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WHAT TO SAY AND WHEN: > COMMUNICATIONS WITH FUNDERS IN US PROCEEDINGS

A huge volume of disclosure is routinely required in US litigation. Here, Alan Guy of Vannin Capital surveys the law in the US regarding the disclosure of communications with funders and sets out best practices for protecting those communications.

One of the defining features of civil litigation in the United States is the large amount of disclosure parties to a litigation can demand from one another. For parties thinking of using litigation funding in connection with a dispute in US courts, this raises several questions. For example, will disclosing confidential information about a case to a funder open the door to disclosure demands – commonly called discovery – in the litigation that follows? And will the terms of the funding agreement have to be disclosed to an opposing party?

These questions can be particularly nerve-wracking for litigants based outside the United States, who may not be familiar with how discovery works in US courts and may need the help of a funder to find qualified US counsel in the first instance. While there is no way to eliminate the risk of disclosures related to funding entirely, there are a few best practices that all litigants can use to minimise the risk that their communications and agreements with funders will get caught up in the broad scope of US-style discovery.

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Discovery in US civil proceedings

At first glance, US-style discovery can seem remarkably broad, but important limitations exist that can protect communications and agreements with funders from disclosure.

Unlike the system used in many civil law countries, discovery in US courts is based on the theory that each party should be required to produce all the evidence it has regarding the facts in a dispute, even if that evidence is unhelpful to that party's case. As the US Supreme Court explained in the seminal case of *Hickman v. Taylor*, 329 U.S. 495, 507 (1947):

> *"Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."*

Under the civil procedure and evidence rules that now apply in many US courts, "parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defence" if the burden of discovery is "proportional to the needs of the case". Relevance is defined broadly to include any information making a fact "of consequence" to the dispute "more or less probable than it would be without the evidence."

Because discovery obligations extend to information within a party's "possession, custody, or control", US courts will require the production of information even when that information is kept outside the territorial borders of the United States.

However, while at first glance US rules regarding discovery may appear to sweep up every scrap of information in a litigant's possession, a number of important principles limit their reach – particularly where communications and agreements with funders are concerned.

First, while the definition of relevance is very broad under US law, US courts are reluctant to allow parties to obtain evidence that has only a speculative connection with a case. Courts have declined to compel the production of funding agreements based on the hypothetical possibility that the agreements might violate rules against champerty and maintenance, noting that those were not defences to the claims against the defendant, or the mere possibility that the lead plaintiffs in a class action lacked the resources to adequately represent the class.

While one state, Wisconsin, has adopted a blanket rule requiring the disclosure of funding agreements by plaintiffs in all civil litigation, this approach has not been adopted by most other authorities that have considered it. The handful of courts that have adopted rules regarding funding-related disclosure have focused on establishing the identity of the funder, not the financial terms of the funding agreement.

Secondly, US courts have recognised that it is unfair to allow one party to exploit the work of another by demanding documents prepared in anticipation of litigation or for trial. Absent a showing of special need, materials prepared by a party – or those working on behalf of a party – while investigating the facts of a dispute or preparing a legal strategy are not subject to discovery. Furthermore, when there is a special need for disclosure (such as when a party has sole control of a statement from an unavailable witness), a court must still protect the "mental impressions, conclusions, opinions [and] legal theories of a party's attorney or other representative concerning the litigation".

Because this work-product doctrine is designed to prevent material from falling into the hands of an opposing party, disclosure of it to a third party does not automatically waive the protection. A waiver only occurs when the protected documents "are disclosed in a manner that substantially increases the opportunity for potential adversaries to discover them". As a result, the majority of US courts that have considered demands for the disclosure of communications between litigants and funders regarding the merits of a case have found that the material is protected by the work-product doctrine and that it does not become subject to discovery when it is disclosed to a funder under a written confidentiality agreement.

Finally, like many common law jurisdictions, US courts recognise that confidential communications with an attorney for the purposes of obtaining legal advice are protected from discovery. This protection may attach even when communications take place outside of the United States if they relate primarily to a US dispute. While arguments can be made that disclosures to a litigation funder should not waive the attorney-client privilege, courts have been slow to accept such arguments. As a result, litigants should not assume that just because their attorney is present during discussions with funders, those communications will automatically be covered by the attorney-client privilege.

It is therefore clear that, while US courts do not automatically protect communications and agreements between litigants and funders, they are willing to apply traditional limitations on discovery to keep these materials out of an opposing party's hands.

Best practice

Because the law regarding disclosure and funding is evolving, there can be no 'one size fits all' approach to protecting communications and agreements between litigants and funders. However, certain best practices can help litigants maximise their chances of keeping materials confidential.

First, litigants should consider the reputation of a funder and the credentials of its team. While there are many sources of funding for civil litigation in the United States, only a handful have adopted Vannin's approach of hiring experienced civil litigators to work with litigants throughout the life-cycle of a case. Working with a funder that understands the unique concerns that arise when deploying capital in connection with litigation will provide a litigant with an added measure of security from the moment the funding diligence process begins.

