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Privilege and Confidentiality in Third Party Funder Due Diligence: The Positions in the United States and Switzerland and the Resulting Expectations Gap in International Arbitration
by A. Frischknecht and V. Schmidt

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Privilege and Confidentiality in Third Party Funder Due Diligence: The Positions in the United States and Switzerland and the Resulting Expectations Gap in International Arbitration

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Introduction

Before investing hundreds of thousands or even millions of dollars in a commercial dispute, third party funders routinely conduct extensive due diligence into the factual and legal background of the dispute. Ultimately, of course, the purpose of such due diligence is to enable the third party funder to make an informed decision as to whether there is a sufficient likelihood of success on the merits to justify the funder's investment.

A prudent funder will base its investment decision on a comprehensive assessment of the strengths and weaknesses of the claimant's position. That assessment will often require access to documents and other evidence as well as candid discussions with counsel. This raises a variety of issues concerning legal privilege and confidentiality: where a document is protected by applicable rules of legal privilege or is otherwise immune from disclosure, does a claimant risk waiving that protection if it discloses the document to the funder in the course of due diligence? What if counsel has prepared a written analysis of the strengths and weaknesses of the client's case for the benefit of the client—could an adverse party subsequently obtain disclosure of that analysis if it has been shared with the funder? Could the funder be called to testify as a witness concerning its own investigation in the course of due diligence?

In international arbitration, these issues become even more complex. It is often difficult, if not impossible, for a party to assess in advance how an arbitral tribunal will approach issues of legal privilege and confidentiality. It has been said that "arbitral tribunals should do justice to the legitimate expectations of the parties"[3] when it comes to evidentiary privileges. This implies an understanding of what the parties' legitimate expectations are, which in turn requires an understanding of the applicable privilege and confidentiality rules in each party's home jurisdiction.

In Sections 1 and 2 of this article, we examine the principles governing legal privilege and confidentiality in the United States and Switzerland, respectively. Based on those principles, we then examine the legitimate expectations a party to litigation in each of the two countries might have in respect of matters of legal privilege and confidentiality in connection with a third party funder's due diligence. Finally, we conclude in Section 3 with some brief comments on how an arbitral tribunal might approach these issues where the parties' legitimate expectations differ. We also offer some practical suggestions to minimize the risk of waiver where possible and to ensure that clients understand any risk that remains.

Before proceeding any further, however, we note that there are a multitude of other considerations that will be relevant in practice but are beyond the scope of this article. One of these is whether, and if so under what circumstances, a party could be required to disclose the existence of the third party funding relationship itself to the court or tribunal and/or to an adverse party or parties. For present purposes, we assume that the existence of the third party funding relationship *per se* is already known to the adverse party or parties. Nor do we address whether any particular form of funding arrangement is permissible under the ethical rules that may apply in any given jurisdiction. Our focus here is on the specific issues of privilege and confidentiality.

1. Privilege and Confidentiality Considerations in Respect of Funder Due Diligence in the United States

1.1 Status of Third Party Litigation Funding in the United States

Third party litigation funding generally, and third party financing of commercial claims in particular, is a relatively recent, but growing phenomenon in the United States. The total value of third party investments in U.S. lawsuits has been estimated to exceed US$1 billion[4], although only a portion of that amount will be attributable to the financing of commercial claims. Major funders of commercial claims include hedge funds, insurance companies, financial institutions, high net worth individuals as well as specialized litigation financing firms.[5]

The rules that apply to third party funding vary substantially from jurisdiction to jurisdiction within the United States, and a detailed analysis of the current state of the law is beyond the scope of this article.[6] In any event, however, counsel will want to give careful consideration to the specific state laws and local attorney rules of professional conduct in the relevant jurisdiction(s) within the United States when contemplating a potential third party funding arrangement.

1.2 Attorney-Client Privilege and Work Product Doctrine

The rules governing the attorney-client privilege and work product doctrine are not uniform throughout the United States. Instead, each state has its own rules, and there is also a body of federal law that applies in the federal courts.[7]

Although the details will differ from jurisdiction to jurisdiction within the United States, the principles governing the application of the attorney-client privilege and work product

doctrine are broadly comparable. This article will focus primarily on federal court cases from New York and the Second Circuit Court of Appeals.

1.2.1 Privilege as a Limited Exception to Otherwise Broad Disclosure

The attorney-client privilege and work product doctrine are best understood in the broader context of the discovery process in the United States. That process differs significantly from the procedures governing disclosure in civil litigation in most other countries. Among the key features of U.S.-style discovery are the following:

First, discovery is controlled by the parties, and most discovery disputes are resolved through negotiations among counsel. Courts become involved in discovery disputes only where the requesting party moves to compel disclosure, or where the objecting party moves for a protective order.

Second, document requests are often very broad and typically seek "all documents concerning or relating to" a particular issue. Although there is a requirement that the documents sought must be relevant to the dispute, "relevance" in the context of discovery is defined broadly "to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."[8] The general rule in the U.S. is that a party may not "pick and choose" among documents that are responsive to the opposing party's document requests but instead "must provide [the requesting party] with *all non-privileged responsive documents* in [the disclosing party's] possession."[9] The attorney-client privilege and work product doctrine thus operate as a limited exception to the general rule that a party must hand over all relevant material in its possession, custody or control at the request of the other party.

Third, a unique feature of discovery in the United States is the widespread use of depositions, *i.e.,* witness examinations before trial. Depositions provide a valuable opportunity to explore the source and extent of a witness's knowledge and the witness's expected testimony at trial. The outcome of depositions also informs the parties' assessment of the strengths and weaknesses of their respective cases and the likelihood that one side or the other ultimately will prevail on the merits. As a result, depositions often influence whether (and on what terms) the parties agree to settle their dispute.[10]

The Federal Rules of Civil Procedure provide that counsel may instruct the witness not to answer a question posed during a deposition only on limited grounds, including "*when necessary*

to preserve a privilege."[11] By contrast, where counsel objects to the question on some other basis, "the examination still proceeds; the testimony is taken subject to any objection."[12] Here again, the privilege operates as a limited exception to the general rule that a witness must answer questions from an adverse party's counsel even where the question is objectionable for some other reason.

1.2.2 Scope of Attorney-Client Privilege

"The attorney-client privilege protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance."[13] There are two key limitations to the attorney-client privilege. *First,* the communication between client and counsel must be confidential. Accordingly, the attorney-client privilege generally does not extend to "communications made in the presence of third parties who are objectively not necessary to informed attorney-client contact."[14]

Second, "the privilege is triggered only by a client's request for legal, as contrasted with business, advice."[15] To qualify for protection, "the predominant purpose of the communication [must be] to render or solicit legal advice."[16] Where a document contains legal advice that is merely "incidental to the nonlegal advice that is the predominant purpose of the communication," redaction of the legal advice, rather than withholding of the entire document, is generally appropriate.[17]

1.2.3 Scope of Work Product Doctrine

"The attorney work product doctrine provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial."[18] In the words of the United States Supreme Court in the seminal case of *Hickman v. Taylor,*[19] the work product doctrine is a reflection of "the general policy against invading the privacy of an attorney's course of preparation [that] is so well recognized and so essential to an orderly working of our system of legal procedure."[20]

As codified in Fed. R. Civ. P. 26(b)(3), the doctrine applies to "(1) a document or tangible thing, (2) that was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by or for his representative."[21] In the Second Circuit and most other Circuits,[22] any document prepared "because of" pending or anticipated litigation may qualify for protection as

work product.[23] The work product doctrine is thus broader than the attorney-client privilege because it extends to documents prepared for a business-related purpose as long as they were prepared because of litigation.[24] Whether a document was prepared because of litigation "turns on whether it would have been prepared irrespective of the . . . litigation."[25]

On the other hand, the work product doctrine is narrower than the attorney-client privilege in that the former does not protect documents reflecting legal advice that is unrelated to pending or anticipated litigation.[26] Moreover, under Fed. R. Civ. P. 26(b)(3), only documents or tangible things qualify for protection as work product.[27] However, some federal courts have found that the underlying common law doctrine extends more broadly to "all trial preparation activities and all communications made principally for the purpose of preparing for litigation or trial."[28]

There are two basic categories of work product. The first category is generally referred to as "opinion work product" and consists of the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."[29] Under the Federal Rules of Civil Procedure, a party may be required to disclose opinion work product to an adversary only in exceptional circumstances (if at all). The Second Circuit has left open the possibility of "whether such opinion work product is ever discoverable upon a showing of necessity and unavailability by other means" but has made clear that "at a minimum, such material is to be protected unless a highly persuasive showing is made."[30]

The second category of work product, often referred to as "fact work product," includes all other documents prepared because of litigation and "may encompass factual material, including the result of a factual investigation."[31] Fact work product may include documents prepared by the agents of a party's attorney,[32] *i.e.,* by non-attorneys "enlisted by legal counsel to perform investigative or analytical tasks to aid counsel in preparing for litigation,"[33] or by non-attorney employees of the party itself, provided that the employees were acting at the direction of counsel.[34]

The Federal Rules of Civil Procedure afford less protection to fact work product in comparison to opinion work product. Indeed, a party may be required to disclose documents that qualify as fact work product where the requesting party "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[35] Whether compelled disclosure of fact work product is warranted

in a given case will depend on all of the facts and circumstances, but the requesting party generally will need to demonstrate more than "[m]ere inconvenience or expense" in order to satisfy the requirement of undue hardship.[36]

