

12 N.Y.U. J.L. & Bus. 911

NYU Journal of Law & Business

2016

Special Issue 2016

Article

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ALTERNATIVE LITIGATION FINANCE AND THE LIMITS OF THE WORK-PRODUCT DOCTRINE

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INTRODUCTION

As third-party funding of litigation begins to take hold in the United States, debates about the normative value of such arrangements have heated up among scholars, practitioners, and policymakers. Meanwhile, such arrangements are up and running--providing capital for parties in various cases. As a result, while higher-level debates remain ongoing, courts have had to grapple with on-the-ground issues at the intersection of ⁹¹² such funding arrangements and the operation of the Federal Rules of Civil Procedure. In particular, as this essay addresses, courts have begun to deal with the question of whether and to what extent materials created in the course of obtaining and making use of third-party funding in litigation qualify for work-product protection under Rule 26.

The work-product doctrine, codified in Rule 26 after years of existence in the common law, has long been understood as protecting the values and functions of the adversarial system. To that end, it limits the otherwise open and liberal system of discovery under the Federal Rules by shielding from production materials created “in anticipation of litigation,” on the grounds that attorneys should be afforded a “zone of privacy” in which to prepare their cases, and that adversaries should not be able to intrude upon that zone of privacy in order to free-load off the efforts of their opponents. The work-product doctrine has traditionally and most frequently been invoked to protect materials created by attorneys in the course of readying a case for trial, as such materials frequently contain mental impressions, opinions, and thoughts of the attorney that would provide a direct window into her litigation strategy, thereby frustrating adversarial norms.

As litigation techniques have evolved, the work-product doctrine has been invoked to protect what might be considered less traditional materials that courts have nonetheless found to have been prepared “because of” or “in anticipation of” litigation, such as materials prepared to evaluate the tax implications of a potential merger,¹ materials generated

in the *913 course of an employer's preparation for large-scale layoffs,² and materials generated by independent accountants in the course of an audit,³ just to name a few. In just the last few years or so, courts have been faced with the question of whether materials created in relation to alternative litigation funding arrangements fit within the work-product protection. Because alternative litigation finance is in its infancy in the United States, the number of opinions dealing with the issue are relatively few. As this essay traces, however, the general trend so far has been in favor of extending work-product protection to litigation funding materials.

Indeed, the courts' inclination toward protecting litigation funding materials has been quite broad-sweeping, and often the cases do not square easily with the often rigorously fact- and document-intensive work-product doctrine analysis. As this essay explains, the emerging trend toward near categorical protection for funding materials is perhaps at best only partially explained by the work-product doctrine itself. Instead, this trend seems undergirded less by considerations related to the work-product doctrine or its normative underpinnings, and more by those related to the goals and functions of *914 litigation funding itself. Specifically, these opinions appear to reflect concerns that withholding protection of these documents would impede both the funded party's ability to pursue her claim on the merits and the ability of litigation funding to achieve its purpose of bringing about a greater equality of resources among parties.

This essay proceeds in two parts. Part I is descriptive, and provides both a brief history of the work-product doctrine and an account of the current state of the law regarding the application of the work-product doctrine to litigation funding materials. Because alternative litigation finance is still in its early stages in the United States, the case law exploring the intersection between litigation funding and the work-product doctrine is evolving. Nonetheless, a general trend toward protection of funding materials has undoubtedly emerged. As Part II explains, this trend appears to be motivated by concerns that are both beyond and unrelated to the work-product doctrine--namely, concerns about protecting the availability, functioning, and normative goals of litigation funding itself. Part II then begins to explore possible implications of this trend, arguing that recognition of the normative considerations beyond the scope of the work-product doctrine underlying these opinions may well shed light on other, less litigated issues that also test the boundaries of the work-product doctrine in the context of alternative litigation finance.

I.

STATE OF THE LAW: THE WORK-PRODUCT DOCTRINE AND ITS APPLICATION TO LITIGATION FUNDING MATERIALS

As third-party litigation funding has gained a foothold in the United States, courts have begun to grapple with questions regarding the discoverability of materials created as part of those funding arrangements. Because these materials do not typically reflect communications between an attorney and client, arguments claiming the attorney-client privilege have proven largely unsuccessful. Instead, funded parties have turned increasingly to arguments that these funding materials are protected by the work-product doctrine.

This section proceeds in two parts. The first part provides a brief history of the work-product doctrine itself. This short overview is not intended to replace more robust and thorough *915 accounts.⁴ Rather, it is intended to provide background against which both the applicability and limitations of work-product protection to alternative litigation financing materials should be understood. The second part provides an overview of the state of the law at the intersection of the work-product doctrine and litigation funding.

A. *Brief History of the Work-Product Doctrine*

The seeds of what would become the work-product doctrine began as a reaction to the adoption of the Federal Rules of Civil Procedure in 1938,⁵ which broadened the scope of discovery significantly from prior practice⁶ but provided no

explicit protection for materials that could be described as attorney work-product. In the years following the enactment of the Federal Rules in 1938, courts were faced with disputes regarding requests for documents prepared for trial split--some allowed production, and some held that such materials were protected.⁷ On the one hand, those courts that withheld protection cited “liberal spirit of discovery” as being inconsistent with work-product protection.⁸ On the other hand, many *916 lower courts prohibited parties from obtaining through discovery materials that could be classified as “attorney work-product.”⁹

Some of the courts that protected work-product materials did so on grounds distinct from those underlying the modern work-product doctrine--for instance, some courts held that attorney work-product was not “material”;¹⁰ other courts protected such material unless the requesting party could demonstrate that it was admissible under the Federal Rules of Evidence.¹¹ Some courts, though, disallowed requesting parties from obtaining materials that constituted “attorney work-product” for reasons sounding quite similar to those that undergird the modern work-product doctrine. For example, in a frequently cited 1939 case, the United States District Court for the Eastern District of New York in *McCarthy v. Palmer* explained its rationale for denying discovery of material that constituted work-product as follows:

While the Rules of Civil Procedure were designed to permit liberal examination and discovery, they were not intended to be made the vehicle through which one litigant could make use of his opponent's preparation of his case. To use them in such a manner would penalize the diligent and place a premium on laziness. It is fair to assume that, except in the most unusual circumstances, no such result was intended.¹²

*917 Indeed, in the years following the enactment of the Federal Rules in 1938, a number of scholars, judges, and attorneys began to think that, under this liberal discovery regime, some manner of protection for attorney work-product was needed.¹³ In 1944, the Rules Advisory Committee on the Federal Rules of Civil Procedure entered the fray and issued a proposal to amend Rule 30(b), under which courts could issue protective orders “designat [ing] [that] restrictions be imposed upon inquiry into papers and documents prepared or obtained by the adverse party in the preparation of case for trial.”¹⁴ The purposes of the proposed amendment were one, to empower courts to limit discovery of work-product, but not to ban the acquisition of it altogether,¹⁵ and two, to exclude from discovery “matters which, if obtained, are of no great value to the *918 party making the inquiry if the material is legitimately used.”¹⁶ The final proposed amendment was issued in 1946, wherein the standards of unfair prejudice and undue hardship were introduced, as was complete protection for attorneys' mental impressions.¹⁷ Nonetheless, the Supreme Court chose not to forward the proposed Rule amendment to Congress, as it had just granted certiorari in *Hickman v. Taylor*.¹⁸

As is well known, in *Hickman*,¹⁹ the Supreme Court enshrined into law what is now known as the work-product doctrine. *Hickman* involved a tugboat accident in which five crew members were killed.²⁰ The tugboat operator hired an attorney immediately after the accident, and that attorney interviewed four survivors.²¹ Those interviews were memorialized in signed, written statements and notes by the attorney about the interviews. The family of one of the deceased crew members sued Taylor & Anderson Towing & Lighterage Co., which owned the tugboat. During discovery, the family sought the statements that the attorney had obtained from the survivors.²² The district court held the documents were not protected.²³ The Third Circuit reversed, extending the attorney-client privilege beyond the parameters of “attorney” and “client” to cover the documents.²⁴ The Supreme Court rejected the Third Circuit's distortion of the attorney-client privilege, but nevertheless held the documents were protected as “work-product.”²⁵ Such materials fell outside of the parameters of even liberal discovery, the Court stated, because, at least in the absence of any showing of justification and

need, requiring production of work-product would “contravene[] the public policy underlying the orderly prosecution and defense of legal claims.”²⁶

*919 Indeed, the need for a work-product doctrine, the Court reasoned, was that protection of work-product from discovery would safeguard the adversarial process by providing a “zone of privacy” within which attorneys could develop their cases.²⁷ On the one hand, by allowing for this zone of privacy, the work-product doctrine maintains an attorney's incentive to develop and advance with vigor the facts and legal theories of the case. Conversely, without this “zone of privacy,” attorneys will be disincentivized to memorialize their impressions and observations²⁸ and to prepare in advance²⁹ because of the knowledge that what they do could be turned over to their opponents.³⁰ In that sense, the work-product doctrine seeks to incentivize and enable attorneys to act in their core function in the adversarial process;³¹ developing the facts and legal theories *920 of a case fulfills any attorney's duty to their clients and to the courts.³² At the heart of the work-product doctrine, then, is a concern for the adversarial system itself.