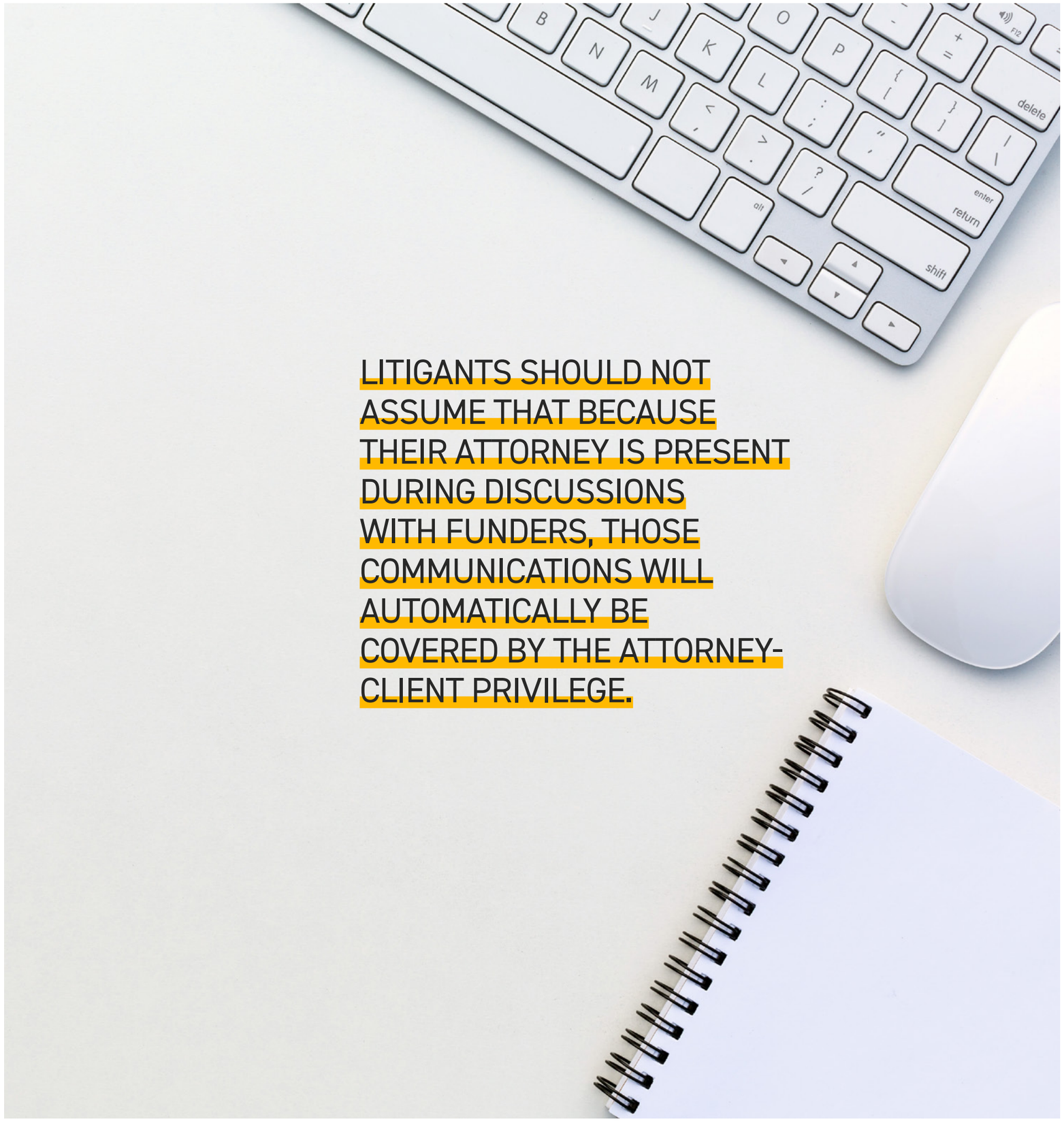
Second, litigants and funders should develop a plan for managing disclosure risks using available limitations on discovery at the outset of their relationship. That plan should take into account the rules governing discovery and disclosure in both the jurisdiction where litigation is likely and the jurisdictions where sensitive information may be kept. While it is often helpful to have litigation counsel involved at this stage, the work-product doctrine will provide a measure of protection even if counsel has yet to be retained.

Third, written non-disclosure agreements should be put in place before sensitive information is exchanged. Because the work-product doctrine remains one of the most robust protections for communications and agreements with funders, non-disclosure agreements should make clear that the primary purposes of any communications or funding agreements are to allow the litigant to pursue claims or defences in a pending or impending litigation.

Fourth, funding agreements should clearly state their litigation purpose and delineate the roles played by litigant, lawyer, and funders in relation to the case. When disclosure of a funding agreement is anticipated, it may also be appropriate to segregate particularly sensitive information, such as terms reflecting an attorney's opinions regarding the merits of a case, so that they can be easily redacted.

Fifth, as the case proceeds, litigants, lawyers, and funders should follow the plan developed for managing disclosure risks at the outset and update it as necessary. As the law in this area evolves, they should adjust their practices to match. They should also take care that familiarity and convenience do not lead them to share information in ways that increase disclosure risks.

Finally, when communications or agreements with funders are the targets of discovery demands and the subject of disclosure obligations, litigants, lawyers, and funders should be forthright with the court and opposing parties when resisting disclosure. Courts are likely to look much more favourably on objections to disclosure if they are raised promptly and in an appropriate manner.



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Conclusion

The United States is an appealing forum in which to litigate for many reasons, not least of which is the increasing availability of funding from experienced funders like Vannin. While discovery in US civil litigation is broad – a fact that can work to the significant advantage of a litigant – an increasingly robust body of law is developing that protects communication and agreements with funders from disclosure. By following the best practices above, litigants can take maximum advantage of both features of the US legal system.