By Dan D. Kohane, Sean Griffin, and John R. Ewell

Practical Solutions to Fend Off the Attack on the Confidentiality of Insurer-Coverage Counsel Communications

Recent court decisions have made protecting an insurer's claims file and its communications with coverage counsel from discovery more challenging. Unlike other businesses and corporations, insurance companies face court decisions holding that they should not receive the full protection of the attorney–client privilege or the work product doctrine, a term of art that refers to mental impressions, opinions, conclusions, and legal theories of an attorney. (Some cases use this term incorrectly to refer to what is really material prepared for litigation. Under both Federal Rule 26 and CPLR 2101(c), attorney work product is not discoverable. In some of the cases discussed within this article, courts do not draw the distinction and suggest work product is discoverable when they mean material prepared for litigation is discoverable.) Those holdings are forming an alarming trend. This is an attack on insurance companies' ability to do business and participate meaningfully in our system of justice. It also serves as a warning to other industries that, going forward, the courts may look to circumscribe their rights to attorney–client privilege and work product protection.

An insurance company should have the right to seek confidential legal advice. Like other organizations and individuals, an insurance company must consult lawyers for advice about legal issues impacting its business. An insurance company needs to be able to get an honest and candid evaluation of certain claims, including the worst case scenario. As one appellate court has noted,

> Such a rule makes perfect sense, as an insurance company should be free to seek legal advice in cases where coverage is unclear without fearing that the communications necessary to obtain that advice will later become available to an insured who is dissatisfied with a decision to deny coverage. A contrary rule would have a chilling effect on an insurance company's decision to seek legal advice regarding close coverage questions, and would disserve the primary purpose of the attorney–client privilege—to facilitate the uninhibited flow of information between a lawyer and client so as to lead to an accurate ascertainment and enforcement of rights.

Aetna Cas. & Sur. Co. v. Superior Ct., 153 Cal. App. 3d 467, 474 (Cal. Ct. App. 1984).

Any concern that opposing counsel in a bad faith suit could discover the insurance company's confidential attorney–client communications would "certainly chill" open and honest communication, while the inability to communicate freely would impede all communications and diminish the attorney's effectiveness. *State ex rel. U.S. Fid. & Guar. Co. v. Montana Second Jud. Dist. Ct.*, 783 P.2d 911, 916 (Mont. 1989). Even in the absence of bad faith, when an insurer seeks the advice of coverage counsel, it should have the same rights its policyholder enjoys to secure confidential legal advice.

Yet in recent years, courts across the country have crafted an exception to the attorney–client privilege, holding that it does not apply in bad faith insurance cases. Meanwhile, an alarming number of jurisdictions have begun restricting an insurer's work product protection in bad faith cases as a matter of law. These courts consider bad faith insurance cases to be "unworthy" of these protections as a matter of public policy. *E.g., Boone v. Vanliner Ins. Co.*, 91 Ohio St. 3d 209, 213 (2001); *Garg v. State Auto. Mut. Ins. Co.*, 155 Ohio App. 3d 258, 265 (2003).

As disturbing as that may be to some, a more significant problem faces claims pro-

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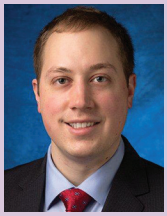

fessionals. Insurers are finding their right to confidential legal advice challenged, as some courts also restrict an insurer's work product protection even in the absence of bad faith. Accordingly, insurers who seek the advice and assistance of coverage counsel in reviewing first- and third-party coverage issues face the possibility that what it had assumed was confidential legal advice will become discoverable by the policyholder and third parties.

Today, insurance companies cannot assume that their communications with their attorneys will remain confidential. Therefore, insurance companies need to adopt new strategies to protect their communications with coverage counsel.

Restricting an Insurer's Right to Attorney–Client Privilege and Work Protection as a Matter of Public Policy

Washington Law

A recent Washington Supreme Court case exemplifies this disturbing trend. *Cedell v. Farmers Ins. Co. of Washington*, 295 P.3d 239 (Wash. 2013), involved a bad faith insurance claim that arose out of a house fire. The fire started when Cedell's girlfriend, Ms. Ackley, was home with the couple's young child. Farmers Insurance questioned the cause of the fire and investigated. Ms. Ackley admitted that she and others at the house "might have consumed" methamphetamine on the day of the fire. Cedell himself swore under oath that he had not consumed meth and did not know that Ms. Ackley had. The fire department investigated and concluded that the fire was likely accidental.