The work-product doctrine as articulated in *Hickman* in 1946 was not included in the Federal Rules of Civil Procedure until decades later. In 1970, the work-product doctrine was codified (and clarified) in Rule 26.³³ Under Rule 26, the work-product doctrine protects “documents and tangible things” that are “prepared in anticipation of litigation or trial.”³⁴ To satisfy the “litigation or trial” requirement, litigation need not *921 be in progress, but it must be at least somewhat foreseeable.³⁵ However, as to the “prepared *in anticipation of* litigation” requirement, courts remain split even today in their approaches. A minority of courts require the party invoking the privilege to demonstrate that litigation was the “primary reason” that the requested materials were created.³⁶ A majority of federal courts apply a “because of” test; in other words, those courts ask whether a document or tangible thing was prepared “because of” the prospect of litigation,³⁷ leaving more room for the privilege to apply. Even under the more liberal “because of” test, however, some courts have denied protection to documents that were prepared in the “ordinary course of business,” even if future litigation was possible.³⁸ Moreover, even if the work-product privilege is found to apply in any given case, the *922 privilege can be waived,³⁹ or, in the case of ordinary work-product,⁴⁰ it may yield in the face of a showing of substantial need by the requesting party.⁴¹

Throughout its history--pre-*Hickman*, pre-Rule 26, and post-Rule 26-- the work-product doctrine has been invoked almost exclusively to protect the work created by attorneys preparing for (at least the theoretical prospect of)⁴² trial. This is, of course, directly in line with the normative goals that underlie the protection. However, as litigation techniques have continued to evolve, new questions have arisen as to which documents prepared by which people are covered under the work-product privilege. Indeed, courts have for many years been grappling with the application of work-product protection in what one might call non-traditional contexts.⁴³ The next part discusses a very recent of these non-traditional contexts in which courts have had to deal with questions of work-product protection: materials created in the course of obtaining and making use of alternative litigation finance arrangements.

B. The Work-Product Doctrine Meets Alternative Litigation Finance

One new, yet increasingly common, litigation development that has intersected frequently with the work-product doctrine in recent years is the growth of third-party litigation funding. In these funding arrangements, a third party advances *923 money to a party (typically, the plaintiff) to enable her to proceed with her case, and the funder then takes a cut of the winnings.⁴⁴ This type of funding mechanism is especially appealing to plaintiffs who do not have the resources to engage in major litigation with extensive recovery, and who, without an additional source of funding, may ultimately have to drop their claims or accept unfair settlements.⁴⁵ As plaintiffs are increasingly entering into litigation

finance agreements with third-party funders, questions have arisen as to the discoverability of the terms of these contracts as well as the communications between a party's lawyer and the funder during and after negotiations of such a contract.⁴⁶

Because the growth of third party litigation funding is a relatively new phenomenon, the legal landscape regarding these questions is evolving. I therefore provide generalizations about the doctrinal trends these cases reveal with a requisite level of caution regarding their predictive value for future cases. Nonetheless, these cases do, so far, reveal some clear general trends. Overall, courts have been quite receptive of arguments that materials regarding litigation finance arrangements constitute work-product. Moreover, with few exceptions, courts have largely held that the funded party does not waive work-product protection of those materials by sharing information with the third-party litigation funder.

As a preliminary matter, in order to even reach the work-product question, the requesting party must demonstrate that the materials relating to the terms of litigation financing agreements satisfy the Rule 26 requirement of relevance.⁴⁷ That is, the information must be “reasonably calculated to lead to the discovery of admissible evidence.”⁴⁸ Funding documents often-- though not always⁴⁹--have the potential to be relevant *924 to claims or defenses.⁵⁰ At the same time, the terms of an ultimate funding agreement and the communications between the party and the funder almost always will reveal some analysis conducted by the funded party or its attorney regarding the merits of the case-- information that falls within the scope of Rule 26(b)(3)(B) and is thus protected by the work-product privilege.⁵¹

Thus far, courts have generally held that materials containing communications between attorneys and third-party funders are protected by the work-product privilege, as they have been prepared “because of” the prospect of litigation, even though they are also prepared for a business purpose⁵² (entering into a business contract for funding) and therefore potentially not characterized as prepared “primarily or exclusively to assist in litigation.”⁵³ Even courts that characterize the funding arrangements as constituting a business transaction have held that they are still covered by the work-product privilege *925 because they would not be prepared *but for* an impending litigation.⁵⁴ Those courts have reasoned that, in order to obtain the funding, the lawyer will likely have to provide mental impressions, theories, and strategies about the merits of the case to convince the third party to supply financing.⁵⁵ At least one court also has held that the work-product protection applies even when the requested documents are not prepared in connection with any *ongoing* litigation, reasoning that those materials are prepared in order to aid in future possible litigation.⁵⁶

Moreover, the majority of courts thus far have held that a claim of work-product privilege in this context is not waived because the party claiming that privilege has shared information about the case with the third-party funder. Under the work-product doctrine, waiver of work-product privilege “occurs when the protected communications are disclosed in a manner that substantially increased the opportunity for potential adversaries to obtain the information.”⁵⁷ Even though the potential funders or investors will generally be considered third parties for purposes of this inquiry, courts have tended to find that disclosure of this information does not waive work-product protection, especially when the documents are subject to non-disclosure agreements.⁵⁸ The existence of non-disclosure agreements “militates against a finding of waiver,” as well as the fact that the litigation financing companies have an incentive to protect the information from disclosure to the opposing party, because if they disclosed information it would harm their ability to attract clients in the future.⁵⁹ Therefore, *926 disclosure of information to litigation financing companies generally does not “substantially increase the opportunity for potential adversaries to obtain the information.”⁶⁰ However, at least one court has found that communications between a party and a third-party funder are not privileged *before* any funding agreement is actually consummated, so any documents disclosed to a third-party funder before a funding agreement is reached will not be protected.⁶¹ At least at this point, drawing an *ex ante* distinction seems to be a minority position.⁶²

II.

ALTERNATIVE LITIGATION FINANCE AND THE LIMITS OF THE WORK-PRODUCT DOCTRINE

To be sure, the state of the law on work-product protection of materials created in the course of securing and using litigation funding is in flux. There are relatively few decided cases, and the reasoning in some of the cases is sparse. Accordingly, drawing any broad conclusions about either the trajectory of the doctrine or about the broader implications for litigation funding risk being premature.

*927 Nonetheless, as the first part of this section explains, the courts' relatively broad-sweeping inclination toward protecting litigation funding materials seems to reveal broader considerations than those raised by the work-product doctrine--considerations, instead, about the goals and functioning of litigation funding itself. In particular, what seems to explain the trend toward categorical protection from production for funding materials is not so much the strict dictates of the work-product doctrine or discovery rules, but rather concerns that withholding protection of these documents would impede both the funded party's ability to pursue her claim on the merits and the ability of litigation funding to achieve its purpose of bringing about a greater equality of resources among parties.

