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Via Email: RulesCommittee_Secretary@ao.uscourts.gov

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Re: Application of the Attorney–Client Privilege and Work-Product Doctrine to Third Party Litigation Funding Agreements

Dear Secretary Dubay:

I respectfully submit this comment to the Advisory Committee on Civil Rules regarding whether mandating disclosure of third-party litigation funding agreements ("TPLF Agreements") implicates, diminishes, or otherwise erodes protections afforded by the attorney–client privilege or work-product doctrine. In reviewing the back-and-forth commentary and rules suggestions related to the Committee's deliberation of whether to consider amending Federal Rule of Civil Procedure 26 to require disclosure of TPLF Agreements, some commentators state in a conclusory manner that mandatory disclosures "could" nullify or somehow "threaten" these discovery protections. Yet, it does not appear that any commentator has addressed these perceived threats with sufficient detail to allow the Committee to reach a well-informed conclusion whether a rule-based disclosure requirement improperly invades work-product or substantive-law privilege protections.

I write, therefore, in an effort to fill this important gap. Having studied, lectured, and published commentary on evidentiary privileges and the work-product doctrine generally over the last 20-plus years, and more recently applied my study to TPLF Agreement disclosures, for the reasons explained below I conclude that mandating disclosures will not adversely affect a party's attorney–client privilege shield for communications or that party's or her lawyer's work-product. I do not take a position on whether the Committee should or should not adopt a mandatory-disclosure rule for TPLF Agreements, and while the Committee may see certain policy reasons for rejecting such a rule, it should not, in my view, perceive the attorney–client privilege or work product doctrine as barriers to implementing such a rule.

Background

I have a demonstrated interest in understanding and developing the law of privileges. In addition to my trial and appellate work, I have devoted a substantial amount of my practice to the study and analysis of evidentiary privileges in general and the attorney–client privilege and work-product doctrine in particular. I have published over 40 articles in various journals on privilege-related issues, including as a co-author of the peer-reviewed article *The Sedona Conference Commentary on Cross-Border Privilege Issues*, 23 Sedona Conf. J. 475 (2022).

Separately, I am the sole creator and author of the legal blog *Presnell on Privileges*, which the ABA Journal previously named to its Top 100 Blawg List, and the lead author of the legal treatise *Privileges and Protections: Tennessee and Sixth Circuit Law* (Matthew Bender & Co. 2026), a 700-plus page examination of each evidentiary privilege recognized under Tennessee law and federal law with a focus on Sixth Circuit decisions. I have given over 100 legal-education presentations or client-focused privilege training sessions, been retained to author and file several amicus briefs on privilege issues, including before the United States Supreme Court, Federal Circuit, Ninth Circuit, and Texas Supreme Court, and been retained by law firms to serve as a legal expert witness in the area of evidentiary privileges.

Question Presented

I understand that the Committee is debating whether to consider amending Federal Rule of Civil Procedure 26(a) to require parties to disclose their *TPLF Agreements* with non-party litigation-funding groups related to the at-issue lawsuit. As I understand the scope of this proposed requirement, the mandatory-disclosure rule would not command automatic disclosure of related information, such as communications between the party's lawyers and non-party funders or documents shared among parties, their counsel, and non-party funders. This latter batch of information, rather, would remain subject to potential Rule 26(b) discovery, to which a responding party may assert various objections, including relevance, lack of proportionality, or privilege or work-product protections they would identify and describe in accordance with Rule 26(b)(5).

Some commentators interested in the Committee's debate and consideration assert that the disclosure of TPLF Agreements implicates privilege and work-product concerns. For example, one commentator contends that "[t]he most fundamental risk is that disclosure of funding arrangements *could* abrogate core protections of attorney-client privilege and the work product doctrine." (Rules Suggestion 25-CV-O, October 1, 2025 Letter, at p. 17) (emphasis added). And even though this "fundamental risk" allegedly pertains to "funding arrangements," not communications about funding arrangements, this commentator continues that a disclosure rule "threatens to pierce" these protections that "ensure candid *communication* between client and counsel" and would cause "parties and counsel [to] sanitize their *communications* with funders." *Id.* (emphasis added).

The Advisory Committee's Third-Party Litigation Funding Subcommittee, in its April 2026 report, states that "[t]entative initial reactions to the last decade of discussion of TPLF disclosure include … required disclosure of all details of the funding arrangement (including communications between counsel and the funder about counsel's request for funding) would raise very serious (opinion) work product problems." The Subcommittee did not include the attorney–client privilege as an adverse "tentative initial reaction" or "raising serious problems." Nonetheless, parties often, and unintentionally, improperly conflate privilege and work-product protections. And while these safeguards may overlap for certain information, they serve entirely different purposes and present separate and distinct legal questions.

