HANCE SCARBOROUGH, LLP
ATTORNEYS AND COUNSELORS AT LAW

Kent R. Hance
Founding Partner
(512) 479-8888
Khance@hslawmail.com

August 30, 2024

Judge Harvey Brown
10940 W. Sam Houston Pkwy N,
Suite 100
Houston, TX 77064

Judge Brown,

Over the past several years, the International Legal Finance Association's (ILFA)[1] members have advocated on behalf of the commercial legal finance industry. Such advocacy includes appearing before the Federal Advisory Committee on Civil Rules of the Committee on Rules of Practice and Procedure (Civil Rules Advisory Committee),[2] the Uniform Law Commission (ULC), as well as before Congress and state legislatures across the country, including in Texas.

While ILFA does not oppose reasonable disclosure requirements, ILFA believes that disclosure requirements should be appropriately tailored and consistent with the Rules of Civil Procedure and applicable law and that there should not be special disclosure rules targeting litigation funders, as opposed to banks or other providers or capital, or any entity with a financial stake in the outcome of a matter. The facts surrounding how a party finances its litigation – whether self-funded, contingency, traditional bank loan, legal finance, or otherwise – are simply not relevant to the merits of the litigation in the vast majority of cases. Despite highly politicized efforts to mandate disclosure in various forms, careful examination of the topic has yielded a consensus view among neutral organizations – including the Civil Rules Advisory Committee and others – that existing disclosure mechanisms are adequate for the vast majority of federal cases.

Federal Courts have differing opinions on forced disclosure

The Texas Civil Justice League (TCJL) overstates the current state of federal rules requiring disclosure. Only the United States District Court for the District of New Jersey has adopted a local rule requiring disclosure of the existence of funding. One judge in the United States District Court for the District of Delaware issued a standing order applicable to his cases, which largely mirrors the New Jersey rule. The United States District Court for the Northern District of California, like

[1] Founded in September 2020, ILFA is the only global association of commercial legal finance companies. ILFA is a non-profit trade association that promotes the highest standards of operation and service for the commercial legal finance sector, including respecting duties to the courts, avoiding conflicts of interest, and preserving confidentiality and legal privilege.

[2] The Civil Rules Advisory Committee is within the Judicial Conference. Accordingly, "[w]hile the policy conclusions of the Judicial Conference may not be binding on the lower courts, they are at the very least entitled to respectful consideration." *See Hollingsworth v. Perry*, 558 U.S. 183, 193-94 (2010).

several other courts, has a disclosure rule that is broader than Federal Rule of Civil Procedure 7.1, but even then only requires the disclosure of litigation funding in very limited circumstances.[3] Moreover, federal courts across the country have issued dozens of opinions analyzing disclosure of financing under Federal Rule of Civil Procedure 26(b)(1), which have yielded an ever-growing body of precedent holding disclosure of litigation finance unwarranted absent special circumstances. In the select circumstances where courts have deemed disclosure, they have exercised their inherent authority to implement orders that narrowly limit disclosure in a manner that promotes judicial economy, follows Rule 26's requirements of relevance and proportionality, and respects bedrock principles of attorney-client privilege and work-product privilege.

Significantly, federal courts in Texas have resisted efforts to make litigation finance subject to disclosure. The Northern District of Texas has a broad disclosure rule – not specifically directed at litigation funding – that requires the disclosure of all legal entities that have a financial interest in the outcome of the case, but it has not required production of documents related to litigation funding.[4] Similarly, the Western District of Texas has consistently denied motions to compel production of information related to litigation funding.[5] The Eastern District of Texas has also forbidden parties from requesting funding information.[6]

For example, in *Lower48 IP LLC v. Shopify, Inc.*, Shopify requested the court issue an order compelling Lower48 to disclose all third-party interests involved in the action. [7] Judge Ezra adopted Magistrate Judge Gilliland's order that recommended denial of the motion, noting, "none of the judges of the Western District of Texas have ordered the production of [disclosure of all third-party financial interests]." Judge Ezra also noted that there is no Fifth Circuit precedent for this type of disclosure.

