MEMORANDUM

To: Supreme Court Advisory Committee

From: John H. Kim

Date: October 28, 2024

Re: Proposed Disclosure Rule for Litigation Funding Agreements

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As lawyers learned back in law school, litigation should be a level playing field for all of the parties. Courts should resolve lawsuits on their merits, not on the basis of procedural devices that tip the balance in favor of one side over the other.

The Texas Civil Justice League and the US Chamber of Commerce Institute for Legal Reform have long advocated that courts adopt a mandatory discovery rule that would require a plaintiff in any civil lawsuit to disclose (i) the identity of any commercial enterprise that has provided litigation funding in exchange for a contingent interest in the outcome of the lawsuit and (ii) a copy of at least the litigation funding agreement and perhaps other documents as well. Those efforts have largely failed and for good reason. At this point, the most effective policy would be to wait to see if the federal legislation or federal courts, where this debate has not only been long but hot, over whether to adopt such a rule.

Although the CJL and ILR repeatedly proclaim that mandatory disclosures ensure "fairness" and are "impartial," their proposed revisions in fact ensure exactly the opposite. They explicitly seek to tip the balance of fairness in favor of defendants.

Litigation funding can mean many things.

There is nothing particularly new about litigation funding.[1] By definition, litigation funding is simply a means by which a party to a lawsuit receives financing for the lawsuit from a person or entity that is not a party to the lawsuit. An attorney, by paying for expenses under a contingency fee agreement, effectively provides litigation funding to a client.[2] But even when a plaintiff is reluctant to engage an attorney on a contingency basis, a plaintiff may receive litigation funding from any number of sources: parents, friends, banks, or even — as is relevant here — third-party entities in the specific business of offering litigation funding.

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[1]William C. Marra, *What's So New About Litigation Finance*, NYU SCHOOL OF LAW CENTER ON CIVIL JUSTICE SYMPOSIUM, at 83 (2021).

[2]*Id.* ("When a lawyer takes a case on contingency, litigating the case for no up-front charge in exchange for a share of case proceeds, she provides third-party financing.").

Litigation funding is not unique to plaintiffs. Defendants too may receive litigation funding from any number of sources. An employer may pay the legal fees of an employee who is sued for conduct in the course of employment.[3] A parent or affiliated company may pay the legal fees of a single-asset LLC or other entity that lacks sufficient capital to cover the costs of defense. Indeed, a third-party commercial entity — such as, for instance, a surety, a bank, or even a litigation financing company — may agree to pay the legal fees of a corporate defendant in exchange for some form of consideration, such as an ownership interest in the defendant's business or assets.[4]

CJL and ILR's proposed revisions to Rule 194 focus almost entirely on litigation funding to plaintiffs. They largely ignore any litigation funding to defendants.

Notably, Texas has long recognized that plaintiffs generally may not seek discovery as to how a defendant is paying for its attorney's fees.[5] Such discovery is deemed to be irrelevant and an invasion of the work product doctrine — even in cases where the defendant has claimed insolvency and seemingly would be unable to pay its attorney's fees in the absence of any litigation funding.[6] Yet, many of the policy concerns that the CJL and ILR have raised in favor of their proposed revisions to Rule 194 would apply as equally to a defendant as they would to a plaintiff.

More broadly, the arguments for mandatory disclosure of commercial third-party litigation funding to plaintiffs apply equally to *many* of the various other forms of litigation funding, such as contingency fee agreements or reverse contingency agreements. "Just as we have long recognized that mandatory disclosure of these various other forms of arrangements is not necessary, there is no reason to require mandatory disclosure of commercial litigation finance."[7]

What is sauce for the goose must be sauce for the gander. As even some advocates for disclosure of litigation financing agreements have recognized, "the variability of litigation finance

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[3]*Id.* at 83-84 ("When an employer pays the employee's legal fees, or when a parent pays an adult child's divorce costs, the employer and parent provide third-party financing.").

[4]*See, e.g.,* Maya Steinitz*, Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. DAVIS L. REV. 1073, 1089 (2019) (recognizing that litigation financing may be "utilized on both sides of the 'v.'").

