Hon. Clint Bolick, Justice
Arizona Supreme Court
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ARIZONA SUPREME COURT

In the matter of:	)	
	)	
PETITION TO AMEND RULE 8, RULES OF CIVIL PROCEDURE	)	Supreme Court No. 25-0003
	)	
	)	REPLY
	)	
	)	

Hon. Clint Bolick, Petitioner in this matter, hereby replies pursuant to Rule 28(e)(5), Rules of the Supreme Court of Arizona and this Court's Order dated January 21, 2025.

I. Background

The Task Force on Alternative Business Structures ("Task Force") was established on March 18, 2024 by then-Chief Justice Robert Brutinel, to evaluate the program allowing for the creation of Alternative Business Structures (ABS's), propose amendments to court rules as appropriate, and determine whether additional disclosures should be made for those funding ABS's.

On July 3, 2024, Chief Justice Ann A. Scott Timmer issued Administrative Order No. 2024-136, ordering the Task Force to examine third-party funding of civil litigation and its ramifications for ABS's, and directing the Task Force to include any related proposals in its report and recommendations.

The Task Force submitted its report and recommendations to the Arizona Judicial Council (AJC) at its October 2024 meeting and returned to the December 2024 AJC meeting with a draft of the proposed rule amendments relating to third-party litigation funding of civil litigation. A motion was passed at that meeting to approve the filing of a rule petition reflecting the proposed amendments to Civil Rule 8 as set forth in Petition R-25-0003.

Accordingly, Petitioner filed the Petition on January 8, 2025. This Court opened the Petition for public comment until May 1, 2025, with any Reply due by June 2, 2025. Petitioner files this Reply to address the comments received during the comment period.

II. Discussion of Comments

This petition received seven comments, summarized as follows:

1. Ms. Paige A. Martin, Assistant City Attorney, City of Phoenix Law Department – **Supporting** petition
2. Mr. Marcus Osborn, Senior Director-Government Affairs, Kutak Rock, LLP – **Supporting** petition and further supporting comment submitted by U.S. Chamber of Commerce Institute for Legal Reform

3. Mr. Michael Stinson, Vice President, Public Policy and Legal Affairs, on behalf of Medical Professional Liability Association – **Supporting** petition but proposing two changes
4. Ms. Molly Lang, on behalf of American Property Casualty Insurance Association – **Supporting** petition but proposing one change and further supporting comment submitted by U.S. Chamber of Commerce Institute for Legal Reform
5. Ms. Page C. Faulk, Senior Vice President, Legal Reform Initiatives, U.S. Chamber of Commerce Institute for Legal Reform – **Supporting** petition but proposing two changes
6. Mr. Daniel B. Seiden, President and CEO, Arizona Chamber of Commerce and Industry on behalf of business community stakeholders – **Supporting** petition and further supporting comment submitted by U.S. Chamber of Commerce Institute for Legal Reform
7. Ms. Whitney Cunningham, Managing Partner, Aspey, Watkins & Diesel, PLLC – **Opposing** petition

Petitioner appreciates the comments stakeholders submitted during the comment period and deems it important to file this Reply to address those comments.

A. Medical Professional Liability Association

The comment submitted on behalf of the Medical Professional Liability Association supports the petition, but proposes deleting subpart (j)(2)(B) from the proposed rule, which currently reads:

> **(j) Third-Party Litigation Funding Agreements**
> . . .
> (2) *Definitions*. For purposes of this rule, "Third-Party Litigation Funding" or "Third-Party Litigation Funding Agreement" means a third party enters into an agreement to provide funding for the purpose of pursuing or defending (which includes but is not limited to legal filings, appeals, testimony, discovery, retention of experts, preparing and drafting legal documents, creating a litigation strategy, and other related litigation expenses) a civil action, administrative proceeding, claim, cause of action, or a portfolio of cases, where the funder secures a financial interest in or benefit from any potential recovery. However, it does not include:
>
> > . . .
> > (B) loans, agreements, contracts, or arrangements for personal needs or medical treatment of a party unless the purpose for doing so is to enable the pursuit of a claim;
> > . . .

Commentor proposes deletion so that the new proposed subsection (j) can be applied to all circumstances in which a third party has an immediate, vested financial interest in the outcome of legal proceedings, thereby increasing transparency in the justice system.

