents, and even nonparties who by definition do not have any role in the litigation, such as *amici curiae*.

The opposing “unfair advantage” argument ignores the case management problems caused by undisclosed nonparty engagement in litigation—and the Advisory Committee rejected the same arguments against insurance disclosure in 1970. The “different purposes” argument misunderstands why disclosure is required: not because of product purpose, but because courts and parties need to know about actual nonparty financial interests and control. The “no rule necessary” argument ignores the numerous documented failures that have occurred despite courts’ inherent authority. The “discretionary, limited disclosure” proposal would impose substantial burdens on courts, designed to deter them from ordering disclosure rather than enable it, and it would create unique *ex parte* procedural requirements that violate judicial ethical norms.

Exhibit A

Proposed Rule Amendment and Committee Note

Rule 26 Duty to Disclose; General Provisions Regarding Discovery

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under [Rule 34](#) the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;

(iv) for inspection and copying as under [Rule 34](#), any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment; **and**

(v) the name, address, and telephone number of any non-party 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 for the action or the financial interest therein.

Proposed Notes of Advisory Committee on Rules — 2027 Amendment

Subdivision (a)(1)(A)(v)—Litigation Funding Agreements. Existing case law sharply conflicts on the question whether information about litigation funding usage and agreements are subject to discovery when such facts normally are not themselves admissible and do not bear on other issues in the matter. Examples of federal precedents requiring disclosure are: *In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, No. 23-MD-03084-CRB (LJC), 2025 WL 2201056, at *2–3 (N.D. Cal. Aug. 1, 2025) (ordering disclosure of litigation funding arrangement to avoid any judicial conflicts of interest); *MSP Recovery Claims Services, LLC v. Sanofi-Aventis U.S. LLC*, No. 2:18-CV-02211 (BRM) (RLS), 2024 WL 4100379, at *6 (D.N.J. Sept. 6, 2024) (affirming special master’s order requiring disclosure of litigation funding arrangements and documentation due to concerns about funder control of litigation); *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-

SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) (requiring production of third-party funding agreement, explaining that it “is relevant to the adequacy [of representation] determination” required for class certification). Examples of federal cases rejecting disclosure are: *Akiane LLC v. Art & Soulworks LLC*, No. 19 C 2952, 2020 WL 5593242, at *5-6 (N.D. Ill. Sept. 18, 2020) (quashing discovery request on relevancy grounds); *V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 306, 313 (D. Nev. 2019) (same); *VHT, Inc. v. Zillow Grp., Inc.*, No. C15-1096JLR, 2016 WL 7077235, at *1 (W.D. Wash. Sept. 8, 2016) (same). It appears to be difficult (if not impossible) to obtain appellate review of the issue.

Some federal appellate and district courts have sought to resolve the question by adopting varying local rules specifying that disclosures must be made about litigation funding without need for request. *See, e.g.*, USCIT Form 13 (requires identification of “each third-party litigation funder”); N.D. Cal. L.R. 3-15 (dictates identification of an individual or entity . . . that provides funding for the litigation and that has a financial interest in the outcome”); N.J. L.R. 7.1.1 (mandates filing of statement with information “regarding any person or entity that is not a party and is providing funding for some or all of the attorneys’ fees and expenses for the litigation on a non-recourse basis in exchange for” either a contingent financial interest in the results of the litigation or a non-monetary result). Numerous federal courts have adopted rules broadly requiring disclosure of non-parties with financial interests, which presumably would include litigation funders with direct or indirect revenue expectations attributable to a funded action. *See, e.g.*, 5th Cir. R. 28.2.1 (dictates identification of persons “financially interested in the outcome of the litigation”); C.D. Cal. L.R. 7-1.1 (requires disclosure of persons who “may have a pecuniary interest in the outcome of the case”); N.D. Ga. L.R. 3.3 (mandates identification of persons with “either a financial interest in or other interest which could be substantially affected by the outcome”); S.D. Iowa L.R. 7.1 (requires identification of persons with “a direct or indirect pecuniary interest in the plaintiff’s outcome in the case”).