[5]*E.g., In re Topletz,* No. 05-20-00634-CV, 2020 WL 6073877, *3-4 (Tex. App.—Dallas Oct. 15, 2020, orig. proceeding); *see MCI Telecommunications Corp. v. Crowley*, 899 S.W.2d 399, 403 (Tex. App.—Fort Worth 1995, orig. proceeding) (holding that if the defendant is not seeking to recover any attorney's fees, the plaintiff may not conduct any discovery *at all* into the defendant's fees, as those fees are "patently irrelevant" and "not reasonably calculated to lead to the discovery of admissible evidence"); *see also In re Texas Mut. Ins. Co.*, 358 S.W.3d 869, 872 n.3 (Tex. App.—Dallas 2012, orig. proceeding) ("When a party does not seek to shift its fees to its opponent, the party's attorney's fees are not subject to discovery because they are 'patently irrelevant'").

[6]*Topletz*, 2020 WL 6073877, at *3-4.

[7]Marra, *supra* note 1, at 93.

scenarios militates against a bright-line approach."[8] That is especially true where, as here, the proposed bright-rule approach would effectively require disclosure only of litigation funding to plaintiffs, not defendants.

Litigation is expensive and necessarily requires funding.

If the CJL and ILR are honest about it, the key motivating factor in their proposed revisions to Rule 194 is that they just do not like the idea that third-party commercial companies can invest in lawsuits by providing funding in exchange for a contingency interest in the outcome from the plaintiff's counsel. CJL and ILR think that such investments smack of champerty. Texas, however, has long since rejected the old English bar against champertous agreements; and especially in Texas, any concern that litigation funding agreements smack of champerty rests on "ancient and transplanted fears."[9]

Third-party commercial litigation funding agreements serve a valid purpose. Lawsuits are expensive.[10] Particularly in disputes against large corporate entities, individual plaintiffs often cannot afford the cost of litigation without some kind of litigation funding. Litigation funding thus "allows lawsuits to be decided on their merits, and not based on which party has deeper pockets or stronger appetite for protracted litigation."[11]

Litigation funding "evens the playing field on an economic level in a way that traditional banking institutions cannot."[12] By providing the necessary financing for litigation, "lawsuit-funding companies help ensure that justice, although blind, is not also a beggar."[13]

CJL and ILR's proposed revisions to Rule 194 are simply a veiled attack on third-party commercial litigation funding. Their attacks are unfair and unfounded. What CJL and ILR really seek to do is to tip the balance in favor of defendants and ensure that litigation remains a place where only the wealthy can play ball.

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[8]Steinitz, *supra* note 4, at 1088.

[9]Christy B. Bushnell, Comment, *Champerty Is Still No Excuse in Texas: Why Texas Courts (and the Legislature) Should Uphold Litigation Funding Agreements*, 7 HOUS. BUS. & TAX L.J. 358, 363 (2007).

[10]*See* Marra, *supra* note 1, at 86 ("Bringing even a straightforward breach of contract claim can cost hundreds of thousands, or even millions, of dollars. Not everyone has that kind of money.").

[11]*Lawsuit Funding, LLC v. Lessoff*, No. 650757/2012, 2013 WL 6409971, *6 (N.Y. Sup. Ct. Dec. 4, 2013); *see* Keith Sharfman, *The Economic Case Against Forced Disclosure of Third Party Litigation Funding,* N.Y. STATE BAR ASS'N, Feb. 11, 2022 ("[L]itigation should always be about the merits themselves, not about which side is better funded or whether one side or the other seems more Goliath- or David-like.").

[12]Bushnell, *supra* note 9, at 364.

[13]*Id.*

The arguments for disclosure are speculative and baseless.

In CJL and ILR's letter to the Committee, their primary argument in favor of their proposed revisions to Rule 194 is that a few other jurisdictions have already required that plaintiffs disclose third-party commercial litigation funding agreements. Texas, however, has never been inclined to adopt any revisions to its rules of civil procedure simply because "that's what other jurisdictions are doing." Indeed, Texas's rules of civil procedure vary substantially from the federal rules and most other states' rules of civil procedure — precisely because Texas has tailored its rules to work in a way that best fits the needs of Texas practitioners and their clients.