This topic was discussed at length by the Task Force. The Task Force took the position that exclusion provided by proposed subpart (j)(2)(B) is extremely important in circumstances in which a smaller personal injury firm needs to take care of its clients during the pendency of litigation. Moreover, this provision does not raise broader concerns that would otherwise undermine the concerns the proposed rule is intended to address. Petitioner therefore respectfully requests that this Court decline to adopt this proposed change, acknowledging that this is a legitimate concern, but any changes would be more appropriately considered in circumstances in which this provision is being abused.

Commentor also proposes deleting “In extraordinary circumstances and” from proposed subpart (j)(4). Petitioner agrees with this proposed revision, but for reasons that differ from those of Commentor. Specifically, the phrase “In extraordinary circumstances and” does not substantively add to the text that follows, and arguably creates ambiguity as to the required standard, since the text that follows precisely sets forth the determinations the court must make before it can order that any portion of a funding agreement be provided to the other party. Petitioner therefore proposes the following revision to proposed subpart (j)(4) (deletions shown in ~~strikethrough~~, additions shown in underline):

> (4) *Additional Disclosures*. For good cause shown, the court may order additional disclosures, including *ex parte* submission of the third-party litigation funding agreement to the court for an *in camera* review. ~~In extraordinary circumstances and o~~Only after an *in camera* review, the court may order a party to provide the third-party litigation funding agreement, or any portion thereof, to the other party if the court determines the disclosure will not run afoul of the work-product privilege, the party seeking the agreement shows a substantial need, and then only if no less intrusive option is feasible. Any documents the court orders to be disclosed must be maintained as confidential by the receiving party, and that party is prohibited from further distributing such documents.

Petitioner's proposed revision to proposed subpart (j)(4) as set forth above is incorporated into the entirety of Petitioner's proposed amendment to Civil Rule 8, reflected in the Appendix to this Reply.

B. American Property Casualty Insurance Association

The comment submitted on behalf of the American Property Casualty Insurance Association supports the petition but proposes amending the proposed rule to require automatic disclosure of the funding agreement or at a minimum change the standard in proposed subpart (j)(4) to "good cause" rather than "extraordinary circumstances."

The Task Force discussed, at length, whether funding agreements should be subject to automatic disclosure, and most members of the Task Force agreed that automatic disclosure should not be required. Therefore, Petitioner respectfully requests that this Court decline to adopt this proposed change.

As to Commentor's alternative that "extraordinary circumstances" in proposed subpart (j)(4) be changed to "good cause," Petitioner believes that his proposed change to proposed subpart (j)(4) to remove "extraordinary circumstances" as indicated above and as set forth in the Appendix resolves this concern.

C. U.S. Chamber of Commerce Institute for Legal Reform

The comment submitted on behalf of the U.S. Chamber of Commerce Institute for Legal Reform supports the petition but proposes amending the rule to:

1. Require automatic disclosure of funding agreements. For the reasons previously stated in this Reply, Petitioner respectfully requests that this Court decline to adopt this proposed change.
2. Require identification of any foreign funding sources. The Task Force discussed concerns relating to abuse of the legal system by foreign entities and concluded that it was beyond the scope of the expertise of the Task Force members and more properly addressed at the federal level. Moreover, the identity of funders will be disclosed under proposed subpart (j)(3). Should a litigant have concerns, the litigant can take further action as deemed appropriate. Petitioner therefore respectfully requests that this Court decline to adopt this proposed change.
3. Amend proposed subpart (j)(2)(A) so that the definition of "Third Party Litigation Funding Agreement" does not include "a loan, agreement, contract, or arrangement to pay expenses that requires repayment regardless of the outcome of the litigation<u>, unless the repayment amount includes an interest rate in excess of the greater of (i) 7 percent or (ii) a rate equal to twice the annual average yield on 30-year United States Treasury securities</u>." (proposed additions shown in <u>underline</u>) This additional verbiage has not been vetted by the Task Force members or any other stakeholders. Accordingly, Petitioner believes it is better proposed as the

subject of a separate rule petition on which all stakeholders have a chance to weigh in. Petitioner therefore respectfully requests that this Court decline to adopt this proposed change.

D. Aspey, Watkins & Diesel, PLLC

The comment submitted on behalf of Aspey, Watkins & Diesel, PLLC disagrees with the Petition and recommends that this Court deny it. For the reasons stated in the Petition and as set forth herein, Petitioner maintains his position in support of the Petition and recommends that this Court adopt the proposed rule changes as set forth in the Appendix to this Reply. Petitioner, however, wishes to address two points raised by Commentor.