Moreover, recognizing the protective policy toward litigation funding that seems to underlie these courts' decisions sheds light on other, less frequently litigated issues that test the boundaries of the work-product doctrine as applied to alternative litigation finance. As the second part of this section explores, by way of example, even the act of claiming work-product protection by way of a privilege log--a fundamental, core practice under the work-product doctrine--not only creates unique burdens for the funded party that frustrate the underlying purpose of the litigation funding in the first place but also may well reveal information the work-product doctrine was actually designed to protect. Going forward, then, it would be consistent with existing trends for courts faced with these issues in the future to look beyond the narrower confines of the work-product doctrine to analyze the scope of discovery of litigation funding materials.

A. Beyond the Work-Product Doctrine: The Normative Value Judgments Underlying the Opinions Protecting Funding Materials from Discovery

As discussed above, decisions regarding alternative litigation finance and the work-product doctrine tend to come out in favor of more or less categorical protection for documents exchanged in connection with negotiation of the funding deal and subsequent communications between the funder and the party (or the party's attorney). This outcome, however, arguably is difficult to square with the typically fact- and document-intensive considerations courts give to work-product issues. It seems, then, that these decisions reflect two sometimes *928 stated--but often unstated--considerations, largely unrelated to the work-product doctrine. First, requests for these kinds of communications can be understood as mechanisms by which defendants seek to impede efforts by the plaintiffs to vindicate their claims on the merits. Apart from the rare instance in which a defendant has a legitimate defense under state law champerty or maintenance doctrines,⁶³ the only arguable relevance of these materials is that they reflect either the litigation funder's or the party's assessment of the strengths and weaknesses of the plaintiffs' claim or damage estimate. This may satisfy relevance in a technical sense, because those documents could well reveal information that bears on a claim or defense, but it is clearly not the kind of information that should be usable at trial or otherwise.⁶⁴ The defendant's request for these documents thus tends to come unsupported by any weighty argument as to why the information would be useful for the court's resolution of the claims on the merits.

Second, these courts tend to recognize that allowing discovery into these matters will tend by itself to undermine the point of litigation finance, a concern that the work-product doctrine does not address. These decisions thus arguably reflect a recognition that permitting discovery into these matters effectively constitutes a tax on the plaintiffs' use of litigation funding. They recognize that permitting discovery of these materials may in fact so sap the plaintiffs' resources

that the defendant may achieve indirectly what the litigation funding arrangement was meant to solve in the first place, by undermining the level playing field that litigation finance was meant to provide.

*929 Take, for instance, the decision of the United States District Court for the Eastern District of Pennsylvania--applying the law of a state where doctrines of champerty and maintenance have been explicitly declared alive and well⁶⁵--in *Devon IT, Inc. v. IBM Corporation*. There, the court granted plaintiff's motion for a protective order to quash subpoenas directed at Burford Group LLC, Glenavy Capital LLC, and Litigation Risk Solutions LLC, which were asked to evaluate plaintiff's case to determine the feasibility of providing financing to the plaintiff.⁶⁶ The subpoenas directed to those funders requested production of an assortment of documents relating to the financial evaluation process generally, and more specifically, production of materials relating to the funders' financial condition, their communications with the funded party, the lawsuit the third-party funders were asked to (and did ultimately) finance, and the funders' relationship with the plaintiff.⁶⁷ The court, in a one-page opinion (contained, strangely, entirely in a footnote), concluded that the requested materials were protected by the work-product doctrine and the attorney-client privilege, under a theory of common legal interest.⁶⁸

Such a swift and largely unexplained holding is both interesting, and potentially revealing, about the larger considerations at work. For one thing, the purpose for which these materials were sought was to aid defendant in its pursuit of a defense of champerty and maintenance--in one of the minority of states where those defenses are still enforced.⁶⁹ It is hard to imagine a set of materials more relevant to such claims and defenses than the very documents that might demonstrate that the plaintiffs had, in fact, violated those prohibitions. More than that, the work-product privilege is not absolute--it can yield, for instance, upon a showing of substantial need.⁷⁰ Among the considerations for a showing of substantial need is an evaluation of whether the requested materials are available *930 elsewhere.⁷¹ Here, too, the court's holding seems strange: it is hard to imagine what *other* materials would be relevant to their claims and defenses of champerty and maintenance besides those concerning the negotiation, obtaining, and use of third-party funding for the litigation.

In short, neither the relevance standard of 26(b)(1) nor the work-product doctrine alone explain the opinion in *Devon*. To be sure, the court was correct that granting defendants' discovery request might well reveal sensitive information about, say, the funders' view of the merits of plaintiffs' case, the plaintiffs' financial status--information that falls within the protection of the work-product doctrine. However, given the state of the law regarding champerty and maintenance in Pennsylvania, one cannot accuse the defendants of lacking any meaningful support for their requests for the funding materials, nor, it seems, can one so easily resolve the tension between protecting the funding materials on the one hand and providing defendants with what are likely some of the only materials about their defense that exist--a tension the court in *Devon* did not acknowledge. At a minimum, then, I believe the court's decision implicitly recognizes that granting the defendants' request would not so much undermine the work-product doctrine, but rather would undermine the litigation funding arrangement itself. Allowing discovery into the funding arrangement--which, given the frequency of email communications between attorneys and the funder, may number well into the thousands--would be immensely costly to an already cash-strapped plaintiff. Indeed, even claiming privilege of these documents may generate significant expense.⁷² Insofar as litigation funding arrangements are designed to more closely level the economic playing field between parties, allowing defendants to impose significant discovery costs upon the plaintiff *that derive from the very arrangement intended to defray litigation costs in the first place* might well be seen as a tax levied only on those plaintiffs who make use of litigation funding.

Similar value judgments were made somewhat more explicit in the decision in *Miller U.K. Ltd. v. Caterpillar, Inc.*⁷³ In *931 *Caterpillar*, Judge Cole, a magistrate judge for the U.S. District Court for the Northern District of Illinois, denied Caterpillar's motion to compel the production of various materials created, shared, or discussed by plaintiff Miller, his counsel, or any third party for the purpose of "considering, investigating, pursuing, arranging, or obtaining litigation funding."⁷⁴ Miller did produce some of the documents requested voluntarily, but withheld two categories of documents:

first, documents showing the structure and terms of its financing deal (the deal documents)--which Miller argued were not relevant, or in any case, were privileged--and second, documents that had been submitted to various third-party funders in the course of Miller's seeking of litigation funding, which Miller argued were privileged.⁷⁵

As to the deal documents, the court rejected Caterpillar's suggestion that they were relevant, in a broad discovery sense, to the case overall.⁷⁶ Instead, the court found that the only relevance the deal documents had was to Caterpillar's vaguely pled defenses of champerty and maintenance,⁷⁷ but nonetheless rejected that claim of relevance on the grounds that, under Illinois law, a third party must *officiously intermeddle* in an action not belonging to that person for a statutory violation of champerty and maintenance to occur.⁷⁸ In short, Judge Cole effectively cut off Caterpillar's access to funding documents at the pass; it never even reached the assertion of privilege. As to the second set of documents, however, the court addressed directly the application of the work-product privilege to defendants' request for documents submitted to potential third-party *932 funders. The documents, the court said, were no doubt relevant, inasmuch as they likely included information about Miller's claims. Nonetheless, the court held that the materials were protected by the work-product doctrine (though not the attorney-client privilege), even though the materials had been shared with multiple potential funders, protected only by oral confidentiality agreements.⁷⁹

Like *Devon*, *Caterpillar* reflects a fairly strong inclination toward protecting funding documents from discovery. Moreover, the court in *Caterpillar* provided a much deeper discussion of the relevant discovery principles of relevance and privilege. That, combined with the weaker maintenance and champerty law in Illinois,⁸⁰ perhaps suggests that that discovery principles, and those principles alone, are doing the work in the court's decision. Contained in the concluding paragraph of the opinion, however, are statements by Judge Cole suggesting that broader value judgments are at work. After a relatively lengthy opinion devoted to discovery principles, Judge Cole concludes his analysis by discussing alternative litigation funding more generally. After noting that there is a great deal of debate about the normative value of third-party litigation financing, he states that "questions of societal value are generally for the Legislature, and a judge ought not 'succumb to the temptation to substitute his own incandescent conscience for the will of the legislature.'" ⁸¹ Given an earlier statement in the opinion that litigation funding represented a "new opportunit [y] for [creative businessmen] to profit" from economic inequality, it appears that while Judge Cole is personally skeptical of the value of litigation financing itself, he recognized that the appropriate role of the judge prevented him from letting *933 such skepticism infect his decision-making, either about the discoverability of litigation funding documents or about the interpretation of Illinois champerty and maintenance statutes, or both. Perhaps the inclusion of these statements stands for nothing more than that.