CJL and ILR's letter to the Committee offers few, if any, practical reasons for requiring that plaintiffs disclose any third-party commercial litigation funding agreements. To the contrary, their letter relies heavily on speculation. In Texas, of course, speculation is no evidence of anything.[14] Nor does CJL and ILR's speculation have any merit.

First, CJL and ILR say that there is "mounting evidence" that litigation funding companies exercise control and influence over the litigation. But they cite only three examples — all out-of-state cases involving complex commercial issues and hundreds of millions of dollars in potential damages. Extreme examples are never a good justification for imposing blanket rules that would govern *all cases*. And as Texas courts have already recognized, CJL and ILR's extreme examples do not reflect the norm in Texas: most litigation funding agreements do *not* give litigation funding companies any right to control a case by selecting counsel, directing trial strategy, or dictating the terms or amount of any settlement.[15] Regardless, CJL and ILR's speculative fear that litigation funding companies may exercise control or influence over lawsuits is no basis for a blanket rule of disclosure:

- As ethics expert Professor Brandley Wendel has explained, TPLF "does not create any risks for the lawyer-client relationship that cannot be mitigated by the conscientious application of existing state disciplinary rules.[1] In any event, , a defendant has no standing to question who is selecting the plaintiff's counsel, directing the plaintiff's trial strategy, or participating in any settlement evaluation for the plaintiff. Those are matters entirely between a plaintiff and her counsel.[16]

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[14]*E.g., Joe v. Two Thirty Nine J.V.*, 145 S.W.3d 150, 164 (Tex. 2004).

[15]*E.g., Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 104 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *see also* Marra, *supra* note 1, at 94 ("Reputable litigation finance companies scrupulously adhere to the ethics rules and do not control litigation.").

[1] Letter from Cornell Associate Dean Wendel dated September 27, 2017 to secretary of the Committee on Rules of Practice and procedure at 2.

[16]*See* Sharfman, *supra* note 11 ("If there is an ethical concern about attorneys' fee structures or their arrangements with litigation funders, it is appropriate for their clients but not their adversaries to complain. … [A]dditional disclosure targeted at litigation funders would not improve attorney ethics but rather would merely benefit the funded parties' adversaries."); *see also Fleet Connect Sols. LLC v. Waste Connections US, Inc.*, No. 2:21-CV-00365-JRG, 2022 WL 2805132, *3 (E.D. Tex. June 29, 2022) (noting that a defendant's request for litigation funding agreements, in the absence of any evidence that the agreements

- CJL and ILR's speculative fear applies equally to any number of litigation funding arrangements. Attorneys who handle cases on a contingency fee basis provide litigation funding to their clients, but Texas law does not presume that the mere fact that they may exercise control and influence over the litigation means that they must disclose their fee agreements to opposing counsel in personal injury disputes.[17] Indeed, employers who pay for the defense of their employees may exercise control and influence over any lawsuits against their employees; parent entities who pay for the defense of their subsidiaries may, through their in-house counsel, exercise control and influence over any lawsuits against those subsidiaries.[18] Yet, CJL and ILR are not clamoring for disclosure of *those* kinds of litigation funding arrangements.

- CJL and ILR's speculative fear presumes that all commercial third-party litigation funding companies are dishonest. The law, however, generally does not presume dishonesty. There must be evidence of dishonesty to prompt an investigation.[19] "Just as it would not be appropriate to audit all taxpayers but rather only those whose filings raise a reasonable suspicion of illegality, we should not presumptively investigate litigation financing in all cases but rather only in the rare case where circumstances suggest to a neutral judge a specific area of ethical concern."[20]

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were relevant, were "a fishing expedition that serves only to shift the burden of establishing proof of standing to Plaintiff prior to any good-faith challenge to standing being put forward by Defendant").