Farmers hired an attorney to assist in making a coverage determination. The coverage attorney examined Cedell and Ms. Ackley under oath and sent a letter to Cedell stating that Farmers might deny coverage. The letter extended to Cedell a one-time offer of $30,000, good for ten days. Cedell tried to contact Farmers regarding the offer, but no one from Farmers returned his calls.

Cedell sued Farmers alleging bad faith and he requested the entire claim file. When the insurer resisted, Cedell moved to compel disclosure or, in the alternative, for an *in camera* review of the file. Farmers opposed the motion and filed an application for a protective order covering all privileged communications with the attorney. After a review of the claims file *in camera*, the trial court granted Cedell's motion to compel Farmers to produce the entire claim file. The Washington Court of Appeals reversed, finding that "a factual showing of bad faith" was insufficient to trigger an *in camera* review of the claim file. The Washington Supreme Court granted review.

Insurers are finding their right to confidential legal advice challenged, as some courts also restrict an insurer's work product protection even in the absence of bad faith.

The Washington Supreme Court began its analysis noting that "unique considerations arise" in the context of insurance bad faith claims. The court said "[t]he insured needs access to the insurer's file maintained for the insured in order to discover facts to support a claim of bad faith." *Id.* at 244–45. Furthermore, allowing a blanket privilege because lawyers were involved "would unreasonably obstruct discovery of meritorious claims and conceal unwarranted practices." *Id.* at 245. Therefore, the court created the following procedure for determining the scope of discovery in bad faith claims:

1) For first-party bad-faith claims that do not involve uninsured motorist claims, there is a presumption of no attorney–client privilege or work product protection. As a matter of law, "attorney–client and work product privileges are generally not relevant." *Id.* at 246.
2) The insurer can overcome this presumption "by showing its attorney was not engaged in the quasi-fiduciary tasks of investigating and evaluating or processing the claim, but instead in providing the insurer with counsel as to its own potential liability; for example, whether or not coverage exists under law." *Id.*
3) If the insurer overcomes the presumption, it is entitled to an *in camera* review of the documents and "redaction of communications from counsel that reflected the mental impressions of the attorney to the insurance company, unless those mental impressions are directly at issue in its quasi-fiduciary responsibilities to its insured." *Id.*
4) At that point, the insured may assert any exceptions to the privilege it claims should apply, such as the civil fraud exception. If the civil fraud exception is asserted, the court will conduct a second *in camera* review to determine if there is "a showing that a reasonable person would have a reasonable belief that an act of bad faith tantamount to civil fraud has occurred." *Id.* at 246–47.

In other words, the Supreme Court of Washington held that there is a presumption of no attorney–client privilege in bad faith cases. Where an attorney is engaged in the tasks of "investigating and evaluating or processing the claim" during the claims adjustment process, the presumption against the attorney–client privilege applies and the insurer may not raise the shield of privilege. *Id.* at 246. However, where an attorney instead engages in core attorney–client communications with the insurer, such as "providing the insurer with counsel as to its own potential liability," there is no presumption against the attorney–client privilege. *Id.* Although *Cedell* was decided in a "bad faith" milieu, the language used suggested a broader context. *See also Stewart Tit. Guar. Co. v. Credit Suisse, Cayman Is. Branch*, 1:11-CV-227-BLW, 2013 WL 1385264, *4 (D. Idaho Apr. 3, 2013) (adopting *Cedell* as "well-reasoned").

When an attorney takes on the role as a claims handler, courts are suggesting that he or she has a quasi-fiduciary duty to act in good faith towards the insured. Therefore, the attorney, retained to pro-

vide coverage advice, must take care not to commingle the claim investigation with the provision of coverage advice. *Cedell* drew a distinct line between acting as coverage counsel and acting as a claims handler, stating that while the attorney "may have advised [the insured] as to the law and strategy, he also performed the functions of investigating, evaluating, negotiating, and processing the claim." *Cedell*, 295 P.3d at 247. Therefore, the *Cedell* court advised, "[w]here an attorney is acting in more than one role, insurers may wish to set up and maintain separate files so as not to co-mingle different functions." *Id.* at 246 n.5.