The Question Presented, therefore, is whether the Committee should view the attorney–client privilege or work-product doctrine as an impediment to considering whether to adopt a mandatory-disclosure rule for TPLF Agreements?

Short Answer

No. The attorney–client privilege shields from compelled disclosure confidential communications made within an attorney–client relationship for legal-advice purposes. A TPLF Agreement between a party, or that party's counsel, and a non-party funding entity is not a communication, not a communication between a client and her lawyer, and does not pertain to the request for or provision of legal advice. The work-product doctrine shelters from compelled disclosure information created by a party or that party's representative, including her lawyer, in anticipation of litigation or for trial. A TPLF Agreement arises in the ordinary course of a non-party funding entity's business. The Committee, therefore, should not perceive the attorney–client privilege or work-product doctrine as a barrier to adopting a mandatory-disclosure rule for TPLF Agreements so long as the litigant-party can assert privilege and work-product objections over putatively protected portions of those agreements as they otherwise would in the normal course of discovery.

Attorney–Client Privilege

Courts interpret and apply the attorney–client privilege's scope "in light of its purpose." *Fisher v. United States*, 425 U.S. 391, 403 (1976); *In re Columbia/HCA Healthcare Corp. Billing Pracs. Litig.*, 293 F.3d 289, 294 (6th Cir. 2002). The privilege's purpose is to encourage clients to communicate freely and candidly with their lawyers so that those lawyers may render optimal legal advice. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Trammel v. United States*, 445 U.S. 40, 51 (1980). Applying the privilege, however, necessarily renders nondiscoverable relevant information—the client's statements—but courts have long considered the social good arising from the privilege's implementation to outweigh any loss of relevant evidence. *See United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950). Yet, for this same reason—the suppression of relevant evidence—courts interpret the privilege narrowly.

Construing the privilege narrowly, yet fully to enforce its purpose, courts have required the party seeking the privilege's protection to prove (1) a communication (2) between the client and her lawyer (3) in a confidential manner (4) for the purpose of obtaining legal advice. *See generally* David M. Greenwald, et al., *Testimonial Privileges* § 1:5 (Thomson Reuters 2025) (collecting cases). Importantly, the privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts." *Upjohn Co*., 449 U.S. at 395–96 ("A fact is one thing and a communication concerning that fact is an entirely different thing.") (citations omitted). The communication, moreover, must occur between the client (or her agents) and her lawyer (or the lawyer's agents). This element generally means that the client must have a professional engagement with an attorney licensed to practice law in the relevant jurisdiction. *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 338 n.3 (4th Cir. 2005); *In re Behr Dayton Thermal Prods., LLC*, 298 F.R.D. 369, 375 (S.D. Ohio 2013). The legal-advice element, too, is critical as courts limit the privilege's scope to those communications with a lawyer made for the purpose of securing

legal advice. *Fed. Trade Comm'n v. Boehringer Ingelheim Pharms., Inc.*, 892 F.3d 1264, 1267 (D.C. Cir. 2018); *Fausek v. White*, 965 F.2d 126, 129 (6th Cir. 1992).

A word about the distinction between the privilege's confidentiality element and waiver is warranted for purposes of this letter. To be privileged in the first instance, the client and attorney must communicate in a confidential manner and intend for the communication to remain confidential thereafter. *United States v. Evans*, 113 F.3d 1457, 1462–63 (7th Cir. 1997); *Fausek*, 965 F.2d at 129; Greenwald, *supra*, § 1:47 ("It is fundamental logic behind the attorney-client privilege that no communications will be protected from disclosure unless made in confidence and intended to remain confidential."). Waiver, on the other hand, is the voluntary relinquishment of a known right. Once the privilege (a known right) is established, which necessarily means the client and attorney communicated in a confidential manner, the privilege holder may elect to waive the privilege's protections by disclosing the privileged communication to a third party. *In re King's Daughters Health Sys., Inc.*, 31 F.4th 520, 527 (6th Cir. 2022).