[17]*See* Marra, *supra* note 1, at 95 ("[T]he argument that litigation finance may create conflicts of interest between claimholder, funder, and lawyer applies with at least as much force to contingency fee arrangements."); *see also* W. Bradley Wendel, *Paying the Piper But Not Calling the Tune: Litigation Financing and Professional Independence*, 52 AKRON L. REV. 1, 47 (2019) ("[L]itigation financing is no different in this respect than the risks presented by hourly and contingency fees, both of which create their own characteristic misalignment of interests.").

[18]*See* Marra, *supra* note 1, at 95 (noting that if *any* third party holds the purse strings, *even when funding a defendant*, "a lawyer must be careful to resist the temptation to follow the third-party funder's wishes over those of her client").

[19]*Id.* at 102 ("[I]dle suspicion of wrongdoing has never been found to warrant discovery — much less mandatory disclosure."); *see In re Valsartan N-Nitrosodimethylamine Contamination Prods. Liab. Litig.*, 405 F. Supp. 3d 612, 615 (D.N.J. 2019) (stating that "rather than directing *carte blanche* discovery," disclosure of litigation funding would be relevant only on "a showing that something untoward occurred").

[20]Sharfman, *supra* note 11; *see* Marra, *supra* note 1, at 96 ("Our legal system takes these threats to a lawyer's independence seriously — but it does not deal with these threats by requiring mandatory disclosure whenever a third party is paying the attorney's legal fees, or by requiring lawyers to disclose whenever they are working on a contingent fee. Instead, we trust lawyers to satisfy their ethical duties to maintain their independence and place the interests of their clients first, without allowing opposing counsel to peer over

Second, CJL and ILR say that there are "questions" about "potential manipulation" of the judicial process "by foreign actors." They cite "limited data" suggesting that "foreign actors" have previously funded intellectual property litigation in the United States, purportedly for the purpose of enabling those foreign actors to gain access to "sensitive technology." Intellectual property litigation, however, occurs almost exclusively in federal court and raises issues that are not usually relevant in state court.[21] CJL and ILR do not explain why "foreign actors" would have any interest in the kinds of personal injury lawsuits, or even commercial lawsuits, that are the subject of most litigation funding agreements for plaintiffs in the *Texas state courts* to which their proposed revisions to Rule 194 would apply. CJL and ILR certainly cite no evidence that "foreign actors" are seeking to influence any litigation *in Texas*.

And once again, CJL and ILR's speculative fear that "foreign actors" may exercise control or influence over lawsuits is no basis for a blanket rule of disclosure that applies only against plaintiffs. Significantly, CJL and ILR's letter to this Committee acknowledges on its face that foreign governments may seek as much or more to benefit *defendants* — for example, by providing funding to foreign entities defending against trade secret claims by American companies. Yet, CJL and ILR's proposed revisions to Rule 194 would not require that any *defendants* disclose any litigation funding from foreign actors; instead, their proposed revisions would only require the disclosure of litigation funding agreements in which the funding company receives a contingent interest in the outcome — *i.e.*, an interest in a *plaintiff's* potential recovery.

Absent any *specific* evidence that a litigation financing company or a "foreign actor" is acting improperly in a *specific* case, then the general rule — as it always has been in Texas — is that a party is entitled to discover only information that is relevant or reasonably calculated to lead to the discovery of admissible evidence.[22] The mere fact that a plaintiff has received litigation funding is not usually either relevant to a plaintiff's substantive claims or reasonably calculated to lead to any admissible evidence about those claims — just as the plaintiff's wealth, the plaintiff's financial condition, and the plaintiff's tax returns are not generally discoverable in civil litigation.[23]

Texas certainly never has approved a "shoot first" approach to discovery in which a party seeks information merely on the *hope* that the information might turn out to be relevant. To the contrary, Texas has long recognized that a party may not use the discovery process for the purpose

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their shoulder to monitor compliance."); Wendel, *supra* note 17, at 46-47 ("To the extent disinterested funding does present risks, they can be mitigated by existing rules of procedure . . . .").

[21]*Cf. Valsartan*, 405 F. Supp. 3d at 615 (noting that the cases in which federal courts have required disclosure of litigation funding agreements commonly have been intellectual property disputes "where the ownership of a patent is relevant to determining who has standing to bring the lawsuit").