Efforts before the Civil Rules Advisory Committee to amend the Federal Rules of Civil Procedure to mandate disclosure have been persistent yet unsuccessful. In 2014, 2015, 2017, 2018, 2019, 2020, 2021, 2022, 2023, and 2024, the United States Chamber of Commerce's Institute for Legal Reform (Chamber) has lobbied the Civil Rules Advisory Committee to force disclosure of funding arrangements in all civil cases. After multiple in-depth studies of the topic, including the creation of a subcommittee that undertook a roadshow across the country to examine the disparate

[3] *See InfoExpress, Inc. v. Cisco Sys.*, No. 4:23-CV-02698-YGR (N.D. Cal. May 20, 2024) (holding that litigation funder need not be disclosed unless it has the ability to control settlement negotiations). As litigation funding agreements generally do not grant the funder settlement control, the N.D. Cal. rule does not generally require the disclosure of litigation funding.

[4] *See Mobile Telecomms. Techs. LLC v. Blackberry Corp.*, No. 3:12-cv-01652 (N.D. Tex. Nov. 2, 2015) (granting litigation funder's motion to quash subpoena).

[5] *See, e.g., Advanced Aerodynamics, LLC v. Spin Master, Ltd.*, No. 6:21-cv-00002-ADA (W.D. Tex. Feb. 4, 2022) (denying discovery into funding).

[6] *See, e.g., Fleet Connect Solutions LLC v. Waste Connections US, Inc.*, No. 2:21-cv-00365-JRG, (E.D. Tex. Jun. 29, 2022) (denying discovery into funding).

[7] *See Lower48 IP LLC v. Shopify, Inc.*, No. 6:22-cv-00997-DAE, 2023 U.S. Dist. LEXIS 240862 (W.D. Tex. Nov. 2, 2023).

views on the topic at several academic conferences, the Civil Rules Advisory Committee has repeatedly declined to recommend amending the Rules to force disclosure.

For instance, in 2014, the Civil Rules Advisory Committee's reporter stated that "a disclosure regime that applies in every case except those exempted by Rule 26(a)(1)(B) might seem far too broad to address the concern[s] raised."[8] Further, in his Report to the Standing Committee on Rules of Practice and Procedure, the Honorable David G. Campbell remarked that "judges currently have the power to obtain information about third-party funding when it is relevant in a particular case."[9]

In 2016, the Civil Rules Advisory Committee again declined to take action when the Chamber renewed its proposal. The Committee acknowledged the Chamber's "suggestion follow[ing] up an earlier submission that the Committee should act to require disclosure of third- party financing arrangements."[10] Nonetheless, "[t]he Committee decided, as it had earlier, that this topic should remain open on the agenda without seeking to develop any proposed rules now."[11]

In its examination of the topic in June 2019, the MDL Subcommittee of the Civil Rules Advisory Committee declined to make any proposals – including proposals to supplement Rule 7.1 regarding recusal decisions – stating:

> The MDL Subcommittee continues to study third-party litigation funding (TPLF), including various proposals for disclosure. All that is clear at the moment is that the underlying phenomena that might be characterized as third-party funding are highly variable and often complex. They continue to evolve at a rapid pace as large third-party funders expand dramatically. It seems clear that more study will be required to determine whether a useful disclosure rule could be developed. Nor does it seem likely that the several advisory committees will soon be in a position to frame possible expansions of disclosure requirements designed to support better informed recusal decisions.[12]

As mentioned above, the Chamber has perennially urged the Civil Rules Advisory Committee to take various steps toward requiring disclosure. Notably, the Civil Rules Advisory Committee has not found it appropriate to take up the issue.