The Attorney–Client Privilege Does Not Protect TPLF Agreements. Applying these privilege principles, one can readily see that a civil-procedure rule mandating disclosure of TPLF Agreements would not violate the protections offered by the attorney–client privilege. *First*, the privilege applies only to communications, and a TPLF Agreement is a contractual arrangement, not a communication. A communication conveys information while a contract sets forth terms and conditions with which, upon sufficient consideration, the contracting parties must comply. *Second*, a TPLF Agreement is not a confidential interaction between a client and her lawyer but rather involves a third party—the litigation funder. The Agreement therefore lacks the requisite confidentiality for privilege coverage. *Third*, while the TPLF Agreement may finance the client's lawyer to supply her with legal advice, the Agreement does not itself relate to the provision of legal advice. And, *last*, to the extent a client's lawyer inserts an otherwise privileged communication into a TPLF Agreement, that constitutes disclosure to a third party resulting in privilege waiver. *See Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 734 (N.D. Ill. 2014).

The concept of the privilege's non-application to contracts is not a new one. For example, most courts have found that the attorney–client privilege does not shelter from discovery an engagement or retention agreement between a client and her lawyer. *See, e.g.*, *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985); *Duttle v. Bandler & Kass*, 127 F.R.D. 46, 52 (S.D.N.Y. 1989). Similarly, and by analogy, jurisdictions recognizing a privilege for settlement or mediation communications hold that this privilege does not apply to settlement agreements that may arise from those privileged communications. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Universal Health Grp., Inc.*, 325 F.R.D. 602, 605 (E.D. Mich. 2016), *adopted*, 2016 WL 6822014 (E.D. Mich. Nov. 18, 2016). In short, construing the privilege narrowly, as courts must do, the attorney–client privilege simply does not shield TPLF Agreements from discovery and, therefore, should not impose an impediment to a mandatory-disclosure rule. *See generally* Grace M. Giesel, *Alternative Litigation Finance and the Attorney-Client Privilege*, 92 Denv. U. L. Rev. 95 (2014) (concluding that the attorney–client privilege does not protect communications involving non-party funders).

Work Product Doctrine

Different Protections and Purposes. While often conflated with the attorney–client privilege, the work-product doctrine offers a distinct and separate discovery protection. *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975) (stating that "the work-product doctrine is distinct from and broader than the attorney-client privilege"); *Payne v. Ind. Dep't of Corr.*, 2025 WL 1732843, at *4 (N.D. Ind. June 23, 2025) (noting that "a large part of the parties' dispute appears to stem from their conflating of the attorney-client privilege and the attorney work-product doctrine"); *see generally* Greenwald, *supra*, § 2:1 (stressing that "the attorney-client privilege and the work product doctrine serve different purposes, require different elements for successful assertion of their protections, and have different grounds for and scope of waiver"). The work-product doctrine is simultaneously broader and narrower than the attorney–client privilege. It is broader because it covers documents and things, tangible and intangible, rather than just communications. *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 713 (6th Cir. 2006); *In re Grand Jury*, 106 F.R.D. 255, 256 (D.N.H. 1985) ("Although only confidential communications between the attorney and client are protected by the attorney-client privilege, the work product doctrine may encompass any document prepared in anticipation of litigation by or for the attorney."). It is narrower because it provides qualified, non-absolute protection—even if established, the doctrine gives way upon the opposing party showing certain reasons for needing the information. *In re Pfohl Bros. Landfill Litig.*, 175 F.R.D. 13, 26 (W.D.N.Y. 1997) (noting that the work-product doctrine "is not a traditional substantive privilege, but, instead, provides qualified immunity from discovery").

The work-product doctrine promotes a different purpose. While the privilege encourages clients to supply their lawyers with candid information, the work-product doctrine is designed to preserve a "zone of privacy" within which lawyers may develop legal theories and promotes effective legal representation by giving lawyers confidence that their mental-impression and legal-opinion arrows will not easily find their way into their adversaries' quivers. *Drummond Co., Inc. v. Conrad & Scherer, LLP*, 885 F.3d 1324, 1335 (11th Cir. 2018) ("The purpose of this protection is to protect the integrity of the adversary process by allowing a lawyer to work 'with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.'" (quotations omitted)); *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998).

Elements. Unlike the attorney–client privilege, the work-product doctrine is mostly[1] codified in the Federal Rules of Civil Procedure. Under the rule and courts' interpretations of it, a party seeking work-product protection must show that the putatively protected information is (1) a document or tangible thing (2) prepared in anticipation of litigation or for trial (3) by or for that party or its representative. Fed. R. Civ. P. 26(b)(3)(A); *Astra Aktiebolag v. Andrx Pharms., Inc.*, 208 F.R.D. 92, 104 (S.D.N.Y. 2002); *In re Application of Republic of Ecuador*, 280 F.R.D. 506 (N.D. Cal. 2012), *aff'd sub nom. Republic of Ecuador v. Mackay*, 742 F.3d 860 (9th Cir. 2014).