However, particularly given that these thoughts about alternative litigation finance immediately follow Judge Cole's concluding characterization of the defendants' request--burdensome, costly, and seemingly aimed at obtaining insight into plaintiffs' financial status--these statements indicate a recognition that attempts to obtain funding materials should not be fully conceptualized as mere discovery requests. Rather, particularly in states that do not have strong maintenance and champerty laws, the requests are more appropriately viewed as attacks on both the funded plaintiff and upon litigation funding itself. Indeed, if allowing discovery of these materials would constitute, as Judge Cole suggests, a substitution of judicial judgment about the value of litigation financing for a legislative one, then the requests themselves seem to represent an attempt by non-funded parties opposed to litigation funding to attack it indirectly, without the public input, scrutiny, and difficulty that accompanies the legislative action Judge Cole says is required.⁸²

These same value judgments were made quite explicit in the Court of Chancery of Delaware's opinion in *Carlyle v. Moonmouth Company*.⁸³ As in *Devon* and *Caterpillar*, defendants in *Carlyle* requested production of materials relating to plaintiffs' arrangement with a third-party litigation funder. The court granted plaintiffs' motion for protective order on the grounds that the documents requested were protected by the work-product privilege. The court's work-product analysis was relatively straightforward, if arguably lenient in favor of protecting the materials. Specifically, the court

stated that the third-party litigation-funding documents were created “because *934 of” litigation, and that even though they also had a business purpose, they were protected because they might, *inter alia*, “reflect an analysis of the merits of the case.”⁸⁴ The court, however, did not stop there. After concluding that the materials were protected by the work-product doctrine, it revealed the normative underpinnings of the decision--normative underpinnings not found within the confines of the work-product doctrine: “Allowing work-product protection for documents and communications relating to third-party funding places those parties that require outside funding on the same footing as those who do not and maintains a level playing field among adversaries in litigation.”⁸⁵ In short, the Court of Chancery made explicit what I believe was implicit in *Devon* and *Caterpillar*, namely, that protecting from production litigation funding materials is warranted not just by the normative values of the work-product doctrine, but also by the normative underpinning for alternative litigation financing. Moreover, to the extent such protection is essential to the effectuation of that normative goal, the converse holds: withholding protection of litigation funding documents enables non-funded parties to attack, by way of indirection, alternative litigation financing.⁸⁶

The most recent example of a judicial decision seemingly motivated by value judgments about the desirability of protecting litigation funding documents from discovery, and by extension, perhaps of protecting litigation funding itself, is the class action case of *Kaplan v. S.A.C. Capital*.⁸⁷ *Kaplan* involved attempts by defendants to procure materials regarding the litigation funding of named plaintiffs' counsel. The argument made in *Kaplan* was that the adequacy of counsel's representation of the class depended in part on its financial resources to prosecute the claim, and that the fact that counsel had obtained *935 litigation funding was a red flag indicating those finances might be inadequate under Rule 23(g). The magistrate judge for the United States District Court for the Southern District of New York, however, not only rejected the attempt at discovery of the funding materials, it did so while never even reaching the work-product question, which was fully briefed by the plaintiff. Instead, the court held that the documents were not even relevant to the adequacy issue. That decision was then affirmed in full by the district judge.

That holding could well be questioned, at least on some set of hypothetical facts. Indeed, one could imagine any number of legitimate concerns about the ways in which litigation funding could alter the incentives of plaintiffs' counsel and potentially create conflicts between its loyalty to the class and its contractual obligations to the litigation funder. The debatable holding on relevance, then, can best be understood as reflecting a countervailing consideration, also present in the work-product decisions, namely the desire to prevent disclosure of litigation funding communications, and by extension to prevent the use of discovery requests to impede the point of the financing arrangement in the first place.

The prevailing tendency of courts toward protecting funding documents, across a number of factual circumstances, suggests to me that broader normative battles about the function and purpose of alternative litigation finance are at work. The parties often recognize this; indeed, they may well be the genesis. Within the motions and briefs by the parties filed in these cases, one finds not just discussions about the extent to which funding materials do or do not fit the traditional definition of work-product, but also much broader debates regarding whether alternative litigation finance arrangements themselves are good or ill or even illegal.⁸⁸

*936 At some level, it is not unfair to say that these broader normative considerations miss the point; that these considerations do not fit comfortably within the contours of the work-product doctrine and other discovery limitations. Whether alternative litigation funding provides a needed recalibration of resources among parties; whether alternative litigation finance generates a normatively undesirable increase in litigation; whether such arrangements constitute a morally objectionable separation of claimant and claim--none of the answers to these questions directly answer the core doctrinal or core normative questions that the work-product doctrine, or even the discovery rules more broadly, seek to address.

On the other hand, this mismatch between the normative underpinnings of alternative litigation finance and those undergirding the work-product doctrine *is* the point. The work-product doctrine at best protects funded parties from

intrusion into the attorneys' "zone of privacy" in preparing the case for litigation. The goal of protecting that limited aspect of the adversarial process, however, does not address the broader ways in which litigation funding affects the adversarial process, or the ways in which these broad discovery requests into funding arrangements can undermine the goal of alternative litigation funding in leveling the playing field between litigants with disparate resources.

Whatever one thinks as a normative matter about the courts' response to the mismatch between the underpinnings of the work-product doctrine and those of litigation funding, as a descriptive matter, it seems rather clear that there is, in fact, a mismatch. Indeed, as the next part begins to explore, there are other problems that emerge for funded parties and their litigation funding arrangements when such materials are requested--concerns the work-product doctrine is not oriented toward. These problems further suggest that, as courts seem to recognize, these discovery requests are not *just* discovery requests. Instead, they are attacks, functionally, on litigation funding itself.

B. The Limits of the Work-Product Doctrine to Protect the Purpose of Alternative Litigation Funding

Recognizing the protective policy toward litigation funding materials that seems to underlie these courts' decisions sheds light on other, less frequently litigated issues that test *937 the boundaries of the work-product doctrine as applied to alternative litigation finance. Even in the context of a broad trend toward protecting litigation funding materials from discovery, the operation of the work-product doctrine--the invocation of its protection, the litigation over the scope of that protection--may itself frustrate the fundamental purpose and operation of litigation funding. Given the limitations of the essay format, I provide only a brief discussion of a single issue--the ways in which the creation of a privilege log (standard practice when claiming work-product or other protection for production) may frustrate the underlying goals of alternative litigation funding. As such, it is not just production of litigation funding materials that tears at its foundation; the request *itself* constitutes a potential weapon by which requesting parties can attack litigation funding.

To gain protection under the work-product doctrine, the party from whom materials have been requested must assert that privilege. The traditional way to assert the privilege entails creating a privilege log for all documents the party asserts are protected by the privilege. The creation of such a privilege log is well known to be a burdensome task, and this burden may be reliably pronounced in situations involving alternative litigation financing: when a third-party financier engages in due diligence into a potential investment--in this context, a lawsuit--there is naturally a great deal of communication between that third-party financier and the potentially funded party, or, more often, the potentially funded party's attorneys. Indeed, even before any funding arrangement is agreed upon, the attorneys and third-party funders may exchange numerous documents and emails, all in service of giving the third-party funder adequate understanding of the litigation to feel comfortable funding it. Assuming the third-party financier agrees to fund the litigation, additional communications occur. All told, setting up and making use of litigation funding can result in hundreds, if not thousands, of email communications and other documents being exchanged between the funded party's attorneys and the third-party financier. Requiring a party to create a privilege log with all these communications would thus be extraordinarily time-consuming and expensive.

At some level, the fact that the very existence of alternative litigation financing may well generate significant discovery costs might be insufficient to think either that such arrangements *938 call for special treatment under the discovery rules or that the work-product doctrine is ill-fitting with third-party funding. Indeed, to some degree--for better or worse--we accept the costs of refusing production on the basis of privilege as part of an open and expansive system of discovery. Moreover, in the context of alternative litigation financing, to the extent attorneys representing the funded party are working on a contingency, the economic burden may well fall largely upon them, rather than upon the third-party financier or the financed party to the litigation.