1.2.4 Choice of Law Considerations

Where the underlying facts implicate the laws of more than one jurisdiction (whether they are different states or foreign countries), courts in the United States will sometimes engage in a choice of law analysis to determine which jurisdiction's law should govern the *attorney-client privilege*.[37] As a result, a court may apply the rules of a foreign party's home jurisdiction to determine whether communications that took place there are protected from disclosure in the U.S. For example, courts have held that communications between a Swiss party and its in-house counsel occurring in Switzerland may not be protected by the attorney-client privilege in the United States because (as discussed in Section 2.4 below) such communications are not privileged under Swiss law.[38]

In contrast, because "the *work-product doctrine* is a procedural immunity and not an evidentiary privilege,"[39] it follows that the law of the forum should determine whether a particular document is protected from disclosure on work product grounds, regardless of where the document was prepared. In the few reported cases that discuss the issue in any detail, however, courts have not uniformly adopted this analysis.[40] Still, where the materials in question were prepared in anticipation of U.S. litigation (as opposed to litigation in a foreign country), a U.S. court in a transnational case will likely apply the law of the U.S. forum to determine whether the materials are protected from disclosure as work product.[41]

1.3 Protection of Confidential or Sensitive Material on Grounds Other Than Privilege

Disclosure of particularly sensitive information that is not subject to attorney-client privilege or work product protection may be conditioned or limited in a variety of ways by agreement of the parties or by order of the court. Disclosure on an "attorneys' eyes only" basis (or, even more restrictively, on an "outside counsel's eyes only" basis) is a common means of restricting access to sensitive information such as trade secrets.[42]

Additionally, federal courts have authority in appropriate circumstances under Rule 26(c) of the Federal Rules of Civil Procedure to order that "a trade secret or other confidential

research, development, or commercial information" need not be disclosed at all. However, where the requesting party demonstrates a need for access to the confidential information said to be a trade secret, and that the information in question is relevant to the dispute, courts are often more inclined to order disclosure subject to a protective order, rather than no disclosure at all.[43]

1.4 Risk of Waiver in Connection with Third Party Funder's Due Diligence

1.4.1 Attorney-Client Privilege

Because the attorney-client privilege is intended to protect confidential communications between attorneys and their clients, voluntary disclosure to a third party outside the confines of the attorney-client relationship generally results in waiver of the privilege.[44] Under certain limited circumstances, however, the "common interest doctrine" (sometimes also referred to as the "common interest rule" or the "common interest privilege") may allow for disclosure to a third party that does not result in waiver.[45]

The common interest doctrine applies only where the following requirements are met: "(1) the party who asserts the rule must share a *common legal interest* with the party with whom the information was shared and (2) the statements for which protection is sought [must have been] designed to further that interest."[46]

Where a third party funder finances a party's litigation costs, the party and the funder certainly share a common interest in succeeding in the litigation, but that interest would likely be deemed a *common commercial interest,* rather than a common legal interest. A common commercial interest does not meet the requirements for protection under the common interest doctrine.[47] As one court put it, "[s]haring a desire to succeed in an action does not create a 'common interest.'"[48] Nor does the payment of legal fees, in and of itself, give rise to a common legal interest.[49] Accordingly, disclosure of documents or other information protected by the attorney-client privilege to a third party funder will likely result in waiver of the privilege.[50]

Consistent with this analysis, a federal district court in Delaware, in a June 2010 opinion in a patent infringement action against the social networking site Facebook,[51] affirmed a magistrate judge's order requiring the plaintiff in that case to disclose documents it had exchanged with litigation financing companies interested in funding the litigation. The magistrate judge found that the case "presented a close question"[52] but ultimately concluded that the documents at issue were not protected from disclosure under the common interest privilege.

That conclusion appears to have been based at least in part on a finding "that no common legal interest . . . could exist because a deal [to fund the litigation] was not consummated between [the plaintiff] and the litigation financing companies."[53] This raises an interesting question as to whether the outcome would have been different if the funders' due diligence had resulted in an agreement to finance the litigation—a question that the district court's opinion leaves unanswered.

1.4.2 Work Product Doctrine

Disclosure of documents to a third party is considerably less likely to result in waiver of the work product protection in comparison to waiver of the attorney-client privilege. While "disclosure of confidential material to a third party waives any applicable attorney-client privilege," courts have held that "work product protection is waived only when documents are used in a manner contrary to the doctrine's purpose, when disclosure substantially increases the opportunity for potential adversaries to obtain the information."[54]

The cases appear to require only that the disclosing party and the third party must share a "common interest."[55] There does not appear to be a requirement of a common *legal* interest (as opposed to a common commercial interest). Rather, "[w]ork product may be shown to others when there is some good reason to show it."[56] Accordingly, a federal court in the Southern District of New York held that "counsel-drafted or counsel-selected materials" disclosed by counsel to a public relations firm on the one hand, and documents prepared by the public relations firm that "implicitly reflect[ed] [counsel's] work-product" on the other hand, were protected from disclosure by the work product doctrine.[57] The court reasoned that "the public relations firm need[ed] to know the attorney's strategy in order to advise as to public relations, and the public relations impact b[ore], in turn, on the attorney's own strategizing as to whether or not to take a contemplated step in the litigation itself and, if so, in what form."[58]

In light of these principles, there appears to be a fairly strong argument that disclosure of documents protected by the work product doctrine to a third party funder in the course of due diligence should not result in waiver of the protection, particularly where the third party funder undertakes to avoid any further disclosure of the work product pursuant to a confidentiality or non-disclosure agreement with the disclosing party.[59] Indeed, at least one commentator has

deemed it likely that "courts will ultimately find that communications with third-party litigation lenders are protected by the work product rule, but not by the attorney-client privilege."[60]

A recent opinion by a federal district court in the Eastern District of Texas in *Mondis Technology, Ltd. v. LG Electronics, Inc.*[61] supports this conclusion. That case involved efforts by the plaintiff's parent company in a patent infringement case to find "investors to join the company and fund its efforts to license and litigate its various patent programs."[62] In that context, the parent company had "provided a number of investment brokers and potential investors with slide presentations and other documents that contained disclosures of [its] licensing and litigation strategies and also estimates of licensing and litigation revenues."[63]

One of the defendants sought to compel production of a portion of those documents. The defendant argued that "the documents [we]re not covered by the work product protection because that protection does not extend to materials created to assist in raising funds for litigation."[64]

The court flatly rejected this argument, concluding that documents prepared "with the intention of coordinating potential investors to aid in future possible litigation" are protected from disclosure by the work product doctrine.[65] The court added that "although these documents were disclosed to third parties, the disclosures do not create a waiver because they were disclosed subject to non-disclosure agreements and thus did not substantially increase the likelihood that an adversary would come into possession of the materials."[66]

Having found that the documents in question were protected as work product, the court concluded that it "need not reach the issue of attorney-client privilege."[67] However, another recent opinion by the same federal district court judge, Judge John T. Ward, suggests that if it *had* reached the issue, the court likely would have concluded that disclosure to potential investors of materials that are subject only to the attorney-client privilege will result in waiver of that privilege. Consistent with the principles outlined above, Judge Ward described the work product doctrine as "very different from the attorney-client privilege."[68] Whereas "the work product protection exists to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of an opponent," he wrote, "the attorney-client privilege exists to protect the confidential communications between an attorney and client."[69] It follows that "the attorney-client privilege . . . is waived by disclosure of [such] confidential communications to third parties."[70]

In contrast, the court in the *Facebook* case discussed in Section 1.4.1 above does not appear to have considered the materially different standards for waiver of work product protection on the one hand and waiver of the attorney-client privilege on the other. The magistrate judge in that case appears to have concluded that the plaintiff's disclosure of documents to prospective third party funders resulted in waiver not only of the attorney-client privilege, but also of work product protection.[71] In affirming the magistrate judge's opinion, however, the district court appears to have focused solely on the waiver of attorney-client privilege, particularly the requirement of a common legal interest for protection under the common interest doctrine.[72] Accordingly, there is reason to question the precedential value of the district court's opinion in respect of whether disclosure to a third party funder will result in waiver of work product protection (as opposed to waiver of the attorney-client privilege).

Still, the *Facebook* case underscores the risk that a U.S. court might find that a party's disclosure of work product to a third-party funder will result in waiver of work product protection. Indeed, in the wake of the *Facebook* opinion, a November 2010 Issues Paper prepared by a working group of the American Bar Association's Commission on Ethics 20/20 went so far as to conclude that it is "very likely" that disclosures by a lawyer to a third party funder will result in "losing the benefit of the privilege *and work product doctrine.*"[73] In light of that assessment, the working group solicited comments from the legal community as to whether "a change in the common interest doctrine" is required.[74] The working group's investigation is still ongoing.

1.4.3 Trade Secrets

Disclosure of a trade secret to a third party may result in waiver of the secret in the absence of a contractual or other legal obligation on the part of the third party to maintain secrecy. Indeed, the United States Supreme Court has stated that "[i]f an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right [in the secret] is extinguished."[75]

"A failure to require a third party to enter a confidentiality agreement to protect alleged trade secrets" or even "[e]ntering into an agreement, but placing few or no restrictions on the uses a third party can make of a trade secret" has been deemed "a sure path to waiver."[76] As a

result, a party contemplating disclosure of trade secrets or similar information to a third party funder should take pains to ensure that an appropriate confidentiality agreement with the funder is in place prior to any disclosure.

1.4.4 Choice of Law as to Waiver

As discussed above in Section 1.2.4, at least where the attorney-client privilege is concerned, courts in the United States sometimes engage in a choice of law analysis to determine which jurisdiction's privilege rules should apply where the underlying facts implicate the laws of more than one jurisdiction. There is support in the case law for the proposition that the same choice of law considerations also apply to the specific issue of whether a privilege existing under the law of another jurisdiction has been waived.[77]

Therefore, a foreign party to litigation in the United States should have a reasonable argument that to the extent foreign law determines whether a document or communication is protected from disclosure under the attorney-client privilege, foreign law should also govern whether disclosure of the privileged information to a third party in the same foreign jurisdiction resulted in a waiver of the privilege. However, one can easily imagine a scenario where the law of the foreign party's home jurisdiction is deemed to determine whether a document or communication is protected from disclosure under the attorney-client privilege in the first place, while the law of another jurisdiction (such as the jurisdiction where the funder is based) is deemed to govern whether disclosure to the funder resulted in a waiver of protection.

