Judicial Committee Best Venue For Funding Disclosure Rules

By **Stewart Ackerly** (October 28, 2024)

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On Oct. 10, the Advisory Committee on Civil Rules, which considers and recommends revisions to the Federal Rules of Civil Procedure, decided to form a subcommittee to study the issue of developing a rule to require disclosure of litigation funding in civil cases in federal district courts.

The Advisory Committee has considered litigation finance off and on since 2014, but this is the first time it has elected to study formally a potential rule requiring disclosure of litigation finance.

The Advisory Committee's decision came at the urging of major companies and business groups, as well as certain Republican lawmakers, that have argued litigation finance unfairly tilts the playing field against corporate defendants or otherwise harms the U.S. judicial system. They argue disclosure of funding agreements is necessary to show who has control of a case and because funding agreements should be treated like a defendant's insurance agreements, which must be disclosed pursuant to Rule 26(a)(1)(A)(iv) of the Federal Rules of Civil Procedure.

Proponents of litigation funding counter that funding helps level the playing field for litigants with meritorious disputes that otherwise lack the resources to pay lawyers the necessary amount to pursue claims in federal court. Proponents contend disclosure is unnecessary because federal courts already have the authority to inquire into financing if and when needed.

In addition, they argue, a financing agreement is unlike insurance agreements because a funder typically has no control over the litigation. Disclosing the financing agreement can also give a defendant an unfair advantage in the litigation, by revealing the plaintiff's budget for prosecuting the case.

Regardless of what side of the debate you are on about the merits or value of litigation finance, or whether and how financing should be disclosed, the Advisory Committee's decision to form a subcommittee to examine this issue is a positive development for several reasons.

First, as U.S. District Judge John Bates, who chairs the judiciary's top rulemaking panel, the Committee on Rules of Practice and Procedure, said: "We know what the theoretical problem is. I think we have to look if there are actual problems."[1] In other words, it is time to move this debate from the theoretical to the actual.

Opponents of funding often formulate hypothetical concerns about what a funder could or could not do. This committee will transform the debate into one based on actual practice, experience, and data about how funding works and its effect in real world cases. A proper understanding of funding is essential to understanding what issues disclosure may solve, what issues disclosure may create, and what exactly should or should not be disclosed.

Second, there is no group better suited to study this issue than the Advisory Committee. Comprising leading jurists, practitioners and academics, the Advisory Committee understands the complexities of litigation finance and disclosure, and the need for careful

and extensive analysis of this issue. The Advisory Committee noted in its Meeting Book for the October 2024 meeting that this will "likely be a challenging project," and that "[m]uch education will be needed to gain a reliable familiarity with the issues involved."[2]

Although disclosure of litigation funding is often portrayed as a simple issue, there are myriad complex issues and decisions involved. These include definitional issues, several of which the Advisory Committee noted. According to the Meeting Book notes, beyond the foundational question of whether disclosure should be required at all, there is the subsequent "challenge to describe in a rule when the disclosure requirement applies," or, in other words, "what is or is not the sort of litigation funding that must be disclosed"?[3]

What if a plaintiff's family member provides financing for a dispute? What if a plaintiff accepts financing for working capital during the pendency of a dispute? What if a nonprofit is financing a legal dispute? If the plaintiff's lawyer is financing the case — i.e., taking the case on contingency — should that be disclosed? Also — in what is becoming a more frequent scenario — what if the law firm is receiving financing tied to a case, but the client is not? Does the law firm's financing necessitate disclosure?

Other questions will also arise for the subcommittee to consider. For example, there is a stark difference between consumer litigation finance — which focuses on personal injury and medical malpractice claims — and commercial litigation finance — which focuses on business-to-business or other complex commercial disputes. Are the objectives of disclosure the same for both types of financing? And what about mass torts or other collective actions, that involve entirely separate and distinct issues?

The Advisory Committee, with decades of experience in rulemaking and litigating, is well positioned to analyze carefully these issues, consider input from all stakeholders, and take a balanced, deliberative approach to the issue.

Third, the Advisory Committee will take the necessary time to consider the disclosure issue thoughtfully and exhaustively. To date, the disclosure issue has more closely resembled a game of Whac-a-Mole. Litigation finance disclosure bills are proposed in state legislatures around the country every year. Litigation finance proponents then try to beat back those proposals as overbroad, ill-conceived or unnecessary. None of this leads to reasoned debate. Instead, it has politicized the issue and made it more difficult to engage in clear-eyed decision-making about the best path forward.

The Advisory Committee will take the time it needs to study the issue and evaluate potential options. If the Advisory Committee proposes a rule — which may be a big "if," given the complexity of the issue and the powers courts currently have to address the issue — it will ensure any rule is narrowly tailored and carefully calibrated to ensure fairness to all parties.

Helpfully, while the Advisory Committee considers this issue, courts will continue serving as mini-laboratories for how to deal with funding. Examples include the U.S. District Court for the District of New Jersey's limited disclosure requirement, and a September decision from the U.S. District Court for the District of Delaware denying Target's effort to compel production of documents from a funder because the requested documents were protected Attorney Work Product or production "would impose a burden disproportionate to their value."[4] These decisions and efforts will only help inform the Advisory Committee's work.

Fourth, the Advisory Committee's decision will hopefully encourage lawmakers to hit pause on efforts to legislate on this issue. The Advisory Committee provides a neutral setting for study of the disclosure issue, potential options and any recommendations — whether that is

maintaining the status quo or amending the Federal Rules. Hopefully those on both sides of this debate can agree to remove the disclosure question from the politicized halls of Congress and state houses, and give time for the experts to weigh in on this important issue.

The Advisory Committee has a history of examining politically charged issues with a balanced, thorough approach that gives all stakeholders an opportunity to participate. For example, the Advisory Committee recently studied issues surrounding potential rules specific to multidistrict litigation — a highly charged issue for the plaintiffs and defendants bars. This history demonstrates the Advisory Committee's superiority as a venue to consider challenging issues and produce results that provide for balanced and fair rules governing civil litigation in federal courts.

The ultimate result of the subcommittee's work is anyone's guess. It may conclude that courts have ample existing authority to explore financing if and when that's necessary. Alternatively, it may conclude that a rule requiring limited disclosure adequately addresses any issues that the subcommittee's work identifies.

Regardless, this exercise will help all participants in the legal system — plaintiffs, defendants, lawyers, judges, court staff, funders and policymakers — better appreciate the role of funding. More importantly, this exercise should help ensure that the ultimate result, whatever that is, is the product of a thorough, inclusive and deliberative process that appropriately balances the interests of all those involved.

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[1] See https://www.reuters.com/legal/government/us-judicial-panel-examine-litigation-finance-disclosure-2024-10-10/.

[2] Advisory Committee on Civil Rules, Meeting Book at 419 (October 10, 2024) available at https://www.uscourts.gov/sites/default/files/2024-10_civil_rules_agenda_book_final_9-20_at_230_pm.pdf.

[3] Id. at 418.

[4] Design with Friends Inc. et al. v. Target Corporation, No. 1:21-cv-01376, Memorandum Opinion at 7 (Sept. 27, 2024) (ECF No. 417).