On the other hand, perhaps the costs associated with claiming privilege for materials created as part of a litigation funding arrangement in particular ought to give us pause. For starters, even if the funded party's attorneys bear the brunt of the economic burden associated with asserting work-product privilege for funding materials, that reality will naturally

impact the economics of the deal. If the attorneys know that they will face a high burden of producing a privilege log with respect to countless documents related to third-party funding, that will not only affect their incentives to enter into the deal in the first place, but it will likely also result in a demand by those attorneys for a higher stake in the future proceeds as reimbursement for the economic cost heaped upon them during discovery. While such a demand may not be enough to prevent the financing arrangement altogether, the one whose hide is torn will likely be the funded party. Moreover, these are costs that derive not from the plaintiffs' claims on the merits, but from the manner in which that plaintiff sought to pay for the high costs of litigation. In other words, these are costs that arise merely from the fact that the plaintiff is impecunious--a rather ironic result, given the fact that alternative litigation financing, viewed in its most favorable light, exists to remedy the inequality of resources that frequently prevents parties from vindicating their substantive rights or leads the disadvantaged party to settle on the cheap.⁸⁹ To put it more bluntly: the cost of asserting the privilege itself constitutes a tax on parties using third-party funding.

Viewed strategically, the economic burdens that accompany the assertion of privilege for alternative litigation finance *939 are weapons ripe for the using by parties seeking to attack litigation funding itself. To some degree, this is a literal truth: Often, the extent to which funding materials might be "relevant to a claim or defense" under Rule 26(b)(1) is largely tied to more or less colorable defenses⁹⁰ that the funding is illegal because of doctrines of maintenance and champerty (though defendants have and likely will assert relevance on other grounds⁹¹). Because the plaintiff has received third-party funding, the door to discovery requests has been opened to a world not accessible in non-funded litigation. Absent such funding, an opposing party would not generally have a colorable claim to materials relating to the plaintiff's general financial well-being, or to information regarding the financial resources it was devoting to the litigation. Putting aside the strategic advantages that would inure to a party able to obtain such information, the discovery battles over that information inevitably affect the resources the plaintiff could devote to continuing in the litigation. That sort of impact is precisely what results from discovery fights over litigation funding materials. More than a result, that sort of impact may well be the gambit. In any given suit, this impact may hinder or prevent the plaintiff from continuing on and vindicating her claims on the merits; it may well undo the resource equality the financing arrangement was intended to bring about. More broadly, if these sorts of burdens can be reliably imposed in a number of cases, the willingness of third-party funders to finance cases may well decrease, or, at the very least, their financial demands will increase--in either instance, the perceived promise of a mechanism for mitigating the inequality of resources in litigation will be diminished.

The impact of privilege logs on litigation funding arrangements, however, goes beyond the economic. The mere creation of privilege logs regarding litigation funding materials often may well reveal the very sort of information the work-product privilege is designed to protect. A traditional privilege *940 log includes the name of the party who sent the communication, the name of the party who received the communication, anyone who was copied on the communication, the subject matter of the communication, and the date of the communication. Where litigation funding is involved, however, that information will in many cases give away a significant amount of information about the funded party's strategy--the very sort of information that is at the core of the work-product protection.⁹² For instance, say the privilege log in a given case indicates that there was an email from the party's attorney to the litigation funder with the subject line: "Funding Agreement--Executed Copy." From that simple entry, the opposing party knows the date on which the funding agreement was executed, and that one date may provide insight into the funded party's litigation strategy, for at the very least, that date tells the requesting party approximately when the party ran out of money. Indeed, the fact that a litigant is financially in need of third-party funding is itself valuable information to a well-heeled adversary.

Despite this mismatch, there may well be solutions to this problem in particular in the Federal Rules. Some courts have permitted parties to use "categorical" privilege logs where the burden of preparing a document-by-document privilege log would be unreasonable, and/or where a document-specific log would itself divulge work-product that would undermine the integrity of the adversarial process.⁹³ Indeed, such an approach is suggested in the Advisory Committee notes to Rule *941 26 itself⁹⁴ and in the American Bar Association Civil Discovery Standards.⁹⁵ If courts in the future are

confronted with the issue, these approaches appear to be valuable tools for avoiding the aforementioned concerns that the mere request for funding documents can be used to undermine the purposes of third-party funding.

CONCLUSION

At the end of the day, perhaps Congress will heed the cries of the Chamber of Commerce and others and determine that litigation funding, on balance, is a “bad” thing.⁹⁶ Perhaps state legislatures and courts--increasingly inclined to eliminate or relax laws on maintenance and champerty⁹⁷ -- will reverse *942 course. Neither seem particularly likely, at least for now. I suspect, then, that the ability of opposing parties to impose the heavy economic burdens and to reap the strategic advantages through discovery requests for funding materials will remain a tempting means of indirectly disabling or hindering the ability of impecunious parties to pursue their claims. Whether the current trend in favor of protecting funding documents is sufficient to remedy the mismatch between the work-product doctrine and alternative litigation finance and stave off the attacks remains to be seen.

Footnotes

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- ¹ [United States v. Adlman](#), 134 F.3d 1194 (2d Cir. 1998) (holding that work-product protection applied to a memorandum prepared by an accountant and an attorney detailing the potential tax liability implications and litigation risks associated with a possible merger between the client and Sequa Corporation, characterizing the memorandum as constituting an attorney's evaluation of her case). In *Adlman*, the Second Circuit indicated that work-product protection might be appropriate in other less traditional contexts. It set forth two hypotheticals in which it believed such protection would be appropriate. One, if a bank, in the course of a lending decision, required a client seeking the loan to provide an assessment of its ongoing litigation and likelihood of success in that litigation. Two, if a securities underwriter requested an assessment of a company's ongoing litigation and likelihood of success therein before the underwriter decided to go forward with a public offering. *See id.* at 1199-2000.
- ² *See Maloney v. Sisters of Charity Hosp. of Buffalo, N.Y.*, 165 F.R.D. 26, 30 (W.D.N.Y. 1995) (finding that the materials generated in preparation for large-scale layoffs by the Human Resource Director were done so at the direction of counsel, who reasonably anticipated future litigation arising out of the layoffs).
- ³ *See, e.g., United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010) (holding that a memorandum prepared by independent auditors memorializing a communication with their client and its attorneys about potential tax liability in association with the audit might, upon remand review by the district court judge, qualify for work-product protection). Courts in other circuits, however, have reached the opposite conclusion about tax documents when prepared not just with an eye toward litigation, but also for an independent purpose. *See, e.g., United States v. Textron Inc. & Subsidiaries*, 577 F.3d 21, 29 (1st Cir. 2009) (en banc) (explaining that tax documents prepared for independent reason of fulfilling statutory obligation were not subject to work-product protection even though they related to the subject matter of the litigation); [United States v. El Paso Co.](#), 682 F.2d 530, 542-44 (5th Cir. 1982) (holding that tax pool analysis prepared by attorneys for El Paso did not constitute work-product because, though they discussed theories about possible results in litigation, among other things, no litigation had commenced and no specific litigation was referenced and concluding that these documents had, instead, been created in the ordinary course of business).
- ⁴ *See, e.g.,* Jeff A. Anderson et al., *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 765 (1983); Arthur B. LaFrance, *Work-Product Discovery: A Critique*, 68 DICK. L. REV. 351, 353-56 (1963-64) (providing a detailed discussion of the pre-1938 Rules' discovery procedures); Charles R. Taine, *Discovery of Trial Preparations in the Federal Courts*, 50 COLUM. L. REV. 1026, 1026 (1950).
- ⁵ *See* Anderson et al., *supra* note 4, at 765 (1983).
- ⁶ *See* LaFrance, *supra* note 4, at 353-56; Taine, *supra* note 4, at 1026.