1.5 Third Party Funder as Potential Witness in Funded Case

It is hard to imagine a scenario in which an employee or other representative of a third party funder would be called as a witness in the funded case to give testimony concerning the funder's due diligence. Indeed, the employee's testimony concerning any after-the-fact analysis or investigation the funder may have conducted in the course of due diligence likely would be inadmissible for lack of personal knowledge of the underlying facts[78] and/or on hearsay[79] or relevance[80] grounds.[81]

1.6 Legitimate Expectations of a Party to U.S. Litigation: A Hypothetical

In light of the principles outlined above, what are (or should be) the reasonable privilege and confidentiality expectations of a party contemplating litigation in the United States in respect

of documents and other information disclosed to a third party funder? In this respect, a simple hypothetical may be instructive.

Our hypothetical assumes a contract dispute between two American parties arising from an agreement for the sale of widgets. The plaintiff-purchaser intends to assert that the widgets delivered by the defendant-seller were not in conformity with the contract specifications. We further assume, however, that there is an ambiguity in the pertinent specifications. In the course of contract negotiations, plaintiff's outside deal counsel as well as its in-house counsel have given advice on the ambiguous contract term in separate e-mails to plaintiff's management.

a) What is the likely effect of providing copies of the e-mails from plaintiff's outside and in-house counsel to the third party funder? Because the e-mails were not prepared in anticipation of litigation, they are not protected by the work product doctrine. However, both e-mails are protected from disclosure by the attorney-client privilege, which generally applies to communications with in-house counsel as well as outside counsel in the U.S. Yet the plaintiff will probably waive that protection if it discloses the e-mails to the funder, which likely will not be deemed to share a common legal interest with the plaintiff. Of course, savvy counsel may find practical ways around this problem, for example by describing the e-mail to the third party funder without actually furnishing a copy of the document. Oral, rather than written, communications with the funder generally will be preferable in any event given the remoteness of the risk that the funder, or an employee of the funder, will be called as a witness in the funded case.

b) What if plaintiff's outside counsel has prepared a comprehensive written analysis of the strengths and weaknesses of plaintiff's case for the benefit of the plaintiff: what is the likely effect of disclosure of counsel's analysis to the funder? The answer here is less clear. Counsel's analysis is protected from disclosure on both attorney-client privilege and work product grounds; indeed, counsel's analysis qualifies as opinion work product, which courts seldom (if ever) require a party to disclose to an opposing party in litigation. However, for the reasons identified in paragraph a) above, disclosure of the analysis to the funder will likely result in waiver of the attorney-client privilege. In contrast, there is good reason to argue—particularly where the party and the funder have entered into a confidentiality agreement—that disclosure of counsel's analysis to the funder should not result in waiver of work product protection because such disclosure does not materially increase the likelihood that an adversary will gain access to

counsel's analysis. Nonetheless, the risk that a court might reject that argument and conclude that disclosure of counsel's analysis to the funder resulted in waiver of both the attorney-client privilege *and* work product protection cannot be excluded.

c) As a further variation on our hypothetical, we will assume that a member of plaintiff's in-house technical staff—at the request of plaintiff's in-house counsel and to assist the company in determining whether to proceed with legal action against the defendant—has prepared a technical report documenting testing conducted on a sample widget and confirming the suspected deviation from the contractual specifications. Again, what is the likely effect of disclosure of the technical report to the funder? The technical report likely will not be protected from disclosure by the attorney-client privilege, but it does enjoy *qualified* immunity from disclosure as *fact* work product because it was prepared in anticipation of potential litigation at the direction of plaintiff's (in-house) counsel. Plaintiff may be required to disclose the technical report to the defendant if the latter can demonstrate substantial need and an inability to obtain the information in the report from other sources. However, plaintiff would have good reason to argue that the sharing of the technical report with the third party funder should not result in any waiver of the qualified immunity from disclosure that the report otherwise enjoys.

What if the above hypothetical were amended so that it now involves a dispute between a Swiss plaintiff and an American defendant and e-mails from plaintiff's (Swiss) outside and in-house counsel, respectively: what impact would this have on the likely result?

a) Assuming that the court were to apply Swiss law in this scenario to determine whether the e-mails are privileged, the e-mail from plaintiff's *in-house* counsel to plaintiff's management would not be protected from disclosure in the first place, regardless of whether the plaintiff discloses the e-mail to the funder. On the other hand, the plaintiff would have a reasonable argument that if Swiss law determines the scope of the attorney-client privilege, Swiss law should also govern whether disclosure of the e-mail from plaintiff's *outside* deal counsel to the third party funder resulted in waiver of that privilege (at least where disclosure of the e-mail is deemed to have occurred in Switzerland). As discussed below in Section 2.7, disclosure of outside counsel's e-mail to the funder would not waive any applicable privilege under Swiss law.

b) As for counsel's written analysis of the plaintiff's case, the fact that the plaintiff is Swiss and/or that disclosure of the analysis to the funder occurred in Switzerland likely would

have little or no impact on a U.S. court's analysis of whether disclosure resulted in waiver of *work product protection* because the court would likely apply forum law to determine that issue. In respect of waiver of the *attorney-client privilege,* the plaintiff again would have a reasonable argument that disclosure of counsel's analysis to the third party funder in Switzerland should not result in waiver of the privilege if such disclosure would not result in a waiver under Swiss law.

c) Insofar as the technical report is concerned, the result would remain the same as in the prior iteration of the hypothetical because a U.S. court likely would apply forum law to determine whether the report enjoys qualified immunity from disclosure as fact work product, and whether plaintiff's sharing of the report with the third party funder resulted in any waiver of such protection.

In summary, a party to civil litigation in the United States would have a legitimate expectation that disclosures to a third party funder in the course of due diligence will entail a risk of waiver of the attorney-client privilege and/or work product protection. At least where the law of a U.S. jurisdiction governs waiver (as will be the case in most disputes involving American parties and funders or where disclosure to the funder is deemed to have occurred in the U.S.), the risk that disclosures to a third party funder will result in waiver of the attorney-client privilege is high. Where materials disclosed to the funder are protected from disclosure on work product grounds, the risk of waiver is significantly lower, but even in respect of those materials, a degree of risk remains.

2. Privilege and Confidentiality Considerations in Respect of Funder Due Diligence in Switzerland

2.1 Status of Third Party Litigation Funding in Switzerland

Third party funding is a new phenomenon in Switzerland. Until recently, whether third party funding should be permitted at all remained controversial due to concerns that it would infringe on the independence of attorneys. Indeed, the Canton of Zurich deemed third party funding improper and amended its Attorney Act to outlaw the practice outright, effective January 1, 2005.[82]

Before those new provisions could take effect, however, the Swiss Federal Supreme Court (*Bundesgericht*[83]) invalidated Zurich's prohibition on third party funding in a decision issued on December 10, 2004.[84] The court found the prohibition to be unconstitutional, concluding that third party funding does not generally impair an attorney's independence. Accordingly, the court held that a blanket prohibition on third party funding constitutes a disproportionate, and therefore impermissible, intrusion into the freedom of commerce guaranteed by the Swiss constitution. Since that decision by the Supreme Court, third party funding has been legal throughout Switzerland. Likewise, the Swiss Federal Attorney Act, which regulates the professional duties of attorneys practicing in Switzerland, (implicitly) permits third party funding.[85]

In the wake of the Supreme Court's decision, the role of third party funding in Swiss litigation has grown steadily in recent years. Initially, the funders that were active in Switzerland were based in neighboring countries, particularly Germany. Increasingly, however, Swiss funders are also entering the market. Particularly in light of the prohibition on contingency fees in Switzerland as elsewhere in Europe, third party funding can fill a gap in litigation financing for parties contemplating litigation, especially where the amounts in dispute are high.

2.2 Brief Overview of Document Disclosure in Switzerland

At the request of a party, a Swiss court may order a party to the proceeding or a third party to produce certain documents (*Edition*).[86] As is generally the case in civil law countries, the court determines whether, and to what extent, document disclosure is warranted in a particular case, and there is no analog to the party-driven discovery that occurs in the United States.

