

Professional Perspective

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Ken Epstein, Omni Bridgeway & Megan Easley, CAC Specialty

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Law Firm Funding & Work Product Doctrine

Contributed by *Ken Epstein*, *Omni Bridgeway* & *Megan Easley*, *CAC Specialty*

Most judicial activity resumed after a screeching halt early in the pandemic, but even today the pandemic continues to slow resolutions and impact law firm returns as courts clear their case backlogs.

Against this backdrop, law firm funding, already a popular financing tool, has become an important lifeline for law firms with well-developed contingency practices, or law firms looking to take additional work on contingency.

In such law firm-funded transactions, a litigation funder receives its return from the law firm's contingency interest in a case or a portfolio of cases, whereas in a claimant-funded matter, the funder would receive its return from the proceeds that would otherwise go to the client. And while most transactions of this type remain private, some law firms have chosen to publicly embrace funding. In doing so, they flash their "open for business" signs for all to see.

Funders typically require law firms seeking financing to share with the funder certain information about the cases in the proposed portfolio, such as evidence supporting the claims, expected recoveries, and timing of such recoveries. Accordingly, ensuring the confidentiality of these communications is of paramount concern.

Courts have widely held that the attorney work product doctrine protects communications with funders aimed towards procuring a funding transaction. However, the growing body of case law interpreting this doctrine in the context of litigation funding has arisen in claimant funding scenarios. There are no reported cases of which the authors are aware that address the applicability of the attorney work product doctrine when a lawyer discloses confidential client information while seeking financing for the law firm.

This raises two questions: Does it matter who discloses the confidential information—the client or the lawyer? And does the type of financing involved—law firm, as opposed to claimant, funding—matter?

This article analyzes those two questions and concludes that the attorney work product doctrine provides comparable protection whether it is the client or the law firm making the disclosures in the process of seeking funding, and whether the disclosures are made for the purpose of seeking law firm or claimant funding.

How Might Confidential Information Be Disclosed?

Law firm funding, also called portfolio litigation funding when there are multiple cases, is where a litigation finance company funds and contracts directly with a law firm by taking an interest in the law firm's contingency interest in a specified case or set of cases. Typically, the funding is non-recourse. Thus, the funder only gets paid back and earns a return if the underlying litigation succeeds.

This type of funding has significant benefits for law firms, by allowing them to monetize anticipated contingency fee income, smooth cash flows, mitigate the risks involved with a particular case or group of cases, and extend alternative fee arrangements to clients looking for options beyond the billable hour.

To obtain funding, a law firm will have to share confidential information about any cases that will serve as the funder's collateral and sole source of recovery. This will often include attorney work product—we assume for purposes of this article that the information shared qualifies as attorney work product, prepared for purposes of the litigation.

Before choosing to invest, a funder will want to know about the case status, the lawyer's impressions, the perceived strength of the claims, the damages theories, and the likelihood, quantum, and timing of recoveries. Of course, in all circumstances, a lawyer must satisfy his or her professional responsibilities when seeking funding, such as obtaining the client's informed consent to share confidential materials, per Model Rule of Professional Conduct 1.6.

Moreover, best practices suggest that any law firm that enters into a transaction with a litigation funder, in which the firm is receiving funding backed by its contingency fees in a specified case or cases, should inform the relevant clients of the existence of such a transaction and obtain their consent to share any confidential information.

Privileged Communications in Law Firm Funding

The attorney-client privilege and the attorney work product doctrine are two foundational protections afforded to those seeking legal advice. The doctrines have different goals that yield different standards for waiver if otherwise protected materials are shared with third parties, such as litigation funders.

The main purpose of the attorney-client privilege is to protect the attorney-client relationship and encourage clients to provide all necessary information to enable their attorneys to guide clients' conduct in the right direction and resolve disputes. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Disclosure of these communications to a third party, outside of the attorney-client relationship, therefore risks waiver of the attorney-client privilege by eliminating confidentiality. See *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 731 (N.D. Ill. 2014). As a result, reputable litigation funders will not request materials that are protected only by attorney-client privilege.