- 7 See *Wild v. Payson*, 7 F.R.D. 495, 498 (S.D.N.Y. 1946) (noting that there was a “sharp conflict of decisions” between courts asked to rule on requests for documents prepared for trial and citing cases on either side of the split).
- 8 Anderson et al., *supra* note 4, at 769. For a collection of cases that allowed discovery of materials prepared for trial, see *id.* at 769 nn.58-61. See also Taine, *supra* note 4, at 1029 nn.19-20. As one prominent example, the United States District Court for the Southern District of New York in *Bough v. Lee*, a personal injury suit stemming from a car accident, the court allowed plaintiffs to obtain from the defendant insurance company pictures of the car it had taken and statements it had taken from both the plaintiff and its co-defendant, on the grounds that the materials were relevant and material to the claims; there was no confidential relationship between the investigators and the persons who provided the statements, and there was no bad faith, oppression, or unreasonableness. *Bough v. Lee*, 28 F. Supp. 673 (S.D.N.Y. 1939). Other courts reached similar conclusions. See, e.g., *Kane v. News Syndicate Co.*, 1 F.R.D. 738 (S.D.N.Y. 1941); *Leach v. Greif Bros. Cooperaage Corp.*, 2 F.R.D. 444, 445 (S.D. Miss. 1942) (rejecting defendant's claim of attorney-client privilege, the court granted plaintiff's request to discover from defendant employer two documents containing statements taken from plaintiff and an eyewitness regarding plaintiff's work-related injury. The statements had been taken by an individual to whom plaintiff had granted power of attorney to communicate with defendant's district manager in an ultimately unsuccessful effort to settle the matter. The court granted plaintiff's discovery requests on the grounds that the discovery rules should be “liberally construed” to prevent surprise); *E.W. Bliss Co. v. Cold Metal Process Co.*, 1 F.R.D. 193 (N.D. Ohio 1940) (permitting defendant to obtain records of communications between plaintiffs' counsel and other attorneys in a prior related suit).
- 9 See Anderson et al., *supra* note 4, at 770 nn.63, 66.
- 10 See Anderson et al., *supra* note 4, at 768, 771.
- 11 See *id.*
- 12 *McCarthy v. Palmer*, 29 F. Supp. 585, 586 (E.D.N.Y. 1939). Other courts reached similar results. *Byers Theaters v. Murphy*, 1 F.R.D. 286 (W.D. Va. 1940) (“[O]ne party should not be allowed to require another to make investigation, research, or compilation of data or statistics for him which he might equally as well make for himself.”); see also *Maryland v. Pan-Am. Bus Lines, Inc.*, 1 F.R.D. 213, 215 (D. Md. 1940) (denying party's discovery request for statements taken by the defendant's insurer of witnesses to the accident at issue on the grounds that allowing discovery would give the requesting party free access to the other party's work); *Stark v. Am. Dredging Co.*, 3 F.R.D. 300, 301-02 (E.D. Pa. 1943) (denying a request by plaintiff, executor of the deceased estate, that defendant produce records of statements made by defendant's employees to the defendant's insurance carrier in relation to the insurance company's investigation of the decedent's death on the job site). See also LaFrance, *supra* note 4, at 360 (cataloging cases).
- 13 Anderson et al., *supra* note 4, at 766. Support for work-product protection was expressed by scholars. See Taine, *supra* note 4, at 1028 n.16 (explaining that support for work-product protection based on fairness concerns “even permeated the thinking of certain legal writers”)(citing John F. Caskey & Charles F. Young, *Some Limitations upon Rule 33 of the Federal Rules of Civil Procedure*, 28 VA. L. REV. 348, 355 (1942)). Support was likewise expressed by judges. See, e.g., *McCarthy v. Palmer*, 113 F.2d 721 (2d Cir. 1940) (protecting work-product from discovery); *Stark*, 3 F.R.D. 300; *Pan-Am. Bus Lines*, 1 F.R.D. 213. In addition, lawyers also supported work-product protection. See Leland L. Tolman, *Discovery Under the Federal Rules: Production of Documents and the Work-product of the Lawyer*, 58 COLUM. L. REV. 498, 504 (1958) (The question of work-product protection “aroused ... much decision on the bench, at the bar, and in academic halls”).
- 14 Tolman, *supra* note 13, at 504 (quoting the Advisory Committee on Rules for Civil Procedure, Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure for the District Courts of the United States (1944)).
- 15 Advisory Committee on Rules for Civil Procedure, Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure for the District Courts of the United States, 44 (1944).
- 16 Advisory Committee on Rules of Civil Procedure, Second Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure for the District Courts of the United States, 39-40 (1945).
- 17 Tolman, *supra* note 13, at 506.
- 18 *Hickman v. Taylor*, 329 U.S. 495 (1947).

- 19 *Id.*
- 20 *Id.* at 498.
- 21 *Id.*
- 22 *Id.* at 498-99.
- 23 *Id.* at 499.
- 24 *Id.* at 500.
- 25 *Id.* at 508, 512.
- 26 *Id.* at 510.
- 27 Anderson et al., *supra* note 4, at 784-85 (“The central justification for the work-product doctrine is that it preserves the privacy of preparation that is essential to the attorney’s adversary role.”).
- 28 Anderson et al., *supra* note 4, at 786 (“It has been suggested that attorneys, hoping to avoid discovery, will not record reports and information which would otherwise be recorded, thereby making trial preparation less efficient.”); Elizabeth Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515, 1526 (1991) (“Work-product immunity, its supporters believe ... allows the advocate to commit the results of that investigation and other litigation-related thought processes to writing ... [and] avoids forcing litigants to freeze their contentions too early in a lawsuit.”).
- 29 Anderson et al., *supra* note 4, at 786 (“To maximize the facts available in a case, an attorney must be committed to developing those facts. An attorney who hopes to take advantage of his opponent’s diligence will lack this commitment. Absence of a work-product doctrine would encourage laziness and a ‘wait and see’ attitude.”).
- 30 *Hickman*, 329 U.S. at 511 (“Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.”); *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977) (“The primary purpose of the work product privilege is to assure that an attorney is not inhibited in his representation of his client by the fear that his files will be open to scrutiny upon demand of an opposing party.”); D. Christopher Wells, *The Attorney Work Product Doctrine and Carry-Over Immunity: An Assessment of Their Justifications*, 47 U. PITT. L. REV. 675, 682 (1986) (“[W]ithout the work product immunity, the ‘cost’ of the lawyer’s case preparation increases since an adversary may ultimately benefit from the lawyer’s work product. For this reason, lawyers would do less in the performance of their professional duties.”).
- 31 Anderson et al., *supra* note 4, at 785 (“The zone of privacy, which allows unfettered investigation, thus permits a greater degree of freedom to develop facts and theories.”); Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CALIF. L. REV. 313, 411 (1991) (“[T]he central thrust of the doctrine is to lower the risks associated with recording, manipulating, and analyzing information[.]”); Wells, *supra* note 30, at 681 (“The broad rationale for the work product doctrine is that lawyers will better serve their clients and the ends of justice when they can operate in a ‘zone of privacy.’”). *Cf.* Bundy & Elhauge, *supra*, at 412 (theorizing that work-product protection will be weaker where it does not “increase the flow of information to the tribunal”).
- 32 *Hickman*, 329 U.S. at 511 (“Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests.”); Anderson et al., *supra* note 4, at 784 (“By placing the burden of representation on the parties themselves, the adversary system fosters a competitive relationship that motivates each party to marshal all the law and facts beneficial to its case.”).
- 33 FED. R. CIV. P. 26 Advisory Committee’s note to 1970 amendment. The Rules Advisory Committee issued the amendment to clear up confusion about the work-product doctrine’s scope post-*Hickman*. For example, there was significant debate over whether the work-product doctrine covered materials created by non-attorneys. *Id.*; *Attorneys: Attorney-Client Privilege and*

Work Product Doctrine Held Inapplicable to Prevent Disclosure of Expert Appraisal Report Prepared for Estate Tax Return, 1967 DUKE L.J. 691, 692 (1967) (discussing dissent in the courts and commentary over the use of work-product doctrine to cover reports made by experts); James L. Steimel, *Comments: Work Product in the Federal Discovery Procedure*, 43 MARQ. L. REV. 329, 330 (1960) (discussing conflict in the courts over whether statements taken by non-lawyers for use by lawyers are covered). Additionally, there was confusion and debate over the meaning of *Hickman's* good cause requirement. [FED. R. CIV. P. 26](#). Advisory Committee's note to 1970 amendment.