[22]TEX. R. CIV. P. 192.3(a).

[23]*E.g.*, *Benitez v. Lopez*, No. 17-cv-3827, 2019 WL 1578167, *1 (E.D.N.Y. March 14, 2019); *see Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 721 (N.D. Ill. 2014) (noting that discovery is not "an excursion ticket to an unlimited exploration of every conceivable matter that captures an attorney's interest").

of conducting a fishing expedition.[24] Any fishing expedition — *i.e.*, any search for documents merely in the *hope* that it may generate relevant evidence — is improper as a matter of law because it spawns "unnecessary case-within-a-case litigation" that "is not a proper discovery objective."[25]

CJL and ILR's speculative fears are exactly what they appear to be — pretextual "the sky is falling" arguments that seek to mask their true intent. Their proposed revisions to Rule 194 have nothing to do with fears about "foreign actors." They instead have everything to do with trying to tip the scales of justice in favor of wealthy corporate defendants.

Litigation funding agreements are not analogous to insurance policies.

CJL and ILR's letter to the Committee emphasizes that Texas has previously amended Rule 194 to require the disclosure of insurance and indemnity agreements. They imply that litigation funding agreements are analogous to insurance policies, arguing that the mandatory disclosure of litigation funding agreements "would complement the existing insurance disclosure requirement and enable courts and defendants to more accurately evaluate settlement prospects and to better calibrate settlement initiatives."

As an initial matter, defendants have no vested right to peek behind the veil of any litigation financing arrangements to improve their own settlement prospects. "Never before has the law adopted procedural rules with an intention to strengthen the hand of one party so that it can settle more favorably with the other. Procedural rules are supposed to enhance the legal system's ability to adjudicate disputes on the merits, not to tilt outcomes in one direction or another."[26]

Regardless, third-party commercial litigation funding agreements are *not* analogous to insurance policies.[27] Insurance and indemnity agreements are subject to disclosure for a sound policy reason: they necessarily identify whether any third party "may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy

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[24]*See In re American Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) ("This Court has repeatedly emphasized that discovery may not be used as a fishing expedition."); *see also Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995) (criticizing a broad request for all of the defendant's safety documents, without any evidence that they would bear "any relation to the case at all," is "not just an impermissible fishing expedition; it is an effort to dredge the lake in search of a fish").

[25]*In re National Lloyds Ins. Co.*, 532 S.W.3d 794, 799 (Tex. 2017).

[26]Sharfman, *supra* note 11.

[27]*See* Marra, *supra* note 1, at 103 ("The fact that insurance obligations must be disclosed speaks to the unique nature of defense-side insurance; it does not provide an argument for disclosure of other forms of third-party financing, including but not limited to commercial litigation finance."); *see also* Michelle Boardman, *Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation*, 8 J.L. ECON. & POL. 673, 673 (2012) ("A comparison between these relationships is strained; the occasional similarity is overwhelmed by the differences.").

the judgment."[28] Under litigation funding agreements, a third-party commercial litigation funding company is just that — a source of litigation funding, not a party potentially liable or responsible for all or part of a judgment or claim.[29]

That distinction is particularly relevant in Texas state court. Under Texas law, a plaintiff may make a *Stowers* demand for settlement within the limits of a defendant's insurance policy.[30] To be able to make such a demand, a plaintiff must first be aware of the defendant's policy limits. That, in fact, is part of the very reason Texas requires that the parties to a lawsuit disclose any insurance or indemnity agreements. No similar *Stowers* issue applies to a third-party commercial litigation funding agreement.

Litigation funding agreements are attorney work product.

CJL and ILR's letter to the Committee asserts that "there is little support for the notion" that the work product doctrine should shield litigation funding agreements from disclosure. To the contrary, case law from across the United States provides ample support for that notion. As just a few cases explain:

- The work product doctrine "exists to preserve and promote the adversarial system of litigation and prevent a party from free-riding on his opponent's efforts. In those instances where a claim cannot proceed without third-party financing, one element of preparing a client's case for trial will be securing the requisite funding, which probably will require discussions of a case's merits in an effort to convince the third party to supply the needed funds."[31] The work production protection extends to the litigation funding agreement itself, which "could reflect an analysis of the merits of the case."[32]

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[28]TEX. R. CIV. P. 192.3(f); *see* Boardman, *supra* note 27, at 677 ("[T]he insurer's funds are on the hook for the eventual settlement or award.").