In general, document disclosure occurs only after the court has issued an Order of Proof (*Beweisverfügung*) framing the material issues in dispute, and identifying which party bears the burden of proof on each disputed issue.[87] Unlike in the U.S., a party cannot simply request "all documents concerning or relating to" a particular issue; instead, a party's request must be limited to comparatively few, specifically identified or identifiable documents.[88] As a result, a request for production of documents presupposes that the requesting party has at least some idea of what documents the other party is likely to have in its possession. The prevailing view is that a request for production cannot amount to an attempt to explore what documents an opposing party or a third party might have. Therefore, a request for production of "all correspondence" or "all books and records" of a company would not be permissible.[89]

2.3 The Concept and Protection of Secrecy in Swiss Law

At the outset, it should be emphasized that a fact need not be absolutely confidential in order to constitute a "secret" under Swiss law. A review of provisions protecting secrecy in various areas of Swiss law[90] makes clear that a secret generally will be found to exist where the information in question is neither obvious nor widely available[91] and the holder of the secret has a legitimate interest in maintaining secrecy as well as the intention of doing so. Disclosure of a secret to a third party, such as a third party funder, generally does not abrogate secrecy, particularly where such disclosure is subject to a contractual obligation on the part of the recipient to maintain confidentiality, as is typically the case in a funding relationship. Where a secret holder (or, with his consent, his counsel) discloses documents or information that qualify as secrets to a third party funder, such disclosure does not result in forfeiture of secrecy.[92] The same principle applies where the secret holder discloses documents or information that qualify as secrets to other third parties, such as public relations agencies or other advisors and consultants, where there is a relationship of trust and the recipient has an obligation to maintain confidentiality. The notion that disclosure to a third party may result in a waiver of secrecy (including secrecy by dint of legal privilege) does not exist in Swiss law.[93]

Various provisions of substantive civil and criminal law, civil and criminal procedure, as well as professional and regulatory obligations in the Swiss legal system are designed to protect secrecy. Of particular interest here is the protection Swiss law extends to legal privilege (*Anwaltsgeheimnis,* or literally, "attorney secrecy"), both as a matter of the attorney's

professional obligations and as a matter of criminal law in the Swiss Criminal Code (*Strafgesetzbuch* or "StGB").[94] In Swiss civil and criminal procedure, this protection is given effect in provisions that grant a corresponding right to refuse testimony and the production of documents.[95] Also noteworthy is the protection of manufacturing and commercial secrets in the Swiss Code of Obligations (*Obligationenrecht* or "OR"),[96] which requires employees to maintain such secrets, and in the Criminal Code,[97] which sanctions violations of statutory or contractual obligations to maintain manufacturing and commercial secrets.[98] The following section will address the protection of legal privilege and other protectable secrets in Swiss civil procedure in greater detail.

2.4 Legal Privilege in Switzerland

Pursuant to Article 13 of the Federal Attorney Act,[99] all attorneys admitted to practice in Switzerland are required to maintain the secrecy of information disclosed to them by clients in their capacity as attorneys.[100] In addition, attorneys will incur criminal liability if they disclose a secret entrusted to them in their capacity as attorneys or of which they became aware while performing their duties as attorneys. The scope of these two provisions is not entirely identical. In particular, the Federal Attorney Act applies only to attorneys admitted to practice in Switzerland who are registered in one of the attorney registries maintained by each Canton, while the criminal sanctions set out in the Criminal Code also apply to foreign counsel.[101] Yet a common feature of both provisions is that they apply only to the *independent practice of law* and thus *do not apply to in-house counsel.*[102] Further, both provisions apply only to those activities that are specific to the attorney's role as an attorney. Where an attorney engages in other activities that are beyond the scope of his role as an attorney, for example by serving as a corporate director or acting as an asset manager, those activities are not subject to legal privilege. If the attorney's activities encompass multiple roles, the particular role in which a secret was entrusted to him will be the decisive criterion in determining whether or not the secret is protected by legal privilege.[103]

Swiss civil procedure gives effect to the protection of legal privilege in at least two ways. *First,* attorneys have the right to refuse to give testimony or otherwise to participate in the taking of evidence. *Second,* not only the attorney, but also the client and even third parties have the

right to withhold documents on the basis of legal privilege that they otherwise would be required to produce.

Article 166 of the Swiss Civil Procedure Code (*Zivilprozessordnung* or "ZPO") provides that a person has the right to refuse participation in the proceedings (including a refusal to testify as well as a refusal to produce documents or tangible things) to the extent that he or she would incur criminal liability under Article 321 of the Criminal Code[104] for violation of a duty to maintain secrecy. Accordingly, attorneys have the right to refuse to give testimony in respect of any information that falls within the scope of legal privilege protected by criminal law. As the relevant provision in the Criminal Code also applies to foreign attorneys, foreign counsel have the right to refuse to give testimony to the same extent as Swiss attorneys. As for foreign in-house counsel, Swiss courts will not accord them the right to refuse testimony under Article 160 of the Civil Procedure Code.[105][106] An attorney's right to refuse participation in the taking of evidence is absolute: even where the secret holder (*i.e.,* the client) expressly releases the attorney from his duty of secrecy, the attorney maintains the right (though not the obligation) to refuse participation.[107]

In comparison to the civil procedure codes of the various Cantons that were in force until the end of 2010, the new Federal Civil Procedure Code that took effect on January 1, 2011 has significantly expanded the right to refuse production of documents on the basis of legal privilege. Whereas the former civil procedure codes of the Cantons typically provided only for a right to refuse production of documents *in the possession of an attorney,* the Federal Civil Procedure Code now extends such protection to *all attorney correspondence* regardless of where such correspondence is maintained.[108] Specifically, Article 160, paragraph 1, letter b of the Federal Civil Procedure Code provides that attorney correspondence, to the extent it relates to the professional representation of a party to the proceeding or of a third party, need not be produced in civil cases. Not only the attorney, but also the parties to the proceeding as well as third parties may avail themselves of the right to refuse production of any such documents in their possession.[109]

The scope of protected "attorney correspondence" (*anwaltliche Korrespondenz*) will be a matter for the courts to clarify. In the literature, at least one commentator has opined that other materials such as memoranda which are not literally "attorney correspondence" should also be protected under Article 160.[110] This appears to be the correct approach, as the protection of a

particular document cannot depend on whether the document happens to be in the form of a letter or other correspondence to the client as opposed to a memorandum, for example, which typically would be transmitted to the client with a separate cover letter.

Consistent with the underlying purpose of the protection, all materials prepared by, or entrusted to, the attorney in his capacity as an attorney in the course of advising the client should be deemed protected.[111] Again, however, protection extends only to activities that are specific to the attorney's role as an attorney. Documents pertaining to an attorney's other activities do not enjoy such protection.[112] Nor does Article 160 protect correspondence with in-house counsel from disclosure.[113] Consistent with the right of foreign attorneys to refuse to give testimony, correspondence with foreign attorneys and other materials stemming from a foreign attorney's representation of a client should likewise be protected under Article 160.

In substance, therefore, what would be termed "attorney work product" in the United States (with the important exception of materials prepared by in-house counsel) will be protected from disclosure in a civil case in Switzerland. In contrast to the work product doctrine in the United States, however, there is no requirement that a document must have been prepared in anticipation of litigation. Thus, documents reflecting an attorney's transactional advice unrelated to any pending or threatened litigation—which, in the United States, would qualify only for protection under the attorney-client privilege—enjoy the same degree of protection under Swiss law as litigation-related materials.

2.5 Measures to Protect Endangered Interests

Beyond the right discussed above to refuse participation in the taking of evidence and the production of documents where necessary to protect legal privilege, the Federal Civil Procedure Code allows for additional measures to protect other legitimate interests. Where the taking of evidence threatens the interests of a party to the proceeding or of a third party that are worthy of protection, including in particular the commercial secrets of such a party, Article 156 of the Civil Procedure Code authorizes the court to take appropriate measures to protect those interests.

With the exception of an explicit reference to commercial secrets, Article 156 does not define the scope of "interests worthy of protection" (*schutzwürdige Interessen*). Courts therefore retain substantial judicial discretion in this respect and may take appropriate measures to protect secrets of all kinds as well as any private or public interests that may be worthy of protection in a

particular case. The court will need to balance the interests deemed worthy of protection on the one hand against the general need for disclosure and the opposing party's right to be heard (*rechtliches Gehör*) on the other.[114]

Nor does Article 156 enumerate the measures that may be taken to protect endangered interests. That, too, is committed to the court's discretion. In deciding which measures are appropriate, however, the court must adhere to the principle of proportionality. Any such measures must be confined to what is necessary in a given case.[115] Depending on the specific interests at issue and the degree to which they are threatened, a court may consider such measures as proceedings in closed session, the exclusion of one party (or both parties) from participating in the taking of evidence, limitations on the right to inspect records, providing only for the inspection (but not the handing over) of documents, providing for the redaction of sensitive information within a document, permitting access only to a summary of the documentary evidence (but not the evidentiary materials themselves), and restricting access to the parties' attorneys on an "outside counsel's eyes only" basis.[116]

Almost invariably, there will be some tension between court-ordered measures pursuant to Article 156 that have the effect of limiting a party's right to inspect records and the principle that each party to the proceeding has a right to be heard. This is particularly so where the court, in rendering judgment, relies on documents that were not (or not fully) disclosed to all parties. However, the resulting limitation of a party's right to be heard has been deemed acceptable by the courts and in the literature and does not give rise to a violation of a party's constitutional right to be heard, provided that the court gives appropriate consideration to balancing all of the relevant interests and to the principle of proportionality.[117]

2.6 Third Party Funder's Right to Invoke Privilege and Confidentiality Protections

In addition to a third party funder's right to refuse production of "attorney correspondence" and to refuse participation in the taking of evidence (including the right to refuse to give testimony in particular) where other legally protected secrets (such as manufacturing and commercial secrets[118]) are concerned, Article 156 of the Civil Procedure Code offers third party funders a further means of protecting information disclosed to them.

To the extent that disclosure of information protected by legal privilege to the third party funder occurs solely and precisely for the purpose of facilitating litigation financing and on the

basis of a confidentiality agreement, persuasive grounds exist under Article 156 to absolve the third party funder entirely of the duty to give testimony.[119] The shared interest of funders and claimants in financing litigation that the claimant cannot, or does not wish to, fund out of its own resources, accompanied by a contractual duty on the part of the funder to maintain the confidentiality of any facts or materials protected by legal privilege, are plainly interests worthy of protection. Ensuring that those interests are protected effectively requires that the third party funder be absolved of the duty to give testimony.