However, other jurisdictions have rejected the rule of *Cedell*. An Intermediate Court of Appeals of Hawai'i expressly rejected adopting *Cedell* as "inconsistent" with Hawaii's understanding of attorney–client privilege. *Anastasi v. Fid. Nat. Tit. Ins. Co.*, 341 P.3d 1200, 1217 (Haw. Ct. App. 2014) *cert. granted*, SCWC-30557, 2015 WL 3384471 (Haw. May 22, 2015). One Washington federal court states that the problem with *Cedell* is that it "conflates the attorney–client privilege and the work product doctrine" and that, "the opinion creates rather than alleviates confusion about what must be produced, and under what circumstances." *Philadelphia Indem. Ins. Co. v. Olympia Early Learning Ctr.*, No. C12-5759 RBL, 2013 WL 3338503, *3 (W.D. Wash. July 2, 2013). For these reasons, "every [Washington] federal court to consider the issue has held that the *in camera* review mandate of *Cedell* does not apply in federal court." *Ingenco Holdings, LLC v. Ace Am. Ins. Co.*, C13-543RAJ, 2014 WL 6908512, at *3 (W.D. Wash. Dec. 8, 2014). Instead, the federal courts have taken the position that "a federal court exercises discretion in deciding whether *in camera* review is appropriate." *Id.* Thus, even in the State of Washington, the courts are divided on how to apply this presumption against the insurer in bad faith insurance cases, and *Cedell* is not applied consistently.

Illinois Law

Illinois law restricts an insurer's right to attorney–client privilege as a matter of public policy. Illinois has adopted the common interest exception to attorney–client privilege. *Waste Mgt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 328 (Ill. 1991). Under the common interest doctrine, "when an attorney acts for two different parties who each have a common interest, communications by either party to the attorney are not necessarily privileged in a subsequent controversy between the two parties." *Id.* In *Illinois Emcasco Ins. Co. v. Nationwide Mutual Ins. Co.*, communications between an insurer and its coverage counsel were subject to an *in camera* review to determine if the communications were made for the common benefit of the insurer and its insured. 913 N.E.2d 1102, 1108–09 (Ill. App. Ct. 2009). The court held that Illinois law "provides for the trial court to conduct an *in camera* inspection to resolve disputes over which communications are privileged." *Id.* In other words, if the insurer and insured shared a common interest in the underlying litigation, then the insured is entitled to an *in camera* inspection of the claim file in the declaratory judgment action.

> Therefore, the attorney, retained to provide coverage advice, must take care not to commingle the claim investigation with the provision of coverage advice.

Ohio Law

Ohio goes even further than Illinois and Washington, holding that *both* attorney–client privilege and work product are "unworthy" of protection in bad-faith cases. *Boone v. Vanliner Ins. Co.*, 91 Ohio St. 3d 209, 212 (2001); *Garg*, 155 Ohio App. 3d at 265.

In 2001, the Ohio Supreme Court held that in an action alleging bad faith denial of insurance coverage, "the insured is entitled to discover claims file materials containing attorney–client communications related to the issue of coverage that were created prior to the denial of coverage." *Boone*, *supra*, 91 Ohio St. at 213–14. In so holding, the court reasoned that bad faith insurance cases are "unworthy" of these protections as a matter of public policy. *Id.* at 213. Therefore, waiver of the attorney–client privilege is essentially automatic based on the cause of action pled. By simply asserting a cause of action for bad faith, the insured is "entitled" to the entire claims file as it existed before the denial of coverage.

However, other jurisdictions have declined to apply a *per se* exclusion to the attorney–client privilege in a bad faith action. *See, e.g.*, *Aetna Cas. & Sur. Co. v. San Francisco Superior Court,* 153 Cal.App.3d 467, 476-77 (Cal. Ct. App. 1984); *Hutchinson v. Farm Family Cas. Co.,* 867 A.2d 1, 7-8 (Conn. 2005); *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259-60 (Del. 1995); *W. Bend Mut. Ins. Co. v. Higgins*, 9 So. 3d 655, 658 (Fla. Dist. Ct. App. 2009); *Hartford Fin. Serv. Group v. Lake County Park & Recreation Bd.,* 717 N.E.2d 1232, 1235-38 (Ind. App. 1999); *Dixie Mill Supply Co., Inc. v. Continental Cas. Co.,* 168 F.R.D. 554, 558 (E.D.La.1996); *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.,* 173 F.R.D. 7, 11-12 (D.Mass.1997); *Palmer by Diacon v. Farmers Ins. Exchange*, 861 P.2d 895, 905-06 (Mont. 1993); *Spiniello Companies v. Hartford Fire Ins. Co.*, No. CIV A. 07-CV-2689DMC, 2008 WL 2775643, at *6 (D.N.J. July 14, 2008); *State ex rel Brison v. Kaufman,* 584 S.E.2d 480, 489 (W.Va. 2003); *Martin v. Am. Bankers Life Ins. Assur. Co. of Fla.,* 184 F.R.D. 263, 265-66 (D.V.I.1998).