[1] Read literally, the federal civil-procedure rules limit the work-product doctrine to "documents and tangible things." Fed. R. Civ. P. 26(b)(3)(A). Courts, however, interpret the doctrine to shelter intangible work product as well. *See Adams v. Mem'l Hermann*, 973 F.3d 343, 349–50 (5th Cir. 2020) ("Despite the language of Rule 26, the work-product doctrine protects both 'tangible and intangible' work product.").

The doctrine does not protect underlying facts simply because they were provided to an attorney. *See Petersen v. Douglas Cnty. Bank & Tr. Co.*, 967 F.2d 1186, 1189 (8th Cir. 1992) ("Documents are not protected under the work product doctrine, however, merely because the other party transferred them to their attorney, litigation department, or insurer.").

Of these three elements, the most frequently disputed one is whether the putatively protected materials were prepared in anticipation of litigation or for trial. The corollary to the anticipation-of-litigation requirement is that work-product protection does not extend to materials prepared in the ordinary course of business, even if prepared by an attorney. *See, e.g.*, *Simon v. G.D. Searle & Co.*, 816 F.2d 397 (8th Cir. 1987) (refusing to apply work-product protection to risk management documents created to "keep track of, control and anticipate costs of product liability litigation for business planning purposes"). The dispute often turns on the motivation behind the at-issue document's creation. Some courts, predominantly in the Fifth Circuit, employ a "primary purpose" test under which the work-product doctrine applies if litigation was "the primary motivating purpose behind the creation of the document." *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981). The majority of courts, however, assess the anticipation-of-litigation element under a "because of" test, which provides that work-product protection applies to a document if, under the totality of circumstances, it can fairly be said to have been prepared because of the prospect of litigation. *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998); *Adlman*, 134 F.3d at 1202.

Waiver. The work-product doctrine, like the attorney–client privilege, is subject to being waived but the waiver standards for these two protections differ. While one waives the attorney–client privilege over communications disclosed to a third party, one waives the work-product doctrine over materials disclosed only to an adversary or in a manner that substantially increases the chance of an adversary obtaining the information. *See, e.g.*, *Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989) (explaining that the different waiver standards arise from the different purposes of the two protections: "The attorney-client privilege exists to protect confidential communications and to protect the attorney-client relationship" while the work-product doctrine exists "to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of an opponent").

Qualified Protection. The attorney–client privilege, once established and not waived, provides absolute protection. The work-product doctrine, by contrast, provides qualified immunity. Even if firmly determined, an adversary may nevertheless overcome the doctrine's protection upon a showing that "it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(ii). But even if an adversary hurdles this high bar, courts must still protect opinion work product, meaning information within the materials that reflect "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B); *Upjohn Co*., 449 U.S. at 401 (regarding "attorneys' mental processes," that "such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship"). Courts have described the work-product rule's protection of opinion work product as "near absolute" protection. *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977).

The Work-Product Doctrine Does Not Protect TPLF Agreements. Applying these principles, the work-product doctrine does not shield from discovery TPLF Agreements. This agreement constitutes a business transaction between a party or that party's counsel and a non-party funding entity. While the business transaction may *relate to* existing or upcoming litigation, it arises because of the funder's decision to invest capital as part of its ordinary business and an attorney's need for business financing, and it is distinctly not a document generated for a lawyer to develop legal theories for which a "zone of privacy" is necessary.