2.7 Legitimate Expectations of a Party to Swiss Litigation: A Hypothetical

Which are the legitimate privilege and confidentiality expectations of a party contemplating litigation in Switzerland in respect of documents and other information disclosed to a third party funder? For the sake of comparison, we will, *mutatis mutandis,* assume the same hypothetical set out in Section 1.6 above: a dispute between two parties involving an agreement for the sale of widgets and an ambiguous contract term. In the course of contract negotiations, plaintiff's (Swiss and/or U.S.) outside deal counsel as well as its (Swiss and/or U.S.) in-house counsel have given advice on the contract term at issue in separate e-mails to plaintiff's management.

a) What is the likely effect of providing copies of these e-mails to the third party funder? The short answer is that disclosure to the funder will have no effect on any existing privilege or confidentiality protection for the following reasons: (i) The e-mail from plaintiff's *outside deal counsel* is protected by legal privilege. The disclosure or handing over of that e-mail to the third party funder does not result in any loss of such protection. The plaintiff itself, plaintiff's outside deal counsel as well as the third party funder may all refuse to produce the e-mail in the litigation. Further, outside deal counsel has the right to refuse to give testimony pursuant to Article 166 of the Federal Civil Procedure Code. Nor is an attempt by the opposing party to call the third party funder (or an employee of the third party funder) as a witness likely to meet with success.[120] (ii) The e-mail from plaintiff's *in-house counsel* is not protected by legal privilege to begin with and must be produced at the request of the opposing party.[121] Setting aside the protection of manufacturing and commercial secrets and/or protective measures pursuant to Article 156 of the Civil Procedure Code, plaintiff's in-house counsel will be required to give testimony if called as a witness as Swiss law treats a party's in-house counsel no

differently than any other employee. Yet plaintiff's obligation to produce the e-mail from in-house counsel, and in-house counsel's obligation to give testimony if called as a witness, exist independently of any disclosure to the third party funder. In other words, disclosure to the third party funder will not have any detrimental impact on plaintiff's position in the litigation.

b) What if plaintiff's outside counsel has prepared a comprehensive written analysis of the strengths and weaknesses of plaintiff's case for the benefit of the plaintiff: what is the likely effect of disclosure of counsel's analysis to the funder? Here again, disclosure to the funder will have no impact. Counsel's analysis is protected by legal privilege and the funder may refuse to produce it in the litigation.

c) Turning to the technical report prepared by plaintiff's in-house technical staff at the request of its in-house counsel, disclosure to the funder once again will have no impact on any protection from disclosure that otherwise may apply. Under Swiss law, an internal report of this kind is not subject to legal privilege to begin with, as such protection does not extend to documents prepared by in-house counsel (or non-legal staff acting at the direction of in-house counsel). Accordingly, assuming that the plaintiff has possession of the report, it may not refuse production of the same on grounds of legal privilege. Depending on the circumstances, however, there may be *other* grounds to refuse production of the report to the extent it contains commercial secrets or where other interests worthy of protection justify its withholding. If the plaintiff has a right to refuse production on that basis, disclosure of the report to a third party funder will not result in a loss of that right. Further, if the technical report is forwarded or handed over to plaintiff's outside counsel, any resulting correspondence with outside counsel (including any copies of the report in outside counsel's possession) may be withheld from production as privileged. In any event, from a purely practical perspective, an opposing party ordinarily will not be aware that a particular internal document of this kind even exists. As a result, the risk that the report will be the subject of a request for production (which must be confined to specifically identified or identifiable documents) generally will be very low.[122]

In summary, a party to civil litigation in Switzerland would have a legitimate expectation that the engagement of a third party funder, including any due diligence the funder may conduct before agreeing to extend financing, will not have any negative impact in terms of legal privilege and confidentiality.

3. Giving Effect to the Parties' Legitimate Expectations in International Arbitration

As the preceding two sections show, the rules governing legal privilege and confidentiality in the United States and Switzerland are quite different. Indeed, as far as the impact of disclosures to a third party funder on any applicable privilege or confidentiality protection is concerned, the differences between the two legal systems are not merely differences in degree but differences in kind.

While U.S. parties and counsel will be mindful that any disclosure of privileged or confidential information to a third party funder generally will entail at least some risk of waiver, Swiss parties and counsel may find it surprising that waiver would even be considered an issue under those circumstances. This may lead to what the title of this article refers to as an "expectations gap" in an arbitration involving a Swiss and an American party.

As previous commentators have noted, if parties approach issues of privilege in the manner they are used to in their home jurisdictions, they may be faced with an unpleasant surprise if the arbitral tribunal later applies the rules of another jurisdiction (such as the law of the situs of the arbitration) that affords less, or different, protection than the corresponding rules in their home jurisdictions.[123] Although the parties could avoid any uncertainty by specifying in their arbitration clause that the law of a particular jurisdiction will govern matters of privilege and confidentiality, few parties are inclined to devote much attention to that issue when they agree to arbitrate what at the time appear to be hypothetical future disputes.[124]

3.1 Considerations for the Tribunal

The various institutional rules generally do not specify the criteria a tribunal may wish to consider when determining issues of privilege and confidentiality.[125] As a result, assuming that the parties have not agreed in advance as part of their arbitration clause which jurisdiction's laws will govern privilege and confidentiality issues, the tribunal will have broad discretion to determine how those issues should be resolved. Various potential approaches that a tribunal might adopt have been suggested in the literature but can be broadly categorized as based either on an analysis of which jurisdiction bears the closest connection to a particular document or communication or alternatively on the principal of equal treatment of the parties or "equality of arms."[126] The latter approach may be further divided into a "most favored nation" rule—*i.e.,*

application to both parties of whichever jurisdiction's rules afford the greatest degree of protection—on the one hand and a "lowest common denominator" or "least favored nation" rule—*i.e.,* equal application of whichever jurisdiction's rules offer less protection—on the other.[127] Parties will be less likely to object to the "most favored nation" rule in comparison to the "lowest common denominator" rule given that a party ordinarily will have little reason to complain if the protection it receives *exceeds* its legitimate expectations.[128]

Article 9.3 of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules") provides additional guidance in the form of five considerations that the tribunal "may take into account" when considering "issues of legal impediment or legal privilege . . . insofar as permitted by any mandatory legal or ethical rules that are determined by [the tribunal] to be applicable."[129] The criteria set out in Article 9.3 are broadly compatible with the "most favored nation" approach outlined above. Of particular interest here are the following three considerations:

- "the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen" (Article 9.3(c));
- "any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein" (Article 9.3(d)); and
- "the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules" (Article 9.3(e)).

The Commentary on the IBA Rules states that "[a]lthough the standard to be applied is left to the discretion of the arbitral tribunal, it is desirable that the tribunal take account of the elements set forth in Article 9.3, in particular if the parties are subject to different legal or ethical rules."[130] The Commentary explains that Article 9.3(c) "expresses the guiding principle that expectations of the parties and their advisors at the time the legal impediment or privilege is said to have arisen should be taken into consideration," while Article 9.3(e) "emphasizes the need to maintain fairness and equality among the parties," which may be of particular concern "when the approach to privilege prevailing in the parties' home jurisdictions differs."[131] As an example, the Commentary specifically refers to a scenario in which "one jurisdiction may extend the attorney-client privilege to in-house counsel, whereas another may not."[132] In such cases, the

Commentary concludes, "applying different rules to the parties could create unfairness by shielding the documents of one party from production but not those of another."[133]

In light of these considerations, adoption of a "most favored nation" approach in respect of legal privilege and confidentiality in connection with third party funder due diligence will be sensible in most cases. While one could argue that there can be no true "equality of arms" as between the parties in this respect—given that only one party (usually, though not invariably, the claimant) typically will have sought or procured third party financing—it is worth emphasizing that the issue addressed here is a fairly narrow one. If the tribunal applies a "most favored nation" approach to *all* issues of privilege and confidentiality in the arbitration, both parties will enjoy the same protection. The only issue in respect of which the funded party may be said to be "favored" pertains to whether disclosure to the funder of material that is otherwise privileged or confidential will have the effect of waiving existing protection. Simply put, a "most favored nation" approach in this context does not create any additional, independent basis for protecting documents or communications from disclosure. Rather, it simply ensures that the risk of waiver for a funded party in international arbitration will be no greater than the corresponding risk the funded party reasonably would anticipate under analogous circumstances when litigating a dispute in its home jurisdiction.

3.2 Considerations for Counsel

Regardless of the tribunal's ultimate approach to matters of privilege and confidentiality, there are a number of practical steps counsel can take to minimize the risk of waiver and to ensure that the client fully understands any risk that remains. Examples of relevant considerations might include the following:

- When drafting an arbitration clause, counsel may wish to consider including a provision to the effect that the tribunal in any potential arbitration shall be guided by the IBA Rules. Of course, the arbitration clause could also provide that a particular jurisdiction's laws shall govern matters of privilege and confidentiality, or even that either party may assert a claim of privilege or confidentiality under the laws of either party's home jurisdiction. An agreement of this kind would preclude any uncertainty concerning the scope of available protection and the risk

of waiver (in connection with disclosures to a third party funder or otherwise) but may appear impractical.

- Where a dispute has already arisen, in circumstances where disclosures to a third party funder will entail at least some risk of waiver (as is typically the case in U.S. litigation and may also be the case in international arbitration), counsel should discuss any contemplated disclosures with the client in advance to ensure that the client fully understands the risk of waiver and is prepared to proceed with the disclosures notwithstanding that risk. This is certainly good practice in any jurisdiction but may even be *required* in some jurisdictions under applicable ethical rules. Indeed, a recent Formal Opinion by the New York City Bar Association provides that "a lawyer may not disclose privileged information to a financing company unless the lawyer first obtains the client's informed consent, including by explaining to the client the potential for waiver of privilege and the consequences that could have in discovery or other aspects of the case."[134]
- Before making any disclosures to a third party funder, it is essential that the party concerned enter into an appropriate confidentiality agreement with the funder. Again, this is good practice in any jurisdiction (and a precaution the funder itself will often insist on) but will be particularly important in cases where a real risk of waiver exists.
- In circumstances where there is a real risk of waiver, disclosure of written materials to the third party funder should be limited to materials that are essential to the funder's due diligence. Otherwise, oral communications with the funder generally will be preferable. Given the remoteness of the risk that the funder will be called as a witness in the funded case, oral communications between counsel and the funder will rarely, if ever, be subject to disclosure in practice.