The work product doctrine generally protects the mental impressions, opinions, conclusions, and legal theories of an attorney. *Hickman v. Taylor*, 329 U.S. 495 (1947). *See also* Fed. R. Civ. P. 26(b)(3). There is a distinction between work product and material prepared for litigation, although at times the boundary between them is not easy to discern. Although an attorney's mental impressions have absolute protection from discovery, materials prepared in anticipation of litigation are conditionally protected, becoming discoverable upon a showing of substantial need by an adverse party. *Schaeffler v. United States*, 806 F.3d 34, 43 (2d Cir. 2015).

However, an Ohio appellate court determined that work product materials are "unworthy of protection" in bad faith insurance cases. *Garg*, 155 Ohio App. 3d at 262. After reviewing *Boone*, 91 Ohio St. 3d 209, the court concluded that the Supreme Court of Ohio had given "no basis" for "distinguishing [between] materials that are otherwise protected by attorney–client privilege and those otherwise protected by the work product doctrine." *Id.* at 263. Therefore, the court held that both attorney–client communications and work product materials are subject to disclosure in bad-faith insurance claims. *Id.*

Florida Law

Florida refuses to afford *any* work product protection to an insurer's claims file in a bad faith case. In *Allstate Indem. Co. v. Ruiz*, 899 So.2d 1121, 1129-30 (Fla. 2005), the Florida Supreme Court held that work product protection does not apply in first- or third-party bad faith cases, and therefore, "all materials, including documents, memoranda, and letters…" contained in the insurer's claim file are discoverable. The court reasoned that claim file materials

> present[] virtually the only source of direct evidence with regard to the essential issue of the insurance company's handling of the insured's claim.… [T]here is simply no logical or legal tenable basis upon which to deny access to the very information that is necessary to advance such action but also necessary to fairly evaluate the allegations of bad faith.

Id. at 1128–29. Furthermore, any material prepared after the resolution of the underlying matter and initiation of the bad faith action "may be subject to production upon a showing of good cause or pursuant to an order of the court following an in-camera inspection." *Id.* at 1130.

New York Law

The New York courts have stretched this reasoning to a near breaking point, going as far as restricting an insurer's work product protection regardless of whether bad faith is alleged. In *Bombard v. Amica Mut. Ins. Co.*, 11 A.D.3d 647, 648 (2d Dep't 2004), the court noted that the party asserting material was prepared in anticipation of litigation, and thus entitled to the statutory privilege, "bears the burden of demonstrating that the material it seeks to withhold is immune from discovery… by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation…" The appellate court held that the insurer's conclusory assertions failed to satisfy this burden. *Id.*

> It is important to note that in *Bloom*, the lawyers kept the fact investigation separate from their legal analysis of whether coverage exist under the contract.

More significantly, the court held that:

> [O]n the limited record that was before the Supreme Court, it was apparent that the asserted privilege is inapplicable. "[T]he payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding which of the two indicated actions to pursue are made in the regular course of its business."

Id. (emphasis added).

The court concluded that:

> Reports prepared by insurance investigators, adjusters, or attorneys before the decision is made to pay or reject a claim are thus not privileged and are discoverable… even when those reports are "mixed/multi-purpose" reports, motivated in part by the potential for litigation with the insured.

Id. (emphasis added).

The court determined that the decision to deny coverage had not been made until February 4, 2003, the date of the disclaimer letter. Therefore, the court found that the information relating to the formulation of the reservation of rights letter two months earlier was discoverable, as the carrier's investigation of the incident and the facts surrounding it were still ongoing at that time. Therefore, the court held that the material in the insurer's file prior to the February 4, 2003, disclaimer was subject to disclosure.