[29]*Miller UK Ltd.,* 17 F. Supp. 3d at 729; *see* Marra, *supra* note 1, at 103 (noting that third-party commercial litigation funding "does not exist to satisfy the claim — instead, it simply provides financing to the claimholder, usually to meet the legal fees and costs necessary to advance the claim").

[30]*See Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 776 (Tex. 2007); *G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544, 547-48 (Tex. Comm'n App. 1929, holding approved).

[31]*Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co.*, No. 7841-VCP, 2015 WL 778846, *9 (Del. Ch. Feb. 24, 2015).

[32]*Id.*; *cf. National Lloyds*, 532 S.W.3d at 805 (noting that in Texas, the work product doctrine protects documents that, even incidentally, could "reveal the attorney's thought processes concerning the prosecution or defense of the case" or "provide a roadmap" of how she intends to handle the litigation).

- A litigation funding agreement is "work product as it was entered into with the intent to facilitate litigation."[33] Work product protection is particularly important because some of the terms of a litigation funding agreement may "represent an assessment of risk based on discussions of core opinion work product of the case."[34]

- Litigation funding agreements "are created 'because of' the litigation they fund."[35] Any business purpose of litigation funding agreements cannot be segregated from and indeed are "'profoundly interconnected' with the purpose of funding the litigation."[36]

And to the extent that CJL and ILR may — now or in the future — also want to seek the disclosure of any communications that plaintiffs may exchange with litigation funding companies about a lawsuit, those communications are protected work product as well.[37]

CJL and ILR suggest that if a litigation funding agreement contains any analysis of the merits or any assessment of risk, the plaintiff may simply redact the agreement before disclosing it. That, however, misses the point. The purpose of the disclosure requirement in Rule 194 is to ensure that the parties exchange "basic discovery" that would be relevant in just about every lawsuit and that would not normally require any redactions or claims of privilege.[38] CJL and ILR

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[33]*In re Int'l Oil Trading Co.*, 548 B.R. 825, 838 (Bankr. S.D. Fla. 2016).

[34]*Id.* at 839. Curiously, CJL and ILR's letter to the Committee itself cites the opinion *In re IOT* and suggests that the opinion actually supports the disclosure of litigation funding agreements. Although the bankruptcy court in *In re IOT* unquestionably found that the litigation funding agreement at issue in that case was work product, it concluded that the creditor had a substantial need for a copy of the agreement, which was relevant to a specific bankruptcy issue: whether the debtor had transferred or conveyed an asset of its estate — specifically, one or more of its causes of action — to a third party. *Id.* Even so, the bankruptcy court agreed that the debtor could redact "the terms of payment and any terms he reasonably believes may disclose attorney mental impressions and opinion." *Id.*

[35]*Continental Circuits LLC v. Intel Corp.*, 435 F. Supp. 3d 1014, 1020 (D. Ariz. 2020).

[36]*Id.* at 1021.

[37]*See, e.g., Design with Friends, Inc. v. Target Corp.*, No. 1:21-cv-01376-SB, 2024 WL 4333114, *3 (D. Dela. Sept. 27, 2024) ("These internal discussions leave a revealing trail of mental impressions, legal theories, and strategic notes — all created as confidential internal documents or sent under nondisclosure agreements, and so written with vulnerable candor. … If the work-product doctrine did not protect these records, then plaintiffs who got litigation finance would need to expose these confidential attorney impressions to their opponents. That would chill lawyers from discussing a pending case frankly. The work-product doctrine was created to prevent that result."); *see also U.S. v. Homeward Residential, Inc.,* No. 4:12-CV-461, 2016 WL 1031154, *6 (E.D. Tex. March 15, 2016); *Miller UK Ltd.,* 17 F. Supp. 3d at 738; *Devon IT, Inc. v. IBM Corp.,* No. 10-2899, 2012 WL 4748160, *1 n.1 (E.D. Pa. Sept. 27, 2012); *Mondis Tech., Ltd. v. LG Elecs., Inc.*, No. 2:07-CV-565-TJW-CE, 2011 WL 1714304, *3 (E.D. Tex. May 4, 2011).