Conclusion

Even sophisticated parties may approach matters of privilege and confidentiality with engrained expectations derived from the legal systems with which they are most familiar. This is particularly true when it comes to issues of waiver. A party may give little consideration to the risk of waiver in connection with disclosures to a third party funder if such disclosures would not

result in waiver under the laws of the party's home jurisdiction. The subsequent application of a different jurisdiction's law to determine whether the disclosures resulted in waiver of an otherwise applicable privilege or protection may frustrate that party's legitimate expectations. Indeed, had the party been aware of the true risk of waiver, if might have opted not to make certain disclosures to the third party funder (or to make them in a different form).

The adoption of a "most favored nation" approach to the specific issue of waiver in this context would appear to be a sensible solution that gives effect to the disclosing party's legitimate expectations. Nor is this approach likely to result in any real prejudice to the opposing party. A party could only withhold materials disclosed to a funder in the course of due diligence on this basis where the materials themselves are independently protected from disclosure under existing rules of privilege and confidentiality. A "most favored nation approach" merely provides a degree of certainty that a party's disclosures to a third party funder will not result in a waiver of existing protection in circumstances where the disclosing party would not reasonably have expected that result.

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[3] Klaus Peter Berger, *Evidentiary Privileges: Best Practice Standards vs./and Arbitral Discretion,* in: Best Practices in International Arbitration (Markus Wirth, editor) (ASA Swiss Arbitration Association Special Series No. 26, July 2006).

[4] Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts* (New York Times, Nov. 14, 2010).

[5] *See* Holly E. Loiseau, Eric C. Lyttle & Brianna N. Benfeld, *Third Party Financing of Commercial Litigation,* ABA In-House Litigator Vol. 24, No. 4 (Sep. 2010); Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation,* 58 UCLA L. REV. 571, 573 (2010).

[6] *See generally* Anthony J. Sebok, *The Inauthentic Claim,* 64 VAND. L. REV. 61, 68, 98-99 (Jan. 2011) (noting that at present, some 28 of the 51 jurisdictions in the United States, *i.e.,* the 50 states and the District of Columbia, explicitly allow at least some forms of champerty, defined as a stranger's offer "to support a party's litigation costs in exchange for a payment contingent on the outcome of the case," although with varying limitations).

[7] Where some or all of the parties' claims arise under federal law, federal courts apply federal common law to determine whether documents or other forms of evidence are protected from disclosure by the attorney-client privilege. *See* Fed. R. Evid. 501 ("Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the

privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."). However, state law determines the scope of the attorney-client privilege in federal court litigation where the parties' claims are grounded solely in state law and subject matter jurisdiction is based on diversity of citizenship under 28 U.S.C. § 1332. In both types of cases, federal law determines whether documents are protected from disclosure under the work product doctrine. *See, e.g., Orbit One Commc'ns, Inc. v. Numerex Corp.,* 255 F.R.D. 98, 103 (S.D.N.Y. 2008) ("[W]here state law supplies the rule of decision, state law determines the existence and scope of the attorney-client privilege. However, federal law always controls application of the attorney work product doctrine.") (citations omitted).

[8] *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351 (1978).

[9] *See, e.g., Aqua Products, Inc. v. Aquaquality Pool & Spa, Inc.,* No. 05-cv-2538, 2006 WL 2884913, at *1 (E.D.N.Y. Oct. 10, 2006) (emphasis added).

[10] *See, e.g.,* 4 Am. Jur. Trials 119 (updated 2011).

[11] Fed. R. Civ. P. 30(c)(2) (emphasis added).

[12] Fed. R. Civ. P. 30(c)(2).

[13] *In re County of Erie,* 473 F.3d 413, 418 (2d Cir. 2007).

[14] *Strougo v. BEA Assocs.,* 199 F.R.D. 515, 525 (S.D.N.Y. 2001).

[15] *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983,* 731 F.2d 1032, 1037 (2d Cir. 1984).

[16] *In re County of Erie,* 473 F.3d at 420.

[17] *Id.* at 421 n.8.

[18] *In re Grand Jury Subpoena Dated July 6, 2005,* 510 F.3d 180, 183 (2d Cir. 2007).

[19] 329 U.S. 495 (1947).

[20] *Id.* at 512.

[21] *Gucci America, Inc. v. Guess?, Inc.,* 271 F.R.D. 58, 73-74 (S.D.N.Y. 2010) (internal quotations and citations omitted).

[22] The Fifth Circuit is a notable exception. *See U.S. v. Davis,* 636 F.2d 1028, 1040 (5th Cir. 1981) (stating that a document will be protected as work product where "the primary motivating purpose behind the creation of the document was to aid in possible future litigation").

[23] *U.S. v. Adlman,* 134 F.3d 1194, 1202 (2d Cir. 1998) ("[D]ocuments should be deemed prepared 'in anticipation of litigation,' and thus within the scope of the Rule, if '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.'") (quoting Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 FEDERAL PRACTICE & PROCEDURE § 2024, at 343 (1994)) (emphasis in original).

[24] *See Adlman,* 134 F.3d at 1200.

[25] *Id.* at 1204.

[26] *See* Fed. R. Civ. P. 26(b)(3)(A) (work product protection extends only to "documents and tangible things that are prepared in anticipation of litigation or for trial").

[27] *Id.*

[28] *In re Terrorist Attacks on Sep. 11, 2001,* No. 03-MDL-1570, 2008 WL 8183819, at *6 (S.D.N.Y. May 21, 2008) ("Although Rule 26(b)(3), by its terms, is limited to the protection of documents, the work-product rule, which traces its roots to *Hickman . . .,* extends to 'all trial preparation activities and all communications made principally for the purpose of preparing for litigation or trial.'") (quoting *In re Gulf Oil/Cities Serv. Tender Offer Litig.,* Nos. 82-cv-5253, 87-cv-8982, 1990 WL 108352, at *3 (S.D.N.Y. Jul. 20, 1990)); *see also Export-Import Bank of the U.S. v. Asia Pulp & Paper Co.,* 232 F.R.D. 103, 112 (S.D.N.Y. 2005) ("Pre-deposition conversations [with a witness] may . . . be work product; to the extent [a party's] attorneys communicated their legal opinions and theories of the case, their conversations are immune from discovery.").

[29] Fed. R. Civ. P. 26(b)(3)(B).

[30] *Adlman,* 134 F.3d at 1204.

[31] *In re Grand Jury Subpoena Dated July 6, 2005,* 510 F.3d 180, 183 (2d Cir. 2007).

[32] *Matter of Grand Jury Subpoenas Dated Oct. 22, 1991, and Nov. 1, 1991,* 959 F.2d 1158, 1166 (2d Cir. 1992).

[33] *Costabile v. County of Westchester,* 254 F.R.D. 160, 164 (S.D.N.Y. 2008).

[34] *See S.E.C. v. Strauss,* No. 09-cv-4150, 2009 WL 3459204, at *6 (S.D.N.Y. 2009) (interview notes and memoranda prepared by non-attorney staff of the Securities Exchange Commission were protected on work product grounds where non-attorney staff was "supervised by and acting at the direction of an attorney").

Some courts have held that documents prepared by non-attorneys may even qualify as *opinion* work product. *See, e.g., Duplan Corp. v. Deering Milliken, Inc.,* 540 F.2d 1215, 1219 (4th Cir. 1976) (noting that "opinion work product immunity now applies equally to lawyers and non-lawyers alike") (internal quotation omitted); *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.,* No. 00-cv-0783, 2001 WL 1180694, at *2 (D. Mass. Sep. 25, 2001) ("[T]he mental impressions, opinions, or litigation theory of a party's non-attorney employee may qualify as opinion work-product when the party's non-attorney employee is acting on the party's behalf.").

[35] Fed. R. Civ. P. 26(b)(3).

[36] *Garrett v. Metro. Life Ins. Co.,* No. 95-cv-2406, 1996 WL 325725, at *7 (S.D.N.Y. Jun. 12, 1996).

[37] *See, e.g., Delta Fin. Corp. v. Morrison,* No. 011118/2003, 2006 WL 3068853, at *4-5 (Sup. Ct. Nassau County Oct. 24, 2006) (engaging in choice of law analysis and applying South Carolina law to determine whether e-mail originating in South Carolina was protected from disclosure); *Tartaglia v. Paul Revere Life Ins. Co.,* 948 F. Supp. 325, 326 (S.D.N.Y. 1996) (applying New York choice of law rules to determine which state's law governed whether documents were protected from disclosure).

[38] *See Morgan Stanley High Yield Sec., Inc. v. Jecklin,* No. 2:05-cv-01364, 2011 WL 69206, at *2 (D. Nev. Jan. 10 2011) (ordering Swiss defendants to produce documents concerning communications with their in-house counsel that occurred in Switzerland); *In re Rivastigmine Patent Litigation,* 237 F.R.D. 69, 76-78 (S.D.N.Y. 2006) (ordering Swiss pharmaceutical company to produce documents reflecting communications with the company's in-house counsel and rejecting argument that although the documents in question may not have been privileged under Swiss law, a Swiss court would not have ordered the documents to be produced in the first place given the limited scope of document disclosure in Switzerland).

[39] *F.D.I.C. v. Fidelity & Deposit Co. of Maryland,* 196 F.R.D. 375, 381 (S.D. Cal. 2000).