In May 2015, another New York appellate court added its voice. In *Lalka v. ACA Ins. Co.*, 128 A.D.3d 1508 (4th Dep't 2015), the plaintiff commenced an action to recover supplementary underinsured motorist coverage (underinsured motorist benefits) pursuant to an automobile liability insurance policy issued by an insurer. The plaintiff moved for an order compelling the insurer to disclose its entire claim file or, in the alternative, to produce all documentation claimed to be privileged and/or confidential for *in camera* inspection. The motion judge granted that part of the motion seeking those portions of the claim file generated before the date of commencement of the action "with the exception of those materials reviewed *in camera*." *Id.*

The appellate court held that the motion court abused its discretion in denying that part of plaintiff's motion seeking disclosure of those documents submitted to the court for *in camera* review. *Id.* Citing *Bombard*, *supra*, the court held that:

> It is well settled that '[t]he payment or rejection of claims is a part of the regular business of an insurance company. **Consequently, reports which aid it in the process of deciding which of the two indicated actions to pursue are made in the regular course of its business**'

Id. at 1508–09 (emphasis added).

Moreover, the court held that:

> Reports prepared by… attorneys before the decision is made to pay or reject a claim are thus not privileged and are discoverable… even when those reports are 'mixed/multi-purpose' reports, motivated in part by the potential for litigation with the insured… Here, the documents submitted to the court for *in camera* review constitute multi-purpose reports **motivated in part by the potential for litigation with plaintiff, but also prepared in the regular course of defendant's business in deciding whether**

> **to pay or reject plaintiff's claim, and thus plaintiff is entitled to disclosure of those documents."**

Id. at 1509 (emphasis added).

Accordingly, the court ordered that the insurer turn over the communications between itself and its coverage counsel, even in the absence of any claim of bad faith, simply because, at the time the communications were made, the insurer had not yet made a decision on whether or not the claim was covered. *Id.*

Under this rule, the insurer would need to deny coverage, then seek a coverage opinion for the protection afforded to material prepared for litigation to apply. Thus, the insurer faces a Hobson's choice: either blindly deny a claim and then seek confidential legal advice or seek legal advice knowing that its communications will be discoverable. Since coverage opinions are not protected unless made after coverage is denied, the conditional immunity offered to material prepared for litigation provides seemingly no protection. Even so, the rationale that the report is not privileged because it has been prepared in the ordinary course of business should apply to material prepared for litigation only; it should not apply to attorney–client privilege. Unfortunately, the recent trend is for courts to conflate the two. *See, e.g.*, *Lalka*, *supra*. *See also Cedell, supra*.

A Better Rule

Attorney–Client Privilege

Courts could solve this problem by applying the privilege equally to all businesses and individuals. In 2014, the West Virginia Supreme Court of Appeals reached the opposite conclusion of *Cedell* and refused to single out insurers as a matter of public policy. West Virginia's high court held that coverage opinions are protected by attorney–client privilege in bad faith cases. *State ex rel. Montpelier U.S. Ins. Co. v. Bloom*, 757 S.E.2d 788, 794–95 (W. Va. 2014). In reaching this conclusion, the court reasoned that "an insurance company's retention of legal counsel to interpret the policy, investigate the details surrounding the damage, and to determine whether the insurance company is bound for all or some of the damage, is a *classic example* of a client seeking legal advice from an attorney." *Id. See also Aetna Cas. & Sur. Co. v. Superior Ct.*, 153 Cal. App. 3d 467, 474 (Cal. Ct. App. 1984) (holding that coverage counsel is performing a legal service when they are given an insurance policy, a legal document, and are asked to interpret the policy and investigate the claim to determine whether the insurer is legally bound to provide coverage); *Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685, 701 (S.D. 2011) (same); *Hartford Fin. Services Group, Inc. v. Lake County Park & Recreation Bd.*, 717 N.E.2d 1232, 1236 (Ind. Ct. App. 1999) (same); *Anastasi v. Fid. Nat. Tit. Ins. Co.*, 341 P.3d 1200, 1221 (Haw. Ct. App. 2014) (same).

> Thus, even though the underlying facts may be discoverable upon a showing of "substantial need," the coverage attorney's mental impressions, conclusions, and legal analysis detailed in the coverage opinion are still protected from discovery.