The attorney work product doctrine, on the other hand, is intended to promote the adversarial system by protecting confidentiality of materials prepared in anticipation of litigation. Work product protection is not absolute; it may be overcome if the opposing party shows a "substantial need for the materials" and "cannot, without undue hardship, obtain their substantial equivalent by other means." *Pres. Techs. Llc v. Mindgeek United States*, No. 2:17-cv-08906-DOC-JPR, 2020 U.S. Dist. LEXIS 258311, at *19 (C.D. Cal. Dec. 18, 2020) (quoting *Fed. R. Civ. P. 26(b)(3)(A)(ii)*).

However, disclosure of work product to a third party does not automatically waive attorney work product protection. See *Miller UK*, 17 F. Supp. 3d at 736; see also *United States ex rel. Fisher v. Ocwen Loan Servicing, LLC*, No. 4:12-CV-543, 2016 BL 78851 (E.D. Tex. Mar. 15, 2016). Instead, the focus with respect to disclosure of attorney work product is whether it occurs in a way that substantially increases the opportunity for adversaries to obtain the information. See *Viamedia, Inc. v. Comcast Corp.*, No. 16-cv-5486, 2017 BL 227450 (N.D. Ill. June 30, 2017).

In the claimant funding context, courts routinely find that attorney work product is protected from disclosure when a client shares this information in the course of seeking funding. See *Elm 3DS Innovations Ltd. Liab. Co. v. Samsung Elecs. Co.*, No. 14-1430-LPS, 2020 U.S. Dist. LEXIS 216796 (D. Del. Nov. 19, 2020); *Fulton v. Foley*, No. 17-CV-8696, 2019 BL 465858 (N.D. Ill. Dec. 5, 2019); *Viamedia*, 2017 BL 227450; *Ocwen Loan Servicing*, 2016 BL 78851; *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, No. 7841-VCP, 2015 BL 46983 (Ch. Feb. 24, 2015); *Miller UK*, 17 F. Supp. 3d at 734-39.

The existence of a non-disclosure agreement—which reputable litigation funders will almost always require—helps ensure that disclosure to a funder will not substantially increase the likelihood that an adversary would come into possession of protected materials. See, e.g., *Miller UK*, 17 F. Supp. 3d at 736-38. Further, courts have noted that "litigation funders have an inherent interest in maintaining the confidentiality of potential clients' information," confirming that disclosure to adversaries does not become more likely with disclosure to funders. *Ocwen Loan Servicing*, 2016 BL 78851; see also *Fulton*, 2019 BL 465858.

Law Firm Financing Should Have Same Result

As noted, with law firm financing, the funder is typically dealing directly with the law firm. In fact, it is not uncommon for the funder never to speak with the law firm's client whose case is included in the portfolio. That the lawyer is the one sharing attorney work product that may contain confidential client information should not affect the disclosure analysis so long as that work product is shared with a reasonable expectation of confidentiality. This is why funders execute a non-disclosure agreement before considering any type of funding transaction.

Outside of the litigation funding context, courts typically do not differentiate between lawyers, clients, and client's authorized representatives with respect to who shared information protected by the attorney work product doctrine. See *Viamedia*, 2017 BL 227450 (quoting 2 Mueller & Kirkpatrick, *Federal Evidence* (4th ed. 2016) § 5:38); Restatement (Third) of the Law Governing Lawyers § 91 (2000); *Laguna Beach Cty. Water Dist. v. Superior Court*, 22 Cal. Rptr.3d 387, 391 (Ct. App. 2004); *Dedham-Westwood Water Dist. v. Nat'l Union Fire Ins. Co.*, 2000 Mass. Super. LEXIS 29, at *6-12 (Supr. Ct. Mass. Feb. 15, 2000).

Regardless of whether the client or the lawyer discloses information to a litigation funder, and whether disclosure occurs in the context of claimant funding or law firm funding, the applicable non-disclosure agreement will demonstrate the intent of the parties to a potential funding transaction to keep the confidential information from falling into the hands of the adversary, in keeping with the goals underlying the attorney work product doctrine.

Conclusion

The economic impact of Covid-19 on some law firm revenues has made the benefits of law firm financing even more apparent. Law firms seeking funding must handle client communications with care and abide by all rules of professional conduct. However, law firms seeking financing should not worry about waiving protection for attorney work product when these materials are disclosed to a litigation funder pursuant to a non-disclosure agreement.