[40] As to federal court cases, *compare Gucci America,* 271 F.R.D. at 73 ("Because the [work product] doctrine is procedural in nature, the rules of the forum court apply and it is therefore not subject to a choice of law analysis.") *with Astra Aktiebolag v. Andrx Pharm., Inc.,* 208 F.R.D. 92, 97, 102 (stating that "determination of the applicability of attorney-client privilege or work product protection [in respect of foreign documents] . . . implicates issues of foreign law" without drawing any apparent distinction between the attorney-client privilege and the work product doctrine but ultimately applying federal law because "ordering discovery without any protection . . . offends the public policy of this forum").

As to state court cases, *compare In re Arterial Vascular Engineering, Inc.,* No. 05-99-01753-cv, 2000 WL 1726287, at *11-12 (Tex. Ct. App. Nov. 21, 2000) (engaging in choice of law analysis to determine which state's law should determine whether documents were protected by the work product doctrine after concluding that "the same principles favoring use of the most significant relationship test for deciding the attorney-client privilege also apply to the attorney work product privilege") *with Brandman v. Cross & Brown Co. of Florida, Inc.,* 125 Misc.2d 185, 186 (Sup. Ct. Kings County 1984) (applying choice of law analysis to determine which state's law governed whether documents were protected by the attorney-client privilege but holding that "claims of . . . work product . . . are governed by the New York [Civil Practice Law and Rules] as a matter of pure procedure").

[41] *See Morgan Stanley High Yield Sec.,* 2011 WL 69206, at *2 (denying request to compel production of documents containing "the advice, thoughts, and impressions of counsel regarding legal matters within the United States and/or between attorney and client or between co-counsel [that] concern events that took place in the United States"); *cf. Astra Aktiebolag,* 208 F.R.D. at 98 ("Where . . . alleged privileged communications took place in a foreign country *or involved foreign attorneys or proceedings,* this court defers to the law of the country that has the 'predominant' or 'the most direct and compelling interest' in whether those communications should remain confidential, unless that foreign law is contrary to the public policy of this forum.") (emphasis added).

[42] *See, e.g., Aqua Products,* 2006 WL 2884913 (where defendants produced only a portion of the materials responsive to plaintiff's document requests, withholding other materials on the basis that they contained confidential business information, including customer addresses which, if disclosed to the plaintiff, might cause the defendants to lose customers, court ordered defendants to produce the withheld materials on an "attorneys eyes only" basis).

[43] *See Chembio Diagnostic Systems, Inc. v. Saliva Diagnostic Systems, Inc.,* 236 F.R.D. 129, 136 (E.D.N.Y. 2006) (where the party resisting discovery demonstrates that the documents or other information sought constitute a highly confidential trade secret, the burden shifts to the party seeking discovery "to establish that disclosure pursuant to [a] protective order, rather than no disclosure, is warranted because the confidential information is relevant and necessary").

[44] *See, e.g., U.S. v. Stewart,* 287 F. Supp. 2d 461, 464 (S.D.N.Y. 2003) ("[T]he law in this Circuit is clear: apart from a few recognized exceptions, disclosure to third parties of attorney-client privileged materials results in a waiver of that privilege.").

[45] *See, e.g., SR Int'l Business Ins. Co. v. World Trade Center Properties LLC,* No. 01 Civ. 9291, 2002 WL 1334821, at *3 (S.D.N.Y. Jun. 19, 2002) (the common interest doctrine is "a limited exception to the general rule that the attorney-client privilege is waived when a protected communication is disclosed to a third party").

[46] *Allied Irish Banks, P.L.C. v. Bank of America, N.A.,* 252 F.R.D. 163, 171 (S.D.N.Y. 2008) (emphasis added).

[47] *See Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.,* 215 F.R.D. 466, 471 (S.D.N.Y. 2003) ("The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial.") (quoting *North River Ins. Co. v. Columbia Cas. Co.,* 1995 WL 5792, at *3 (S.D.N.Y. Jan. 5, 1995)); *Walsh v. Northrop Grumman Corp.,* 165 F.R.D. 16, 18 (E.D.N.Y. 1996) ("The parties claiming protection under the doctrine must show that they had a common legal, as opposed to commercial, interest, and that they cooperated in formulating a common legal strategy.").

[48] *SR Int'l,* 2002 WL 1334821, at *3.

[49] *See Bank of America, N.A. v. Terra Nova Ins. Co.,* 211 F. Supp. 2d 493, 497 (S.D.N.Y. 2002) (as borrower's payment of bank's attorneys' fees in connection with negotiation of letter of credit agreement was not indicative of identity of interest and did not give rise to common interest privilege, bank was required to produce documents concerning letter of credit agreement to borrower's reinsurer).

[50] Compare this to the situation in other common law jurisdictions in which confidential communications by third parties made for the dominant purpose of a lawyer providing a client with legal advice may be protected by privilege. *See, e.g.,* in Australia, *Brookfield Multiplex Ltd v. International Litigation Funding Partners Pte Ltd (No 2)* [2009] FCA 449; *Spotless Group Ltd v. Premier Building & consulting Group Pty Ltd* (2006) 16 VR 1.

[51] *Leader Techs., Inc. v. Facebook, Inc.,* 719 F. Supp. 2d 373 (D. Del. 2010).

[52] *Id.* at 376.

[53] *Id.*

[54] *Schanfield v. Sojitz Corp. of America,* 258 F.R.D. 211, 214 (S.D.N.Y. 2009) (internal quotations and citations omitted).

[55] *See Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.,* 229 F.R.D. 441, 445-46 (S.D.N.Y. 2004) ("The work product privilege is not automatically waived by any disclosure to third persons. Rather, the courts generally find a waiver of the work product privilege only if the disclosure substantially increases the opportunity for potential adversaries to obtain the information. Implicit in this analysis is the question of whether the third party itself can or should be considered an adversary. Accordingly, courts have generally held that where the disclosing party and the third party share a common interest, there is no waiver of the work product privilege.") (internal quotations and citations omitted).

[56] *Costabile,* 254 F.R.D. at 164.

[57] *Calvin Klein Trademark Trust v. Wachner,* 198 F.R.D. 53, 55 (S.D.N.Y. 2000).

[58] *Id.*

[59] *See, e.g., U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union Number 3,* No. 00-cv-4763, 2002 WL 31296430, at *6 (S.D.N.Y. Oct. 11, 2002) ("[D]ivulging work product to [a] prospective consultant under a confidentiality agreement does not substantially increase the risk of disclosure to the adversary. The consultant

has a strong incentive to comply with the agreement since breaching it would surely result in the inability to attract clients in the future.").

[60] Lyon, *supra* note 5, at 605.

[61] No. 2:07-cv-565, 2011 WL 1714304 (E.D. Tex. May 4, 2011).

[62] *Id.* at *2.

[63] *Id.*

[64] *Id.*

[65] *Id.* at *3.

[66] *Id.*

[67] *Id.*

[68] *Wi-Lan, Inc. v. Acer, Inc.,* No. 2:07-cv-473, 2010 WL 4118625, at *5 (E.D.Tex. Oct. 18, 2010).

[69] *Id.* (internal quotations and citations omitted).

[70] *Id.*

[71] *See Leader Techs.,* 719 F. Supp. 2d at 375-76 (plaintiff challenged the magistrate judge's "finding that no common legal interest protecting attorney-client *or work product* privileged information could exist because a deal was not consummated between [plaintiff] and the litigation financing companies") (emphasis added).

[72] *See id.* at 376-77.

[73] American Bar Association Commission on Ethics 20/20 Working Group on Alternative Litigation Financing, *Issues Paper Concerning Lawyer's Involvement in Alternative Litigation Financing* (Nov. 23, 2010), at 4 (emphasis added).

[74] *Id.* at 8.

[75] *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1002 (1984).

[76] *BDT Prods., Inc. v. Lexmark Int'l, Inc.,* 274 F. Supp. 2d 880, 891 (E.D. Ky. 2003).

[77] *See, e.g., Microsoft Corp. v. Fed. Ins. Co.,* No. M8-85, 2003 WL 548758, at *2 n.1 (S.D.N.Y. Feb. 25, 2003) ("The specific matter at issue here is whether the attorney-client privilege has been waived by Microsoft, a Washington state corporation, in regard to materials created and held by [the law firm of] Sullivan & Cromwell throughout the United States, including New York, New Jersey, Washington D.C., and Los Angeles. It would appear that Washington state, where [Microsoft] is headquartered, has the most contacts with the issue raised here, and accordingly Washington state law should apply."); *ICI Americas Inc. v. John Wanamaker of Philadelphia,* No. 88-cv-1346, 1989 WL 38647, at *2 (E.D. Pa. Apr. 18, 1989) (engaging in choice of law analysis and concluding that "the court shall apply the law of Pennsylvania on the question of waiver of the attorney-client privilege"); *see also In re IPCOM GmbH,* Misc. No. 972, 2011 WL 2490984 (Fed. Cir. Jun. 22, 2011) (where German defendant in patent infringement action argued that German law should govern whether attorney-client privilege had been waived as to correspondence maintained in German law firm's files, court declined to engage in choice of law analysis where "the issue of a possible waiver under German law was never . . . briefed by any of the parties" and defendant thus could not "establish [that] a conflict exists between German and United States law").

[78] *See* Fed. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

[79] *See* Fed. R. Evid. 801(c) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

[80] *See* Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible.").