This line of cases makes sense. A policyholder can take a copy of the insurance policy and meet with a lawyer for legal advice, and those communications are protected from discovery. An insurer should have the same right to seek and secure confidential legal advice. When an insurer consults an attorney, it is seeking confidential and privileged legal advice just like any other business or individual. It makes no sense to us that some jurisdictions single out insurance companies to strip them "as a matter of public policy" of protections normally surrounding the receipt of legal advice.

Bloom was decided after *Cedell*. Although West Virginia's highest court could have moved in the direction of *Cedell* and applied a presumption against the privilege, it declined to do so. West Virginia looked to other jurisdictions for the answer and was persuaded by Indiana's equal application of the privilege. *See*, *Bloom*, 233 W. Va. at 264–65, *citing Howard v. Dravet*, 813 N.E.2d 1217, 1222 (Ind.Ct.App.2004). Finally, it is important to note that in *Bloom*, the lawyers kept the fact investigation separate from their legal analysis of whether coverage exist under the contract. This opinion gives us hope that, if insurers in their counsel keep separate the roles of fact investigation and legal analysis pertaining to coverage, coverage opinions will receive the full protection of attorney–client privilege when other jurisdictions consider (or revisit) the issue in the future.

Work Product

Shouldn't work product protection also apply equally to all businesses and individuals as well? West Virginia's test for work product protection does not single out the insurance industry, but rather applies work product protection equally to all businesses and individuals.

West Virginia's test for whether a document is protected by work product is substantially the same as the work product doctrine codified in the Federal Rules of Civil Procedure. *Compare* W. Va. R. Civ. P. 26(b)(3) *with* Fed. R. Civ. P 26(b)(3). West Virginia Rule of Civil Procedure 26(b)(3) makes a distinction between factual and opinion work product with regard to the level of necessity that has to be shown to obtain their discovery. *Bloom*, 233 W. Va. at 270. Under Rule 26(b)(3):

> [F]actual work product refers to documents and tangible things that were prepared in anticipation of litigation or for trial (1) by or for a party, or (2) by or for that party's representative, which includes an attorney, consultant, surety, indemnitor, insurer, or agent. When factual work product is involved, the party demanding production must show a substantial need for the material and establish that the same material or its equivalent cannot be obtained through other means without undue hardship. Opinion work product consists of mental impressions, conclusions, opinions or legal theories that are contained in

> factual work product. Where opinion work product is involved, the showing required to obtain discovery is stronger than that for factual work product, because the rule states that the court shall protect against disclosure of mental impressions, conclusions, opinions or legal theories. Opinion work product enjoys a nearly absolute immunity and can be discovered in only very rare and extraordinary circumstances.

Id.

Thus, even though the underlying facts may be discoverable upon a showing of "substantial need," the coverage attorney's mental impressions, conclusions, and legal analysis detailed in the coverage opinion are still protected from discovery.

This rule affords insurers the same legal protections that all other businesses and individuals enjoy. Such a rule appears to be more consistent with the U.S. Supreme Court's promulgation of the work product doctrine in *Hickman v. Taylor*, *supra*. It makes no sense that some corporations, such as insurance companies, are singled out and denied this protection by the courts.

Practical Pointers

We offer the following seven practical pointers for insurers and their counsel to help them protect their coverage file from discovery.

Know the Law in Your Jurisdiction

Because an insurer's right to attorney—client privilege varies from state to state, the first step in protecting your coverage communications from disclosure is knowing the applicable law in your jurisdiction. Where an insurer is not in the same state as its attorney, the attorney must research which jurisdictions may apply to the communications. All privileged communications should be tailored to the law of any applicable jurisdictions to minimize the risk of discovery.

Keep the Number of Protected Documents to a Minimum

To optimally protect attorney–client privilege, the insurer and its attorney should try to keep the number of privileged communications to a minimum. There are many instances when no written communication is required. Often, it is best for the insurer and its attorney to discuss the issue over the phone and make an informed decision before memorializing the communication in a letter or email. This is especially important to remember in the age of e-discovery as courts require the production of emails.

> The more privileged documents created, the greater the chance of disclosure of privileged communications.

Although an email may take only seconds to write, each email created increases the risk of disclosure of privileged communications. The more privileged documents created, the greater the chance of disclosure of privileged communications. Therefore, the number of privileged documents should be kept to a minimum.