---

[8] *See* Advisory Committee on Civil Rules, Rule 26(a)(1)(A): Reporter's Memorandum & Suggestion, 14-CV-B at 10 (Oct. 30-31, 2014).
[9] *See* Hon. David G. Campbell, Report of Advisory Committee on Civil Rules, at 4 (Dec. 2, 2014).
[10] *See* Advisory Committee on Civil Rules, April 14, 2016 Minutes, at 35 (Apr. 14, 2016).
[11] *Id.*
[12] *See* Hon. John D. Bates, Report of the Advisory Committee on Civil Rules, at 2-3 (June 4, 2019)

Very limited disclosure rules have been adopted in two MDL cases

In its 2022 letter, TCJL pointed to recent MDL cases that have required the disclosure of litigation funding. The judges in these cases utilized their inherent authority in an appropriately limited way to obtain information necessary for the administration of the MDL. Two notable examples of this inherent authority in use are the *Opioids* and *Zantac* MDLs.[13]

In the *Opioids* MDL, Judge Dan Polster had reason to believe that attorneys in the MDL had received, or were interested in receiving, funding. Judge Polster issued a court order explicitly stating that "[a]bsent extraordinary circumstances, the Court will not allow discovery into [funding]."[14] Instead, he required *ex parte* disclosure of funding arrangements for *in camera* review consisting of affirmations by counsel and financier that the funding 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 [funder] any control over litigation strategy or settlement decisions, or
> (5) affect party control of settlement.[15]

Similarly, in the *Zantac* MDL, Judge Robin Rosenberg issued a pretrial order in connection with MDL leadership applications requiring the provision of affidavits from counsel for *in camera* review.[16] The order required attorneys utilizing funding to respond to the following prompts:[17]

> (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?

[13] *See In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 U.S. Dist. LEXIS 84819 (N.D. Ohio May 7, 2018); *In re Zantac (Ranitidine) Prods. Liab. Litig*., No. 2924, 2020 U.S. Dist. LEXIS 62805 (S.D. Fla. Apr. 3, 2020).
[14] *See In re Nat'l Prescription Opiate Litig.*, 2018 U.S. Dist. LEXIS 84819, at *46.
[15] *See id.* at *45.
[16] *See In re Zantac (Ranitidine) Prods. Liab. Litig*., 2020 U.S. Dist. LEXIS 62805, at *40.
[17] The *Zantac* order also required disclosure of details concerning leadership applicants' personal and financial relationships with clients and parties.

(iii) Briefly explain the nature of the financing, the amount of the financing, and submit a copy of the documentation to the Special Master.

In both cases, the courts required specific, limited disclosure *in camera* on an *ex parte* basis. This sensible approach balanced the courts' obligation to inquire into financing arrangements for specific, narrow purposes against the reality that funding issues are rarely relevant to the parties' claims and defenses. Judges within the State of Texas already may elect to employ similar mechanisms as they deem fit, whether or not a new rule is enacted.[18]

Both the *Opioids* and *Zantac* orders were positively received as thoughtful and balanced methods to address disclosure. Most importantly, no record exists of either court taking issue with any aspect of any disclosed funding arrangement.

Texas courts have a long history of permitting champerty and maintenance

The body of law in Texas allowing champerty is well settled, originating in the Republic of Texas when courts looked to the law of Spain.[19] With over 150 years of permissible champerty in Texas[20], and all champertous devices permissible with limited exceptions[21], there is little caselaw in existence.

The Uniform Law Commission has declined to adopt model rules, while the American Bar Association prematurely adopted best practices

The ULC[22] has twice formed committees to study this issue and declined to proceed with proposing uniform state legislation on both occasions. As recently as July 2020, the ULC noted that "the topic remains highly politically charged" and "the committee did not receive reports of

---

[18] Indeed, the Proposed Rule itself acknowledges the court's inherent authority, providing in Section (c) that "[n]othing herein precludes the Court from ordering such other relief as may be appropriate."

[19] *See, e.g.,* White v. Gay's Executors, 1 Tex. 384, 388 (1846).