34 [FED. R. CIV. P. 26\(b\)\(3\)\(A\)](#).

35 See, e.g., [Coastal States Gas Corp. v. Dep't of Energy](#), 617 F.2d 854, 865 (D.C. Cir. 1980).

36 See, e.g., [United States v. Gulf Oil Corp.](#), 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985) (“If the primary motivating purpose behind the creation of the document is not to assist in pending or impending litigation, then a finding that the document enjoys work-product immunity is not mandated.”).

37 See, e.g., [UK Ltd. v. Caterpillar, Inc.](#), 17 F. Supp. 3d 711, 735 (N.D. Ill. 2014) (quoting the test in the Wright & Miller treatise as “whether, in light ... of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained ‘because of’ the prospect of litigation,” and noting that “most other courts have held ... that the ‘because of’ test ... is the proper way to determine whether a document was prepared ‘in anticipation of litigation’ and thus is eligible for protection under [Rule 26\(b\)\(3\)](#).”).

38 See, e.g., [Sandra T.E. v. S. Berwyn Sch. Dist.](#) 100, 600 F.3d 612, 622 (7th Cir. 2009) (distinguishing between documents created in the ordinary course of business for a relatively unlikely possibility of future litigation and documents prepared once a claim had been filed and providing protection only for the latter); [Sullivan v. Warminster Twp.](#), 274 F.R.D. 147, 152 (E.D. Pa. 2011) (holding that “documents prepared in the regular course of business rather than for purposes of the litigation are not eligible for work-product protection, even if the prospect of litigation exist[ed]” when the materials were created); [United States v. Adlman](#), 134 F.3d 1194, 1202 (2d Cir. 1998) (“[T]he ‘because of’ formulation that we adopt here withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.”); Grace M. Giesel, *Alternative Litigation Finance and the Work Product Doctrine*, 47 WAKE FOREST L. REV. 1083, 1103 (2012) (noting that many courts refuse to extend work-product protection to materials created in the ordinary course of business).

39 [FED. R. CIV. P. 26\(b\)\(5\)\(B\)](#).

40 Ordinary work-product does not include attorney thoughts, mental impressions, conclusions, opinions, and legal theories regarding the litigation, which are considered core work-product. [FED. R. CIV. P. 26\(b\)\(3\)\(B\)](#).

41 [FED. R. CIV. P. 26\(b\)\(3\)\(A\)\(ii\)](#). Courts are not uniform in their approaches to the “substantial need” test. Some courts view [Rule 26\(b\)\(3\)\(A\)\(ii\)](#) as creating a two-prong test. See, e.g., [Fisher v. Nat'l R.R. Passenger Corp.](#), 152 F.R.D. 145, 153 n.10 (S.D. Ind. 1993). Others apply a three-factor balancing test. See 8 CHARLES ALAN WRIGHT & RICHARD L. MARCUS, [FEDERAL PRACTICE AND PROCEDURE](#) § 2025 (2d ed. 1994) (describing the test as involving “three foci”).

42 See, e.g., Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991) (providing an outlier theory of “anomalous” cases that get to trial rather than settlement); J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012) (discussing the decline of trial and rise of settlement).

43 See [Adlman](#), 134 F.3d at 1199-2000; [Maloney](#), 165 F.R.D. 26.

44 [Miller UK Ltd. v. Caterpillar, Inc.](#), 17 F. Supp. 3d 711, 718 (N.D. Ill. 2014).

45 *Id.*

46 *Id.*

47 *Id.* at 721; [FED. R. CIV. P. 26\(b\)\(1\)](#) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.”).

- 48 *Miller*, 17 F. Supp. 3d at 722 (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 (1978)) (internal quotation marks omitted).
- 49 Kaplan v. S.A.C. Capital Advisors, L.P., No. 12-CV-9350 (VM)(KNF), 2015 U.S. Dist. LEXIS 135031 (S.D.N.Y. Sept. 10, 2015).
- 50 See, e.g., *Doe v. Soc'y of Missionaries of Sacred Heart*, No. 11-CV-02518, 2014 WL 1715376, at *2 (N.D. Ill. May 1, 2014) (financing materials were relevant because “they could potentially shed light on the statute of limitations defense asserted by [defendant]”); *Miller*, 17 F. Supp. 3d (requesting party claimed that various deal documents were relevant to claims of champerty and maintenance); *Devon IT, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012).
- 51 *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, No. CV 7841-VCP, 2015 WL 778846, at *9 (Del. Ch. Feb. 24, 2015) (“[T]he terms of the final agreement--such as the financing premium or acceptable settlement conditions-- could reflect an analysis of the merits of the case.”).
- 52 *Carlyle*, 2015 WL 778846, at *8. See *Doe*, 2014 WL 1715376, at *4 (holding that an email from a public relations firm that was forwarded from plaintiff's counsel to a litigation financing company was not protected under the work-product privilege because the communications “deal only with the public relations firm's strategy to ‘generate media coverage.’” rather than with litigation strategy).
- 53 See *United States v. Adlman*, 134 F.3d 1194, 1198 (2d Cir. 1998) (“We believe that a requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and policies of the Rule. Nowhere does Rule 26(b)(3) state that a document must have been prepared to *aid* in the conduct of litigation in order to constitute work product, much less *primarily or exclusively* to aid in litigation.”); *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983) (“[T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.”); *Carlyle*, 2015 WL 778846, at *8 (applying Delaware law).
- 54 *Carlyle*, 2015 WL 778846, at *9.
- 55 *Id.*
- 56 *Mondis Tech., Ltd. v. LG Elecs., Inc.*, No. 2:07-CV-565-TJW-CE, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011) (“Although the [funding] documents may not have been prepared in connection with ongoing litigation, the documents were at a minimum created for possible future litigation.”). At least one author has noted that evaluative materials prepared in the audit setting are prepared because of the threat of litigation, and are therefore protected by work product privilege. Giesel, *supra* note 38, at 1118.
- 57 *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 736 (N.D. Ill. 2014) (internal citations and quotation marks omitted); *Mondis*, 2011 WL 1714304, at *2.
- 58 *Mondis*, 2011 WL 1714304, at *3.
- 59 *Doe v. Soc'y of Missionaries of Sacred Heart*, No. 11-CV-02518, 2014 WL 1715376, at *4 (N.D. Ill. May 1, 2014).
- 60 This view is also supported by some of the secondary literature on this topic. See, e.g., Giesel, *supra* note 38, at 1111-12 (“The common-interest concept in work-product jurisprudence should simply be a shortcut to determining whether the disclosure ‘substantially increased the opportunity for potential adversaries to obtain information,’ or was ‘not inconsistent with maintaining secrecy against opponents,’ or whether ‘the disclosing party had a reasonable basis for believing that the recipient’ of the materials ‘would keep the disclosed material confidential.’”) (internal citations omitted).
- 61 *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010) (combining analysis of attorney-client privilege and work-product doctrine principles and rejecting plaintiff's argument that the district court erred in finding that no common interest existed between plaintiff and the litigation funder prior to the deal being consummated).
- 62 See, e.g., *Devon IT, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012) (not drawing such a distinction); *Charge Injection Techs, Inc. v. E.I. DuPont De Numours & Co.*, No. 07C-12-134, 2015 WL 1540520 (Del. Super.

Ct. Mar. 31, 2015) (extending protection to materials created during the negotiation of litigation funding). Given the language of the common interest doctrine, however, one can see the basis for distinguishing between materials created *after* a litigation funding agreement is entered into, and materials generated prior to entering into such an agreement.

63 See, e.g., *Del Webb Cmty. Inc. v. Partington*, 652 F.3d 1145, 1156 (9th Cir. 2011) (“The consistent trend across the country is toward limiting, not expanding, champerty’s reach.”).

64 For instance, a funder’s assessment of the plaintiff’s likely recovery should not be used to influence the fact-finder’s resolution of the claim’s merits, any more than an adversary should be able to call its adversary’s attorneys to testify about the legal weaknesses of their client’s case. See, e.g., *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 741 (N.D. Ill. 2014) (“What [Mattenson] should not be allowed to do is cross-examine lawyer Bradley about the company’s legal vulnerabilities.”) (citing *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763 (7th Cir. 2006)); *Mister v. Ne. Ill. Commuter R.R. Corp.*, 571 F.3d 696 (7th Cir. 2009) (party admission can be excluded under Rule 403).