[81] It is at least conceivable that a party might seek to *depose* an employee of the third party funder. Information-gathering is often one of the principal objectives of a deposition, and a party might pursue the deposition of a third party funder's employee for purposes of learning more about the opposing party's case, regardless of whether the employee's testimony would be admissible at trial. In that scenario, opposing counsel would almost certainly seek a protective order pursuant to Federal Rule of Civil Procedure 26(c) to prevent the deposition from going forward. Unless the party seeking to depose the third party funder could plausibly show that the deposition is reasonably calculated to yield admissible evidence and amounts to more than just a

"fishing expedition" into the other party's case, the court would likely grant the protective order. *See, e.g., Braga v. Hodgson,* 605 F.3d 58, 60 (1st Cir. 2010) (affirming grant of protective order where party seeking deposition had not "plausibly suggested that the [witness to be deposed] had any personal knowledge" of relevant events and the "request to depose was not reasonably calculated to yield discoverable materials and was instead closer to a fishing expedition").

[82] § 41 of the Attorney Act of the Canton of Zurich (*Anwaltsgesetz des Kantons Zürich*), in force since January 1, 2005.

[83] For the sake of simplicity, all references to Swiss statutes and legal terms in this article will be in German only. It should be noted, however, that there are four national/official languages in Switzerland (German, French, Italian and Rumantsch), and that all federal statutes are published in three languages (German French and Italian), which are deemed co-equal, *e.g.,* for purposes of statutory interpretation.

[84] Federal Supreme Court Decision (*Bundesgerichtsentscheid* or "BGE") 131 I 223.

[85] Federal Act of June 23, 2000 Concerning the Freedom of Movement of Attorneys or "Federal Attorney Act" (*Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte vom 23. Juni 2000*), in force since January 1, 2002, Classified Compilation of Federal Legislation (*Systematische Rechtssammlung* or "SR") 935.61.

[86] An exception exists in family law and other similar proceedings, where the court can order the production of documents of its own accord, even in the absence of a request by a party.

[87] *See* Art. 154 of the Swiss Civil Procedure Code (*Zivilprozessordnung* or "ZPO").

[88] Schmid, Basler Kommentar zur schweizerischen Zivilprozessordnung, Basel 2010, Art. 160 ZPO, at note 24.

[89] *Id.*

[90] Relevant provisions include, *e.g.,* the duty of employees to maintain manufacturing and commercial secrets, etc. pursuant to Art. 321a para. 4 of the Swiss Code of Obligations (*Obligationenrecht* or "OR"), which is complemented by the protection of manufacturing and commercial secrets in criminal law pursuant to Art. 162 of the Swiss Criminal Code (*Strafgesetzbuch* or "StGB"). Concerning protection under criminal law, *see* Amstutz/Reinert, Basler Kommentar zum Strafrecht II (2d ed. Basel 2007), Art. 162, at note 11 *et seq.*

[91] *See* Amstutz/Reinert, *supra* note 90. As stated there, the relevant criterion is whether the secret holder retains control over the dissemination of the secret. As long as the secret holder (legally or *de facto*) has the power to control or prevent dissemination of the information in question (*e.g.,* by *de facto* limiting the sphere of those with knowledge of the information or through the use of legal safeguards such as a confidentiality agreement), the information is not deemed to be known.

[92] Concerning attorney secrecy, *see* in particular Fellmann, Anwaltsrecht, Bern 2010, at note 507; BGE 131 I 223, at 235.

[93] Concerning the confidentiality of information necessary for protection under attorney secrecy, *see* Fellmann, *supra* note 92, at note 430 (stating that the number of people with knowledge of the information is irrelevant, as long as *the party in question* does not yet have knowledge of the information and could not gain access to it other than through the attorney without facing substantial obstacles).

[94] *See* Art. 321 StGB, which also applies to members of the clergy, medical practitioners, notaries and certain other professionals including their staff.

[95] Art. 160 ZPO; Art. 264 letter b StPO.

[96] Art. 321a para. 4 OR.

[97] Art. 162 StGB.

[98] A third party funder will regularly be subject to an obligation of this kind.

[99] Federal Attorney Act, *supra* note 85.

[100] The same requirement applies to information that attorneys obtain from third parties with the client's knowledge and will. *See* Fellmann, *supra* note 92, at note 447.

[101] *See* Oberholzer, Basler Kommentar zum Strafrecht II (2d ed. Basel 2007), Art. 321 StGB, at note 5.

[102] In respect of attorney secrecy pursuant to Art. 13 of the Federal Attorney Act, this is a result of the fact that in-house lawyers lack the necessary independence to be registered in an attorney registry and thus are not subject to the Act. In respect of Art. 321 StGB, *see* Oberholzer, *supra* note 101, Art. 321 StGB, at note 5. In-house

counsel is therefore subject only to the obligation to maintain manufacturing and commercial secrets, which is likewise protected by the penal law (Art. 162 StGB). The status of in-house counsel is unlikely to change in the near future, given that the Swiss cabinet withdrew draft legislation concerning in-house counsel in June 2010 after it became clear that the legislation lacked majority support for passage.

[103] *See* Oberholzer, *supra* note 101, Art. 321 StGB, at note 13; *see also* BGE 115 Ia 197 concerning the right to refuse testimony in criminal proceedings.

[104] Art. 321 StGB.

[105] *See* Schmid, *supra* note 88, Art. 160 ZPO, at note 77. In respect of manufacturing or commercial secrets, however, in-house counsel should be in a position to invoke the limited right to refuse participation pursuant to Art. 166 paragraph 2 ZPO. Pursuant to that provision, holders of statutorily protected secrets other than those listed in paragraph 1 of Art. 166 ZPO are entitled to refuse participation in the proceedings if they can credibly show that the interest in maintaining the secret in question outweighs the interest in ascertaining the truth.

[106] A different rule applies where in-house counsel is examined as a witness pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence in Civil or Commercial Matters (SR 0.274.132). Article 11 of the Convention provides that "[i]n the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence - a) under the law of the State of execution; or b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority."

[107] The attorney retains the right to refuse participation notwithstanding the fact that the client's release removes the risk of criminal liability pursuant to Art. 321 StGB.

[108] Art. 160 para. 1 letter b ZPO.

[109] This is particularly true in situations where the attorney correspondence in question was disclosed to a third party, such as a third party funder, with the knowledge and will of the client.

[110] *See* Schmid, *supra* note 88, Art. 160 ZPO, at note 17.

[111] This also corresponds with the protection afforded by Article 264 of the Swiss Code of Criminal Procedure, which refers broadly to "materials" rather than "correspondence." Any protection is, however, subject to the general prohibition on abuse of a legal right (*Rechtsmissbrauchsverbot*), which would be implicated, for example, where materials are handed over to an attorney solely for the purpose of safekeeping or to create a basis for refusing production of the materials.

[112] *See* Schmid, *supra* note 88, Art. 160 ZPO, at note 19.

[113] *See* Schmid, *supra* note 88, Art. 160 ZPO, at note 20.

[114] *See* Frank/Sträuli/Messmer, Kommentar zur zürcherischen Zivilprozessordnung (3d ed. Zurich 1997), § 145 note 3a. The new Federal Civil Procedure Code, which took effect on January 1, 2011, adopted this provision almost *verbatim* from the prior civil procedure codes of the Cantons, particularly the Civil Procedure Code of Zurich. Accordingly, the literature and case law concerning the parallel provisions in the prior civil procedure codes of the Cantons remains relevant.

[115] *See* Message of the Swiss Cabinet Concerning the Swiss Civil Procedure Code (*Botschaft des Schweizerischen Bundesrates zur Schweizerischen Zivilprozessordnung*) of June 28, 2006, published in the Swiss Federal Register (*Bundesblatt),* BBl. 2006, 7314.

[116] *See* Guyan, Basler Kommentar zur schweizerischen Zivilprozessordnung, Art. 156 ZPO, at note 6; Frank/Sträuli/Messmer, *supra* note 114, § 145 note 3 *et seq.*

[117] *See* BGE 95 I 107, 445.

[118] In this context, it could also be argued that information a third party funder has obtained from clients constitutes a commercial secret of the third party funder.

[119] This assumes that the third party funder's testimony as a witness is not already barred by operation of Art. 169 ZPO, which provides that only facts that the witness has observed *first-hand* are susceptible to witness testimony. Hearsay is generally excluded from testimony. That rule alone will usually preclude the examination of the third party funder as a witness concerning information obtained from a party or the party's counsel in the course of due diligence.

[120] This is the case for the following reasons: The opposing party would need to demonstrate that the witness made first-hand observations in respect of a specific issue to be proved. Moreover, the witness could invoke Art. 166 para. 2 ZPO (commercial secrets of the third party funder) as well as Art. 156 ZPO (protection of legitimate interests).

[121] This assumes a sufficiently specific request for production.

[122] Where the opposing party does have knowledge of particular internal documents, however, a request for production may be expected. This may be the case, for example, where criminal proceedings are pending in addition to civil litigation and the documents in question have been seized by the authorities in the criminal proceedings.

[123] Javier H. Rubinstein & Britton B. Guerrina, *The Attorney-Client Privilege and International Arbitration,* Journal of International Arbitration (Kluwer Law International 2001) Volume 18, Issue 6, at 589.

[124] Rubinstein & Guerrina, *supra* note 123, at 596-97; Berger, *supra* note 3, at 27.

[125] *See* Craig Tevendale & Ula Cartwright-Finch, *Privilege in International Arbitration: Is it Time to Recognize the Consensus?,* Journal of International Arbitration (Kluwer Law International 2009) Volume 26, Issue 6, at 825-26.

[126] *See generally* Tevendale & Cartwright-Finch, *supra* note 125, at 830-34.

[127] Tevendale & Cartwright-Finch, *supra* note 125, at 834; Berger, *supra* note 3, at 36-38.

[128] Tevendale & Cartwright-Finch, *supra* note 125, at 834.

[129] IBA Rules on the Taking of Evidence in International Arbitration (May 2010), *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence.

[130] Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee), at 25, *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] New York City Bar Association Formal Opinion 2011-2*, Third Party Litigation Financing* (June 2011).