[20] *Bentinck v. Franklin* contains the earliest direct declaration from a Texas court regarding the champerty doctrine in that state. 38 Tex. 458, 472 (1873) ('The law [prohibiting champerty] has not been recognized as in force in this State by any of the former decisions.").

[21] "[W]hile the 'practicalities of the modern world have made free alienation ... the general rule,... they have not entirely dispelled the common law's reservations to alienability, or displaced the role of equity or policy in shaping the rule.'" *Coronado Paint Co. v. Global Drywall Sys., Inc.*, 47 S.W.3d 28, 31 (Tex. App.-Corpus Christi 2001, pet. denied) (quoting *Gandy*, 925 S.W.2d at 707). *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79 (Tex. 2004). *Coronado Paint Co.* lists the five public policy exceptions in existence in 2001. *Coronado Paint Co.*, 47 S.W.3d at 31. *PPG Industries* represents the sixth exception, added three years after *Coronado Paint Co. PPG Indus*., 146 S.W.3d at 91-92 ('The DTPA is primarily concerned with people-both the deceivers and the deceived. This gives the entire act a personal aspect that cannot be squared with a rule that allows assignment of DTPA claims as if they were merely another piece of property.") (footnote omitted).

[22] Although the ULC proposes uniform state law legislation, its mission involves "strengthen[ing] the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states." *See* https://www.uniformlaws.org/aboutulc/overview.

a lack of uniformity [concerning legal finance] causing any problems."[23]

In August 2020, the American Bar Association's House of Delegates voted to approve the best practices for third-party litigation funding. ABA is right to educate lawyers about the use of third-party litigation funding, and has sought to provide best practices in the past. However, in this instance ABA's new best practices were drafted without an opportunity for comment and with the glaring omission of commercial legal finance providers. Not surprisingly, the resulting best practices do not reflect how legal finance actually works and could create confusion among lawyers considering it — the opposite of what was intended. The best practices fail to account for the fact that legal finance has been permitted and endorsed in many U.S. states since they separated from England.

Furthermore, the ABA attempts to provide a single set of best practices for the funding of disputes between commercial entities and consumer litigation funding. These are entirely different practices. Commercial legal finance companies provide multimillion-dollar nonrecourse investments to companies and law firms represented by world-class counsel. Consumer litigation funders make small-dollar cash provisions to individuals in economic distress who may not be experienced in or savvy about negotiating legal transactions.

The Chamber has failed to convince Congress to pass similar legislation

Attempts to pass federal legislation to mandate disclosure have likewise failed. For example, the Chamber-supported Litigation Finance Transparency Acts of 2018 and 2019 would have required disclosure of the identities of funders and the funding agreements in a class action or multidistrict litigation.[24] No version of the bill has ever progressed beyond referral to the Senate Judiciary Committee.[25]

The inability of any Chamber-supported forced disclosure legislation to advance in Congress can be attributed, at least in part, to the threat such a mandate presents to the constitutional rights of litigants. In a letter (attached) to the sponsors of the Litigation Finance Transparency Act, thirteen state Attorneys General, (including Texas Attorney General Ken Paxton) expressed the following First Amendment concerns with a legislative proposal that would have required automatic forced disclosure of a private litigant's financial resources:[26]

---

[23] *See* Cassandra Burke Robertson, Memorandum to Study Committee on Third-Party Funding of Litigation and Arbitration (May 20, 2020).
[24] *See* https://www.congress.gov/bill/115th-congress/senate-bill/2815/text; https://www.congress.gov/bill/116th-congress/senate-bill/471/text.
[25] *See* https://www.congress.gov/bill/115th-congress/senate-bill/2815/actions; https://www.congress.gov/bill/116th-congress/senate-bill/471/actions. We note that the Litigation Funding Transparency Act was reintroduced in March of 2021. *See* https://www.grassley.senate.gov/news/news-releases/lawmakers-reintroduce-litigation-funding-transparency-bill.
[26] See attached.