65 *Frank v. TeWinkle*, 45 A.3d 434, 441 (Pa. Super. Ct. 2012).

66 *Devon*, 2012 WL 4748160, at *1.

67 *Id.*

68 *Id.*

69 *TeWinkle*, 45 A.3d at 441.

70 FED. R. CIV. P. 26(b)(3)(A)(ii).

71 See 6 DANIEL R. COQUILLETTE ET AL., MOORE’S FEDERAL PRACTICE § 26.70 [5][b] (2015).

72 See *infra* Part II.B.

73 *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711 (N.D. Ill. 2014).

74 *Id.* at 720.

75 *Id.* at 721.

76 *Id.*

77 *Id.* at 725 (“Caterpillar’s claim that the ‘deal documents’ are relevant rests on its largely unexplained assertion that the Miller’s funding agreement offends the Illinois statute prohibiting champerty and maintenance ... we are told unequivocally [by Caterpillar] that ‘litigation funding agreements are unlawful in Illinois and support a new Caterpillar defense.’”).

78 *Id.* (citing 720 ILCS 5/32-12). The judge reached the same conclusion regarding Caterpillar’s assertion that the deal documents were relevant to an argument about who constituted the “real party in interest,” finding that third-party funders were in no way similar to a subrogee/insurance company or other arrangement whereby the third party takes control over the case or its settlement, the analogy required under Illinois law for a defense of “real party in interest.” *Id.* at 728-30.

79 Moreover, the court noted that the work-product privilege had not been waived by sharing materials with third parties. For one, the work-product privilege is only waived when the material shared is with an adversary or in a manner that substantially increases the likelihood that the material will be shared with an adversary. *Id.* at 736. Third-party funders are not adversaries, the court noted, and moreover, the materials were shared pursuant to oral agreements of confidentiality. *Id.*

80 See *id.* at 724 (making clear that Illinois law forbidding champerty and maintenance is limited only to the funding of litigation that would not have otherwise been brought--in other words--when the funder is an “official” intermeddler whose services were not requested).

81 *Id.* at 742 (quoting HERSHEL SHANKS, THE ART AND CRAFT OF JUDGING: THE DECISIONS OF JUDGE LEARNED HAND 13 (Macmillan, 1968)).

- 82 See, e.g., J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015) (discussing the ways in which defendants have used procedural mechanisms and contracts to reduce or eliminate the ability of private parties to enforce various substantive laws, thereby avoiding the more difficult task of effectuating change to the substantive law at the legislative level).
- 83 [Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.](#), No. CV 7841-VCP, 2015 WL 778846 (Del. Ch. Feb. 24, 2015).
- 84 *Id.* at *9.
- 85 *Id.*
- 86 At least two additional courts have recently held that litigation funding documents are protected by the work product doctrine. See, e.g., [In re International Oil Trading Co.](#), 548 B.R. 825, 835 (Bankr. S.D. Fla. 2016) (concluding that the documents concerning the negotiation of a litigation funding agreement were protected by the attorney-client privilege and the work-product doctrine); [Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co.](#), No. 07C-12-134-JRJ, 2015 WL 1540520 at *4 (Del. Super. Ct. Mar. 31, 2015) (same).
- 87 [Kaplan v. S.A.C. Capital Advisors](#), 1:12-cv-09350-VM-KNF, (S.D.N.Y. Sept. 10, 2015) (Memorandum and Order).
- 88 For instance, those requesting production of materials related to alternative litigation finance frequently invoke crime/fraud arguments-- specifically, that alternative litigation finance constitutes illegal champerty and maintenance. See, e.g., [Devon It, Inc. v. IBM Corp.](#), No. 10-2899, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012); [Miller UK Ltd. v. Caterpillar, Inc.](#), 17 F. Supp. 3d 711, 735 (N.D. Ill. 2014). See also [Charge Injection Techs, Inc. v. E.I. DuPont De Numours & Co.](#), C.A. No. 07C-12-134, 2015 WL 1540520 (Del. Super. Ct. Mar. 31, 2015), an ongoing case wherein defendant alleges that plaintiffs' litigation funding arrangement constitutes an illegal arrangement under maintenance and champerty law in Delaware.
- 89 See Glover, *supra* note 42 at 1748-49 (discussing how information imbalances can disadvantage plaintiffs in the settlement process).
- 90 Compare [Frank v. TeWinkle](#), 45 A.3d 434, 441 (Pa. Super. Ct. 2012) (champerty and maintenance “alive and well” in PA), with [Miller](#), 17 F. Supp. 3d (noting that champerty and maintenance in Illinois requires that the third-party financier be an officious intermeddler for otherwise waning doctrines of champerty and maintenance to apply).
- 91 See, e.g., [Miller](#), 17 F. Supp. 3d at 724, 729 (asserting that funding documents were relevant to an inquiry about the real party in interest).
- 92 See, e.g., [Hickman v. Taylor](#), 329 U.S. 495 (1947) (discussing that attorney's thoughts and mental impressions are at the core of the protection for work-product).
- 93 See, e.g., [In re Rivastigmine Patent Litig.](#), 237 F.R.D. 69, 87 (S.D.N.Y. 2006) (explaining that a categorical log is warranted where “(a) a document-by-document listing would be unduly burdensome and (b) the additional information to be gleaned from a more detailed log would be of no material benefit to the discovering party in assessing whether the privilege claim is well-grounded”); [United States. v. Gericare Med. Supply Inc.](#), 2000 WL 33156442, at *4 (S.D. Ala. Dec. 11, 2000) (permitting plaintiff to use a category-by-category privilege log because a document-by-document privilege log would have disclosed “information that itself would reveal the plaintiff's strategy and mental processes”).
- 94 [FED. R. CIV. P. 26](#), Advisory Committee's note to 1993 amendment (suggesting the use of categorical logs “when voluminous documents are claimed to be privileged or protected” and may be unduly burdensome).
- 95 CIVIL DISCOVERY STANDARDS, No. 27 (AM. BAR. ASS'N 2004). In that Standard, the ABA recommends the following alternative to the disclosure of itemized information to support a claim of privilege:
If it would be overly burdensome, expensive and/or time-consuming to prepare a detailed listing of the information called for in Standard 26, the parties and the court should consider whether the information can be supplied in some other way or, given the demands and circumstances of the case, it can be reduced or eliminated for some or all of the documents or communications in question including whether: a. a *categorical or general description of the material in question would be sufficient*; b. the existence of particular privileged communication, as opposed to their content, is material to the litigation; c.

the likely probative value of the material in question justifies the expense and burden of providing detailed information; and d. the expense of providing detailed information should be shared or paid by the party requesting that it be done.

Id.

96 *See, e.g.*, U.S. CHAMBER INST. FOR L. REFORM, THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES 4 (2009) (listing out the reasons litigation financing is problematic and advocating for its prohibition).

97 *Del Webb Cmty., Inc. v. Partington*, 652 F.3d 1145, 1156 (9th Cir. 2011) (“The consistent trend across the country is toward limiting, not expanding, champerty’s reach.”); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 727 (N.D. Ill. 2014) (“[M]aintenance and champerty have been narrowed to a filament.”); Jennifer Anglim Kreder & Benjamin A. Bauer, *Litigation Finance Ethics: Paying Interest*, J. OF THE PROF. LAW. 1, 6, 21 (2013) (writing for the ABA’s Commission on Ethics 20/20’s white paper of February 2012 and stating that “shifts away from older legal doctrines such as champerty, and society’s embracing of credit as a financial tool have paved the way for a litigation financing industry that appears poised to continue to grow”); *Saladini v. Righellis*, 687 N.E.2d 1224, 1226 (Mass. 1997) (pointing out that the champerty doctrine is no longer needed in Massachusetts); *Osprey, Inc. v. Cabana Ltd. P’ship*, 532 S.E.2d 269, 277 (S.C. 2000) (same in South Carolina); *Toste Farm Corp. v. Hadbury, Inc.*, 798 A.2d 901, 905 (R.I. 2002) (collecting cases finding that champerty is no longer needed in a modern era).

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