Are Litigation Finance Contracts Protected by Attorney Client Privilege in New York?

Prof. Maya Steinitz
The University of Iowa College of Law
Iowa City, IA

Jean-Claude Najar
General Electric Company
Paris, France

Ralph Sutton
Bentham Capital LLC
New York, NY

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Maya Steinitz*
Associate Professor, University of Iowa College of Law

To date, the litigation finance industry has worked hard to keep their litigation finance contracts confidential. Only a handful have come to light through litigation. As financing arrangements become more common and defendants start routinely trying to discover if the plaintiff is financed, and if so, on what terms, we expect the discoverability of these contracts to be heavily litigated. Although no clear precedent exists in New York, cases elsewhere appear to come out both ways.¹

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¹ Very recently the federal court for the Eastern District of Pennsylvania decided, without analysis, that the funding contract was protected, see Devon It, Inc. v. IBM Corp., CIV.A. 10-2899, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012) (extending discovery protection, both attorney client and work product, to “all documents relating to any actual or potential investment by Burford in Devon’s litigation against Defendants”). A few years ago the Northern District of California required discovery of a litigation funding agreement in an opinion involving more analysis of the issues, see Berger v. Seyfarth Shaw LLP,
As a background matter, New York privilege law is generally pro-disclosure,\(^2\) including regarding the identity of the person paying another person’s legal costs, as the Court of Appeals restated as recently as 2005:

The attorney-client privilege protects confidential communications between a lawyer and client relating to legal advice sought by the client (see Matter of Priest v. Hennessy, 51 N.Y.2d 62, 431 N.Y.S.2d 511, 409 N.E.2d 983 [1980]; see also CPLR 4503). The person who asserts the privilege has the burden of proving the above elements. Communications regarding “the identity of a client and information about fees paid by the client” are not generally protected under the privilege, nor are communications regarding the payment of legal fees by a third person.\(^3\)

In Priest v. Hennessy, the 1980 decision the Court of Appeals cites for the italicized proposition, the Court explains in more detail:

The fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case. A communication concerning the fee to be paid has no direct relevance to the legal advice to be given. It is a collateral matter which, unlike communications which relate to the subject matter of the attorney’s professional employment, is not privileged. […] Nor does the payment of legal fees by a third person, in and of itself, create an attorney-client relationship between the attorney and his client’s benefactor sufficient to sustain a claim of privilege. While such an arrangement may well be intended to be confidential, it is not, under ordinary circumstances, undertaken for the purpose of obtaining legal advice for the third party and, therefore, no attorney-client relationship arises between the third party and the attorney on the mere payment of attorney fees on behalf of another.\(^4\)

\(^2\) See Matter of Grand Jury Subpoena of Stewart, 144 Misc. 2d 1012, 1016, 545 N.Y.S.2d 974, 977 (Sup. Ct. 1989) aff’d as modified sub nom. In re Stewart, 156 A.D.2d 294, 548 N.Y.S.2d 679 (1989) (Since the privilege prevents disclosure of relevant evidence, and thus impedes the quest for truth, it must “be strictly confined within the narrowest possible limits consistent with the logic of its principle.” In re Shargel, 742 F.2d 61, 62 (2d Cir.1984), citing, 8 J. Wigmore, Evidence § 2291, at 554 (McNaughton rev. ed. 1961)).


These two decisions do not force the conclusion, however, that financing agreements are discoverable, because the Priest v. Hennessy Court is focused on narrow disclosure:

The name of the person retaining an attorney for another and the amount of the retainer paid are quite simply not the confidences which the privilege was intended to protect. Rather, “the statements of the client for the purpose of seeking advice from his counsel were the disclosures which were to be kept secret.”

In a later case the Court of Appeals phrased the rule perhaps more expansively: “The questions regarding whether legal advice was obtained and how such advice was paid for were not protected.”

Does “how” mean all or most of the financing contract? Or does it mean simply the identity of the funder and a few collateral terms about the attorney’s compensation?

How much fee information is discoverable is not obvious based on NY case law. A NY Appellate Division opinion allowed for the discovery of “fee arrangements” between a law firm and five clients because the amounts paid by the clients were at issue in the case. Several cases stand for the proposition that “The terms of an attorney’s retainer agreement are not privileged.” In one case, a criminal proceeding involving a grand jury subpoena of “any and all records of amounts billed and payments made for services rendered... including fee arrangements and retainer agreements,” the client and attorney had made a pact that the identity of the person paying the fee had to be kept secret. In rejecting the pact the court was scornful:

Where a third-party benefactor has paid for the legal representation of the client, counsel should be aware that fee information is not privileged and the attorney is under a duty to explain to the client the conflict of interest arising from this fee arrangement and the potential for subsequent disclosure of this arrangement and disqualification of the attorney. An attorney cannot accept compensation from a third party except upon the client’s consent after full discussion of the dangers of outside influence.

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5 Id. at (citations omitted, italics added).
8 See Oppenheimer v. Oscar Shoes, Inc., 111 A.D.2d 28, 29, 488 N.Y.S.2d 693, 695 (1985) and; People v. Belge, 59 A.D.2d 307, 308, 399 N.Y.S.2d 539, 540 (1977), citing several cases within it. See also Registered Country Home Builders, Inc. v. Lanchantin, 10 A.D.2d 721, 198 N.Y.S.2d 767, 768 (1960) (At trial the judge did not allow evidence about the retainer agreement even though it revealed the attorney witness had a financial interest in the outcome of the case on the grounds that the agreement was privileged. The appellate court found that omission significant enough to be reversible error and ordered a new trial, stating that the fee information was not privileged). Given that financing contracts always involve contingent compensation, including of the attorneys, those terms (if not the whole contract) are likely discoverable, along with the identity of the financier and the total capital committed.
If a retainer agreement is not privileged, and communications regarding a third party’s payment of legal fees are not privileged, it seems at least reasonably possible that the financing contract would not be privileged, at least under the attorney-client privilege, and almost certain that at least parts of it would be discoverable.

A different approach to examining the discoverability question is to look at the discoverability of joint defense agreements under NY law. Theoretically these agreements might contain legal analysis and strategy, and thus should be more likely to be privileged. Even so, New York courts can be hostile to the idea that privilege prevents their discovery. In 2010 New York’s Appellate Division (1st Dept) held that:

Plaintiff did not meet his burden of establishing that the joint defense agreement in question was protected from disclosure by the attorney-client privilege.10

Similarly in 2007 the federal court in the Southern District of New York rejected the idea that a joint defense agreement was privileged:

In this case, the Agreement does not qualify as a privileged communication because it does not satisfy the first element of the attorney-client privilege doctrine. Namely, the Agreement is not a communication wherein Sunham sought confidential legal advice from its attorney, nor does it reveal the confidences of the client.11

Nonetheless some federal courts in New York have applied the federal work-product doctrine to prevent the disclosure of joint defense agreements on that basis, even while rejecting the applicability of attorney-client privilege.12 In so doing they note that generally federal courts consider such agreements work product. In New York, “factual” work product not involving an attorney’s mental impressions and analysis is discoverable upon a sufficient showing of need. A litigation finance contract is unlikely to contain such information and so even it is found to be work product protected would still be potentially discoverable.

In short, plaintiffs and litigation funders in New York should not count on the courts protecting the confidentiality of the financing contracts, in whole or in part, although they can be reasonably hopeful that the revocable protection of “factual” work product privilege will be extended to it.