Although the legislation's intended goal of transparency is laudable, we believe that mandating automatic forced disclosure of a private litigant's financial resources will open the door to threats, intimidation, harassment, and ultimately the chilling of donor support for charitable causes and public interest organizations.

We know from experience that forced disclosure laws like that proposed by the LFTA and similar forced disclosure bills—which would mandate that parties in litigation, without a discovery request or a ruling on relevancy or privilege, disclose the details about their private financial arrangements—can easily become political weapons and bureaucratic tools for delay and harassment, restricting freedom of speech and association and eroding attorney-client privilege and other important confidentiality rules. While we support efforts to thwart abuses of our court system by bad actors, including foreign adversaries, we are concerned that the LFTA as written could too easily be used to frustrate causes that we support. It was not so long ago that IRS regulations were weaponized to stonewall, target, and discriminate against Tea Party groups, and government officials in Wisconsin used the state's "John Doe" laws in a stunning abuse of power to muzzle political opponents.

As you well know, the threat of forced disclosure chills the associational and speech rights guaranteed by the First Amendment. In recent years, we have seen an onslaught of free speech-chilling proposals, such as H.R. 1, the AMICUS Act, and the DISCLOSE Act, which would give the government unprecedented power to surveil the giving and beliefs of American citizens and the organizations with which they support and associate. In fact, two years ago, the Supreme Court struck down an attempt by California to force nonprofit organizations to disclose their donor lists because doing so violated the First Amendment. Unfortunately, we believe the proponents of this dangerous agenda would use the LFTA or similar forced disclosure provisions, if enacted, as one step down a dangerous road to silencing those with certain viewpoints – primarily conservative viewpoints.

Most states, including Texas, have declined to pass mandatory disclosure laws

While the TCJL points out that some states have passed various versions of litigation funding disclosure laws, the majority of states have declined to adopt any version of such a policy. Most importantly, the legislative history in Texas clearly illustrates a strong resistance to this legislative proposal.

The Texas Legislature has demurred on enacting legislation related to this issue since 2005:

1. 2005, House Bill 2987 prohibited usurious lawsuit loans (died in Senate).[27]
2. 2013, House Bill 1595 required licensure of litigation funding entities and prescribed terms (died in House).[28]
3. 2015, Senate Bill 1282 regulated litigation funders and imposed interest rate cap (died in House).[29]
4. 2017, no legislation was filed.
5. 2019, House Bill 2096 and Senate Bill 1567required disclosure, but did not set rate cap (Neither moved out of committee).[30]
6. 2021, no legislation was filed.
7. 2023, no legislation was filed, despite TCJL letter requesting action by Supreme Court Advisory Committee in 2022.

The inability of the proponents of this rule to pass, propose, or advance any legislation in Texas since 2005 is a clear signal to the Supreme Court Advisory Committee that the regulation or disclosure of litigation finance is not supported by the members of the legislative body of Texas.

Forced disclosure proposals threaten long standing work product protections

The proposed rule could effectively authorize discovery into funding materials that courts have repeatedly afforded work-product privilege.[31] In doing so, the proposed rule improperly substitutes the exacting "substantial need" standard for piercing work product with a more relaxed requirement. This constitutes an improper abrogation of work-product privilege under Rule 192.5.[32]

Even in the rare circumstances where funding agreements may be considered relevant, state and federal courts across the country have consistently held that such agreements, along with communications and documents exchanged among litigants and their funders, are entitled to work-product privilege.[33] These documents are protected as they were prepared because of litigation and reflect the mental impressions of counsel.[34] While work-product privilege is not absolute, it may only be overcome pursuant to Rule 192.5(b)(2) where a party "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Any reasonable policy proposed by the Supreme Court