The case law on this topic is relatively scarce, contradicting, and underdeveloped. Some courts have found that the work-product doctrine does not protect TPLF Agreements from discovery. *See Chevron Corp. v. Salazar*, 2011 WL 13243797 (S.D.N.Y. Aug. 16, 2011); *Combs v. Bridgestone Americas, Inc.*, 2023 WL 9530592 (E.D. Ky. Nov. 27, 2023), *report and recommendation adopted*, 2024 WL 188360 (E.D. Ky. Jan. 16, 2024); *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, 2015 WL 778846 (Del. Ch. Feb. 24, 2015); *Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co.*, 2015 WL 1540520 (Del. Super. Ct. Mar. 31, 2015); *Burkhart v. Genworth Fin., Inc.*, 2024 WL 3888109 (Del. Ch. Aug. 21, 2024); *In re Cote d'Azur Estate Corp.*, C.A. No. 2017-0290-JTL (Del. Ch. Dec. 8, 2022), *as stated in Burkhart*, 2024 WL 3888109, at *7. Other courts, mostly if not exclusively in patent-infringement cases, have ruled that the work-product doctrine protects TPLF Agreements, *see Odyssey Wireless, Inc. v. Samsung Elecs. Co., Ltd.*, 2016 WL 7665898 (S.D. Cal. Sept. 20, 2016); *Taction Tech., Inc. v. Apple Inc*., 2022 WL 18781396 (S.D. Cal. Mar. 16, 2022); *Cont'l Cirs. LLC v. Intel Corp*., 435 F. Supp. 3d 1014 (D. Ariz. 2020); *Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc*., 2018 WL 466045 (W.D. Pa. Jan. 18, 2018), although one of these decisions, *Odyssey Wireless*, relied on cases that permitted discovery for communications related to TPLF Agreements rather than the agreements themselves, and another case, *Taction Tech*., relied upon *Odyssey Wireless*.[2]

While this issue continues to develop, it is instructive to assess how courts have applied the work-product doctrine to other litigation-related agreements. Courts have held that the work-product doctrine does not protect an attorney's fee agreement or arrangement with her client, *Gusman v. Comcast Corp.*, 298 F.R.D. 592, 599–600 (S.D. Cal. 2014), an attorney's invoices or billing statements, *SPV-LS, LLC v. Transamerica Life Ins. Co.*, 2016 WL 3923099 (D.S.D. July 15, 2016), records of payments from a client to her attorney, *JP Morgan Chase Bank, N.A. v. PT*

[2] Other cases have addressed a related topic not relevant to the proposed amendment or this comment—whether the work-product doctrine covers communications and other documents, such as legal memoranda, supplied to non-party funders. *Hardin v. Samsung Elecs. Co.*, 2022 WL 14976096 (E.D. Tex. Oct. 25, 2022); *Samesurf, Inc. v. Intuit, Inc.*, 2024 WL 4994338 (S.D. Cal. Dec. 4, 2024); *Thimes Sols., Inc. v. TP-Link USA Corp*., 2022 WL 18397128 (C.D. Cal. Oct. 6, 2022); *Miller UK Ltd. v. Caterpillar, Inc*., 17 F. Supp. 3d 711 (N.D. Ill. 2014); *Fulton v. Foley*, 2019 WL 6609298 (N.D. Ill. Dec. 5, 2019); *Viamedia, Inc. v. Comcast Corp*., 2017 WL 2834535 (N.D. Ill. June 30, 2017); *Acceleration Bay LLC v. Activision Blizzard, Inc*., 2018 WL 798731 (D. Del. Feb. 9, 2018); *United States v. Ocwen Loan Servicing, LLC*, 2016 WL 1031157 (E.D. Tex. Mar. 15, 2016) (motion to compel "litigation-investing efforts" but unclear whether this included TPLF Agreements); *United States v. Homeward Residential, Inc*., 2016 WL 1031154 (E.D. Tex. Mar. 15, 2016) (same); *Doe v. Soc'y of Missionaries of Sacred Heart*, 2014 WL 1715376 (N.D. Ill. May 1, 2014); *In re Nat'l Prescription Opiate Litig*., 2018 WL 2127807 (N.D. Ohio May 7, 2018). This letter focuses on whether the attorney–client privilege or work-product doctrine protects TPLF Agreements.

Indah Kiat Pulp & Paper Corp. Tbk, 2011 WL 6753984 (N.D. Ill. Dec. 22, 2011), a third-party administrator agreement, *Brooks v. Mon River Towing, Inc.*, 2013 WL 1748334 (W.D. Pa. Apr. 3, 2013), *report and recommendation adopted*, 2013 WL 1748231 (W.D. Pa. Apr. 23, 2013), a settlement agreement, *U.S. ex rel. Fago v. M & T Mortg. Corp.*, 242 F.R.D. 16 (D.D.C. 2007), or a patent-transfer agreement that changed plaintiffs, *Monco v. Zoltek Corp.*, 317 F. Supp. 3d 995 (N.D. Ill. 2018). Each of these documents relate to litigation but were prepared in the ordinary course of business and do not constitute materials falling within an attorney's "zone of privacy" that the work-product doctrine is designed to protect. To be sure, these courts permitted the attorneys to redact true work-product information within the agreements and statements, but did not employ the doctrine to preclude production of the entire documents.