Resolution of the disclosure question by rule amendment is indicated. The question is essentially procedural, since it bears upon preparation for trial and settlement before trial. Regardless of outcome, courts confronting the question have generally treated the question as procedural and governed by the rules. Further, as noted, many courts have adopted varying local rules requiring disclosure. Since litigation funding is ubiquitous in the federal court system, a uniform, nationwide rule on this issue is advisable.

The amendment resolves this issue in favor of mandatory litigation funding disclosure to the court and parties without need for request. As such, the amendment follows the approach taken to resolve a similarly sharp split among federal courts regarding the question whether defendants’ liability insurance agreements should be disclosed. *See* Rule 26(a)(1)(A)(iv) and Advisory Committee Note (1970 Amendment). Most decisions denying litigation funding disclosure reason from the text of Rule 26(b) that it permits discovery only of matters that will be admissible in evidence or appear reasonably calculated to lead to such evidence; they avoid considerations of policy considerations, regarding them as foreclosed. *See V5 Techs. v. Switch, Ltd., supra*. Those policy considerations, however, favor disclosure. Decisions requiring disclosure have noted, irrespective of relevance considerations, the desirability of the court and parties to know who (other than named parties and counsel of record) may exercise control or influence over the conduct of the litigation, particularly for purposes of participating in settlement efforts. *See MSP, supra*. In class actions, some courts ordering disclosure have

emphasized that funding agreements are relevant to the adequacy of representation determination under Rule 23(a). See *Gbarabe v. Chevron Corp*, *supra*. And yet other courts requiring disclosure have done so on the ground that such disclosure is necessary to better assess and avoid judicial conflicts of interest. See *In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, *supra*.

Disclosure of litigation funding will enable counsel for both sides to make the same realistic appraisal of the case, so that litigation and settlement strategies will be more efficient—based on knowledge, not speculation. It will allow the court and parties to know all persons and entities (a) who are monetarily supporting the prosecution or defense of an action, (b) who may exert control or influence over the conduct of the litigation, (c) whose presence may create conflicts of interest for the courts or counsel, (d) who arguably might be held responsible for actions in the litigation, and (e) who should be included in any settlement discussions.

Disclosure is required when any non-party (other than counsel of record) is directly or indirectly (a) providing funding for the action and (b) has a financial interest therein. For purposes of this Rule, the term “nonparty” does not include individuals or entities that are donors to, shareholders of, members of, or investors in a party to the action. The term “funding” includes any past or potential future payments for attorney’s fees, costs, or expenses (including law firm payments for identifying and recruiting clients) related to the litigation, whether directly or through an intermediary non-party. The term does not include funding in the nature of contingency fee arrangements, insurance, or ordinary personal and bank loans (that is, loans with prevailing standard terms and interest rates). “Financial interest” should be interpreted broadly to include any potential for direct or indirect compensation from the matter, including money flowing from securitized interests in law firm income from the litigation.

If disclosure is required, the name, address, and telephone number of any person or entity providing funding should be presented. Further, any agreements or other documentation concerning the provision of funding for the litigation should be produced. The “other documentation” reference is included to ensure that any side agreements or descriptions are made available, particularly materials that may describe respects in which proceeds from the litigation may be forwarded to others by a funder.

Under the existing language of Rule 26(a), the obligation to produce agreements and documentation would be subject to the proviso “[e]xcept as otherwise stipulated or ordered by the court.” Thus, before the required mandatory production occurs, a party could confer with the other litigants about entering into stipulations that certain items need not be produced or may be produced with redactions. If stipulations are not reached, the party could move the court pursuant to Rule 26(c)(1) for a protective order excusing the production of certain items or requiring redactions. Per normal procedure, the court would then conduct an *in camera* review of the materials at issue in determining whether to grant the requested protective order.

The agreements and documentation that must be produced under the amended rule are not discovery and therefore are not subject to the relevancy and proportionality standards of Rule 26(b)(1). Like the insurance agreements that must be provided under Rule 26(a)(1)(A)(iv), the materials to be produced without awaiting a discovery request under this amendment may not be resisted on the grounds that their content is not relevant to the merits of the action.