[27] See https://capitol.texas.gov/BillLookup/History.aspx?LegSess=79R&Bill=HB2987
[28] See https://capitol.texas.gov/BillLookup/History.aspx?LegSess=83R&Bill=HB1595
[29] See https://capitol.texas.gov/BillLookup/History.aspx?LegSess=84R&Bill=SB1282
[30] See https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB2096; https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=SB1567
[31] *See, e.g., Hardin v. Samsung Elecs. Co., Ltd.*, No. 2:21-CV-00290-JRG, 2022 U.S. Dist. LEXIS 194602 (E.D. Tex. Oct. 25, 2022).
[32] See Tex. R. Civ. P. 192.5.
[33] *United States ex rel. Fisher v. Ocwen Loan Servicing, LLC*, No. 4:12-CV-543, 2016 U.S. Dist. LEXIS 32967, at *16 (E.D. Tex. Mar. 15, 2016).
[34] See Tex. R. Civ. P. 192.5(b)(1)

Advisory Committee should not diminish the long-standing protection afforded to an attorney's work product.

Forced disclosure rules would cause an increase in speculative motion practice

Beyond the fact that a proposed rule mandating forced disclosure is unnecessary, its implementation would increase burdensome and speculative motion practice regarding legal finance. Across the country, unsupported conjecture concerning legal finance often inspires parties to demand disclosure. Such efforts are typically motivated by voyeurism and the desire to uncover prejudicial information. These efforts rarely succeed, and instead needlessly consume judicial and party resources.

One can only assume that such a rule will embolden movants' fishing expeditions, driving discovery disputes that compound court congestion and increase the cost of litigation. Disclosures will give movants a starting place to propound document requests and interrogatories, ask deposition questions, and/or issue subpoenas to funders with increased frequency. Their efforts will be met with relevance, proportionality, and privilege objections. If unresolved, such objections will necessitate judicial intervention. As discussed above, judges presiding over such motions would invariably need to expend time and resources to determine whether the requested disclosure is appropriate under Rule 192.5, sometimes performing *in camera* review, given the sensitive nature of the documents in question. Motion practice will distract counsel and the judiciary from substantive case issues. Recipients of funding would also shoulder the burden through the need to finance increased legal fees.

To be clear, how a party finances its litigation is not relevant to the merits of the litigation in the vast majority of cases. The majority of case law holds that legal finance is outside the scope of permissible and proportional disclosure unless it is relevant to a particular case.[35] Furthermore, even in the rare circumstances where legal finance may be relevant, courts regularly deny disclosure on the basis of work-product protection.[36]

---

[35] *See*, *e.g.*, *AVM Techs., LLC v. Intel Corp*., No. 15-33-RGA, 2017 U.S. Dist. LEXIS 65698, at *8-9 (D. Del. Apr. 29, 2017) (finding litigation funding agreements to "have no relevance"); *Colibri Heart Valve LLC v. Medtronic CoreValve LLC, et al,* Case No. 8:20-cv-00847 (C.D. Cal. Mar. 26, 2021) (finding litigation finance documents not discoverable; defendant's "skepticism" that plaintiff's discovery responses were not accurate or complete did not demonstrate the requisite relevance of the funding documents to the claims and defenses in the matter); *MLC Intellectual Prop. LLC v. Micron Tech., Inc.*, No. 14-cv-03657, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019) (finding that defendant's attempts to establish relevance based on potential bias and conflicts of interest concerns were speculative); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 724 (N.D. Ill. 2014) (rejecting discovery into litigation funding arrangements; noting defendant's assertion of relevance lacked "any cogency"); *VHT, Inc. v. Zillow Group, Inc.*, No. C15-1096JLR, 2016 WL 7077235, at *1 (W.D. Wash. Sept. 8, 2016) (rejecting discovery into litigation funding arrangements absent "some objective evidence that any of Zillow's theories of relevance apply in this case").