So too here. A TPLF Agreement does not warrant work-product protection because, while related to litigation, it is a contracting document created in the ordinary course of the non-party funder's business for the purpose of memorializing a financing arrangement. If, as explained below, these agreements contain potentially protected statements, then the producing party may redact those statements, identify them on a privilege log, and allow the requesting party to decide whether to challenge.

Redactions and Privilege Logs for Other Documents

While the focus of the proposed disclosure amendment—and this letter—is on TPLF Agreements, some opposing the amendment expand their privilege and work-product concerns to *other* documents related to TPLF Agreements, such as pre-agreement communications, lawyers' legal memoranda assessing the likelihood of success on certain causes of action, litigation updates shared with non-party funders, and the like. The Federal Rules of Civil Procedure, however, supply an existing mechanism for requesting parties to separately seek that *other* discovery and responding parties to separately object to their disclosure on privilege or work-product grounds.

Specifically, if a requesting party sought communications between its adversary (or her lawyer) and the adversary's non-party funder, the adversary may assert that the attorney–client privilege protects those communications from discovery. And while, as explained above, a disclosure of certain communications to a non-party funder could result in privilege waiver, the adversary would identify those putatively privileged communications on a Rule 26(b)(5) privilege log so that the requesting party could assess the privilege objection's strength.

Similarly, if a requesting party sought discovery of adversary counsel's legal memoranda shared with the non-party funder, the adversary could object on work-product grounds and identify the memoranda on a privilege log so the requesting party could decide whether to challenge the work-product assertion over some or all of the documents. *See, e.g.*, *Doe v. Soc'y of Missionaries of Sacred Heart*, 2014 WL 1715376 (N.D. Ill. May 1, 2014) (finding that the work-product doctrine protected some, but not all, of information that plaintiff sent to non-party funders). The requesting party could, separately, accept the work-product designation as valid but seek to overcome the protection through a showing of substantial need and the inability to obtain the information without undue hardship. Fed. R. Civ. P. 26(b)(3)(A)(ii). And even if the requesting party succeeded, it

would likely achieve production of fact work product, with the adversary's opinion work product (mental impressions, legal conclusions, and the like) likely remaining protected.

Some argue that TPLF Agreements themselves are embedded with counsel's legal opinions, assessments of strengths and weaknesses, and litigation strategies. *See* Rules Suggestion 25-CV-O, October 1, 2025, Letter, at p. 17 ("Litigation funding agreements often contain detailed discussions of case strategy, assessments of strengths and weaknesses, and projections about damages."). But the existing discovery rules govern that situation, too. The adversary could produce the TPLF Agreement in accordance with any mandatory-disclosure rule but redact information she believes falls within the work-product protection, identify the information on a privilege log, and allow the requesting party to challenge the work-product assertion, seek to overcome a valid assertion, or let it be. *See Chevron*, 2011 WL 13243797, at *1 (rejecting work-product protection for TPLF Agreement but recognizing that, "[o]f course, such documents may include some protected information that is subject to redaction"); *see also Doe*, 2014 WL 1715376, at *4 (finding documents submitted to non-party funders relevant but partially protected by the work-product doctrine, and ordering plaintiff to produce the documents with redactions).

Neither the attorney–client privilege nor the work-product doctrine provides a blanket shield for TPLF Agreements. To the extent a party believes that these protections shelter ancillary documents or specific information embedded within the agreement, existing civil-procedure rules and discovery practices supply the opportunity for, and standards governing, those challenges. As such, the Advisory Committee should not consider the attorney–client privilege or work-product doctrine as a categorical obstruction to assessing whether to amend the civil-procedure rules to include a mandatory-disclosure rule for TPLF Agreements, or any lesser disclosure rule, such as in camera production, so long as the litigant-party to the TPLF Agreement has the ability to assert these protections to portions of the agreements in the ordinary course of discovery practice.

Conclusion

Regarding the debate whether to amend the civil-procedure rules to require automatic disclosure of TPLF Agreements (rather than, for instance, communications and memoranda related to TPLF Agreements), the Advisory Committee continues to consider a variety of policy reasons for doing so and not doing so. The Third-Party Litigation Funding Subcommittee's report for the April 14, 2026, Advisory Committee meeting concludes with this statement: "One might say there is a lot of underbrush to clear away to devise a possible rule amendment proposal." To the extent the attorney–client privilege or work-product doctrine constitutes part of that underbrush, I respectfully submit the Advisory Committee can clear it away.

Yours very truly,

/s/ E. Todd Presnell

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