[38]*See* TEX. R. CIV. P. 194 cmt. 1.

seek to do what Texas has never previously done — require the blanket disclosure of agreements that likely have no relevance at all to any issue in dispute and are potentially subject to significant work product concerns.

If a litigation funding agreement is truly relevant to a disputed issue in a lawsuit, then a defendant already has a remedy: it may seek to secure the agreement through a narrowly-tailored and properly-worded request for production under Rule 196 of the Texas Rules of Civil Procedure.[39] The plaintiff then has a reasonable opportunity to preserve any work production objections or claims of privilege. The trial court may review the agreement *in camera*. And as appropriate, the trial court may order the plaintiff to produce the agreement in its entirety or with redactions. Or, for that matter, the plaintiff may voluntarily produce the agreement in its entirety or with redactions. *That is how it should work*.

Texas law does not require the disclosure of contingency fee agreements under Rule 194; if contingency fee agreements are relevant to any disputed issue in a lawsuit, a defendant may request them through a proper request for production under Rule 196. The same should be no less true of litigation funding agreements.

Requiring blanket disclosure of commercial litigation funding agreements is unjust.

Ultimately, any blanket rule requiring that plaintiffs disclose any commercial third-party litigation funding agreements is a bad idea. Even if plaintiffs could redact the agreements to remove any analysis of the merits or any assessment of risk, the agreements themselves would still give defendants case-specific information that they could use to their strategic advantage.[40] As William Marra has explained:

> Mandatory disclosure tells a defendant at least two critical pieces about the plaintiff's case. First, it discloses *whether* the plaintiff has funding — revealing both the strength of those plaintiffs who have funding, and the weakness of those who do not. Second, it discloses *how much* funding the plaintiff has — giving defendants great leverage once they know that plaintiffs are running out of funds. For example, if the defendant knows that the plaintiff has $2,000,000 in funding, the defendant has a lot of leverage to reject a settlement offer proffered right about the time the defendant estimates the plaintiff has burned through that litigation budget.[41]

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[39]*See National Lloyds*, 532 S.W.3d at 806 (noting that the rules allow parties to submit a "narrowly tailored request for information relevant to an issue in a pending case that does not invade the attorney's strategic decisions or thought processes").

[40]*Cf. id.* (noting that redactions are insufficient if they cannot entirely mask an attorney's thought processes and strategies as to "when, how, and what resources" are or will be employed in a lawsuit).

[41]Marra, *supra* note 1, at 103-04 (emphasis in original); *see* Sharfman*, supra* note 11 ("Generally speaking, the last thing a party wants an adversary to know is that it cannot afford to prosecute or defend its case or that its case is not strong enough to attract much if any external funding. Adversaries who know this information can try to use it to win not on the merits, as the legal system intends, but instead through a

A plaintiff has no similar strategic advantage against defendants. Texas does not require that defendants automatically disclose any of their sources of funding. Under Texas law, a plaintiff does not generally have the right to discover any agreements under which, for instance, an employer may provide litigation funding to an employee or a parent entity may provide litigation funding to a subsidiary.

CJL and ILR's proposed revisions to Rule 194 are unfounded, unprincipled, unjust, and unnecessary. The Committee should reject them.

JHK

Hon. Harvey Brown

Jim Perdue, Jr.

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battle of attrition."); *cf. Art Akiane LLC v. Art & Soulworks LLC*, No. 19 C 2952, 2020 WL 5593242, *6 (N.D. Ill. Sept. 18, 2020) (noting that knowledge of the existence, or not, of a litigation funding agreement "would allow the inquiring party to learn whether its opponent has financial difficulties requiring an outside infusion of capital, necessary to allow a party to sue in the first place or to defend itself in litigation").