First, although the Petition does provide as an example, a business that may fund litigation for the sole purpose of harassing a competitor, this was merely an example and was not the primary focus or concern of the Task Force, nor was it the impetus for the Petition. The Task Force was concerned about third party funders manipulating the parties to litigate and during litigation. This is the rationale behind requiring disclosure of the identity of a third-party funder—to determine whether there are invisible forces behind the litigant.

Lastly, the Comment indicates that although the Task Force was formed to study and address ABS's, the proposed rule fails to address them, creating unfair and potentially harmful consequences. The requirements for ABS's are set forth in the

Arizona Code of Judicial Administration § 7-209 and through that section, are required to make a number of disclosures at the outset. Proposed Rule 8(j) places no greater a burden on an ABS—any litigant, not just ABS's, are subject to the provisions of proposed Rule 8(j).

III. Request

Petitioner appreciates the comments stakeholders submitted during the comment period and deems it important to file this Reply to address the concerns reflected in the comments. Based on the foregoing responses, Petitioner respectfully requests that the Court adopt at its August 2025 Rules Agenda the proposed rule amendments as set forth in the Appendix to this Reply.

Respectfully submitted this 22nd day of May, 2025.

By /s/ Clint Bolick
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Appendix
(New language is underlined)

Rules of Civil Procedure

Rule 8. General Rules of Pleading
(a) through (i) [No change]
(j) Third-Party Litigation Funding Agreements.

(1) *Generally*. A party whose litigation is subject to a third-party litigation funding agreement must separately file a certificate regarding third-party litigation funding at the same time the party files the complaint or answer. If a party's litigation was not subject to a third-party litigation funding agreement at the time of filing but becomes subject to a third-party litigation funding agreement during the pendency of the litigation, the party must file a certificate regarding third-party litigation funding within seven days of entering the agreement and serve a copy to all other parties.

(2) *Definitions*. For purposes of this rule, "Third-Party Litigation Funding" or "Third-Party Litigation Funding Agreement" means a third party enters into an agreement to provide funding for the purpose of pursuing or defending (which includes but is not limited to legal filings, appeals, testimony, discovery, retention of experts, preparing and drafting legal documents, creating a litigation strategy, and other related litigation expenses) a civil action, administrative proceeding, claim, cause of action, or a portfolio of cases, where the funder secures a financial interest in or benefit from any potential recovery. However, it does not include:

(A) loans, agreements, contracts, or arrangements to pay expenses that require repayment regardless of the outcome of the litigation;

(B) loans, agreements, contracts, or arrangements for personal needs or medical treatment of a party unless the purpose for doing so is to enable the pursuit of a claim;

(C) funding received from an entity or insurer with a preexisting contractual obligation to indemnify or defend a party to the action or a health insurer which has paid, or is obligated to pay, any sums for health care for an injured person under the terms of any health insurance policy, plan, or agreement; and

(D) a contingent fee agreement between a party and its counsel for legal services as permitted by the Rules of the Supreme Court.

(3) *Requirements*. The certificate regarding third-party litigation funding must:

(A) identify the name and address of any funders;

(B) identify the place of formation for any funder that is a legal entity;
(C) identify the nature of the financial interest of each funder in the litigation;
(D) identify whether approval by any funder is necessary for litigation or settlement decisions and, if so, the nature of the terms and conditions relating to that approval;
(E) indicate whether the funding is applicable to a portfolio of cases or is specific to this litigation;
(F) be signed by the party or its counsel attesting that the statements in the certificate are accurate to the best of the signor's knowledge, information, and belief; and
(G) be in the form or a form substantially similar to the certificate adopted by the Director of the Administrative Office of the Courts.

(4) *Additional Disclosures*. For good cause shown, the court may order additional disclosures, including *ex parte* submission of the third-party litigation funding agreement to the court for an *in camera* review. Only after an *in camera* review, the court may order a party to provide the third-party litigation funding agreement, or any portion thereof, to the other party if the court determines the disclosure will not run afoul of the work-product privilege, the party seeking the agreement shows a substantial need, and then only if no less intrusive option is feasible. Any documents the court orders to be disclosed must be maintained as confidential by the receiving party, and that party is prohibited from further distributing such documents.