[36] *See*, *e.g.*, *Elm 3DS Innovations Ltd. Liab. Co. v. Samsung Elecs. Co. Ltd.*., No. 14-1430-LPS, 2020 U.S. Dist. LEXIS 216796 (D. Del. Nov. 19, 2020) (finding some documents reviewed *in camera* to be "marginally relevant to the claims and defenses" yet "clearly prepared in anticipation of litigation" and "thus protected by the work product doctrine");

The Texas Supreme Court has also given a very broad interpretation of work-product privilege as it relates to the discovery of financial documents of an attorney when it ruled that, "A request for all billing invoices, payment logs, payment ledgers, payment summaries, documents showing flat rates, and audits" is analogous to the request in *Valdez*[37] for an attorney's entire litigation file. These billing records, which are generated in anticipation of litigation and trial, are "almost certain to encompass numerous irrelevant and immaterial documents."[38] In other words, in the exceptional case where cause for disclosure exists, that inquiry cannot be resolved without a Rule 26(b)(1) analysis. The proposed rule would not alter the need for or outcome of this analysis; it would merely promote the expenditure of increased resources on a topic that already receives excessive attention, given its marginal relevance, if any, to the merits of litigation.

The Chamber speculatively claims that unscrupulous foreign actors are behind litigation finance

The Chamber, the insurance industry, and big tech make the wildly speculative claim that foreign adversaries are funding lawsuits for the purpose of extracting confidential information from American companies, and that litigation funding is a potential threat to national security. This is simply untrue.

First, there is zero evidence that a hostile foreign state has invested in litigation financing in this country, whether directly or through a passive investment in a litigation finance company, for the purpose of gaining access to proprietary information. In fact, the U.S Chamber's own witness was forced to admit under oath that these allegations are merely speculative and evidence-free.[39]

Litigation finance firms do not control the operation of the cases in which they invest, and they have no access to confidential materials produced in discovery. Their role is to evaluate and select those cases that are more likely to be successful, and sometimes to aid the party with identifying specialty counsel and experts. The investors in litigation finance firms are even further attenuated from the active cases. These passive investors have no role in the selection of individual cases, much less the materials produced via discovery.

Lambeth Magnetic Structures, LLC v. Seagate Technology (US) Holdings, Inc., Nos. 16-538, 16-541, 2017 U.S. Dist. LEXIS 215773, at *15-16 (W.D. Pa. Jan. 18, 2018) (denying motion to compel funding materials because they were "undisputedly prepared in anticipation of the instant litigation and for the purpose of pursuing the litigation"); *Devon IT, Inc. v. IBM Corp.*, No. 10-2899, 2012 U.S. Dist. LEXIS 166749, at *2-3 (E.D. Pa. Sep. 27, 2012) (granting motion to quash subpoenas to funders where "there was no waiver of the attorney-client privilege or the work product doctrine").

[37] *See National Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 1993 Tex. LEXIS 114, 36 Tex. Sup. J. 1321

[38] See In re *Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 2017 Tex. LEXIS 522, 60 Tex. Sup. J. 1165, 2017 WL 2501107

[39] See witness testimony from David Meyerson of the U.S. Chamber of Commerce in the Nevada State Senate, March 14, 2023, available at https://www.leg.state.nv.us/Session/82nd2023/ Minutes/Senate/JUD/Final/454.pdf at page 24.

Confidential information that may be relevant to litigation is already protected from improper disclosure through protective orders that strictly limit access, and American courts regularly craft orders to address these concerns.

Conclusion:

In conclusion, ILFA submits that the adoption of a forced disclosure rule would not be in the best interests of the Texas judiciary or the parties and attorneys appearing before it. The policymaking branch of Texas government has demurred on adopting any form of legislation regulating or enacting litigation finance disclosure requirements for the last nineteen years. Current jurisprudence in Texas allows for a judge to order the disclosure of litigation finance agreements if it is relevant to the case. Finally, adopting a carte blanche disclosure requirement will significantly diminish the first amendment rights of litigants as well as invite an unnecessary flood of speculative fishing expeditions that will further delay our already clogged court system.

Thank you for considering the issues we have identified in this letter. We stand ready to help you, as well as the full Supreme Court Advisory Committee, develop a policy that carefully addresses the legitimate needs of litigants and the judiciary of Texas.

In your service,

Kent Hance