Clearly Document When Litigation Is Anticipated

Work product protection is triggered when the party reasonably anticipates litigation. Within the context of insurance coverage, the point when litigation is reasonably anticipated varies from jurisdiction to jurisdiction. When an insurer anticipates litigation, it is necessary to clearly document when and why the insurer first anticipated litigation. By clearly documenting the date and reasons for anticipating litigation, the insurer has evidence that litigation was anticipated from a distinct point in time, and a good argument that work product protection should apply from that day forward.

However, in some jurisdictions the date when the insurer reasonably anticipates litigation is irrelevant. As detailed above, in New York, the entire claims file is discoverable as a matter of law until the insurer makes a decision to pay or reject the claim. *See, e.g.*, *Lalka*, *supra*. An insurer in a jurisdiction that follows such rule must weigh the benefits and risks of seeking a coverage opinion before making a decision to pay or reject a claim.

In Federal Court, Emphasize Work Product Doctrine

While the attorney–client privilege is a matter of substantive state law, the work product doctrine is a matter of federal procedural law. *See, e.g.*, *United Coal Companies v. Powell Const. Co.*, 839 F.2d 958, 966 (3d Cir. 1988) (holding that "[u]nlike the attorney–client privilege, the work product privilege is governed, even in diversity cases, by a uniform federal standard embodied in 26(b)(3))." Federal Rule of Civil Procedure 26 provides that:

> Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But… those materials may be discovered if:… the 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.

Fed. R. Civ. P. 26(b)(3)(A).

The rule then states that, "[i]f the court orders discovery of those materials, it *must* protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B).

The insurer resisting discovery of the claims file in federal court should argue that, even if the court determines that some of the documents in the claims file must be disclosed, the Federal Rules still *mandate* that the mental impressions, conclusions, opinions, and legal theories of the insurer be redacted or in some other way "protect[ed] against disclosure." *See, e.g.*, *Underwriters Ins. Co. v. Atlanta Gas Light Co.*, 248 F.R.D. 663, 670 (N.D. Ga. 2008) (holding that Rule 26(b)(3) creates an absolute bar to discovery of opinion work product); *Howard v. Dravet*, 813 N.E.2d 1217, 1222 (Ind. Ct. App. 2004) (same); *but see*

Cozort v. State Farm Mut. Auto. Ins., 233 F.R.D. 674, 676 (M.D. Fla. 2005) (holding that the protection against disclosure of work product is not absolute). Thus, where the litigation is pending in federal court, the work product doctrine may provide more protection than does the attorney--client provision and more protection than either privilege provides in some state courts. Therefore, insurers should emphasize the work product doctrine whenever litigating in federal court.

Keep a Detailed and Accurate Privilege Log

Insurers wishing to shield coverage materials from discovery must maintain an accurate privilege log. Where an insurance company withholds documents and asserts such documents are protected, the privilege log must be detailed and accurate. A vague privilege log runs the risk of causing unnecessary delay or a blanket disclosure order. *See, e.g.*, *Mosley v. Am. Home Assur. Co.*, 13-20259-CIV, 2013 WL 6190746, at *3 (S.D. Fla. Nov. 26, 2013) (finding that vagueness of the privilege roll "prevents a reasonable evaluation of whether these documents are legitimately being withheld from production"); *Muro v. Target Corp.*, 250 F.R.D 350, 353, 362 (N.D. Ill. 2007) *aff'd*, 580 F.3d 485 (7th Cir. 2009) (holding that the magistrate judge did not abuse her discretion when she "concluded that the [privilege] log remained inadequate, and ordered production of all documents listed in the log"); *Kifer v. Am. Family Mut. Ins. Co.*, 13-6085 RJB, 2015 WL 1188565, *6 (W.D. Wash. Mar. 16, 2015).

The privilege log should indicate whether the documents were authored or received by the coverage attorney. The privilege log should also identify: the number of pages for each document, the type of document (*i.e.,* email, handwritten notes, letter, memorandum, or report), the author and recipient(s), the date (if any), the subject, and the type of privilege asserted (*i.e.* attorney–client privilege, work-product doctrine, or both). *Anastasi v. Fid. Nat. Tit. Ins. Co.*, 341 P.3d 1200, 1215 (Haw. Ct. App. 2014). It should be clear whether the document is protected by attorney–client privilege, work product, or both. Ambiguous designations such as "attorney–client privilege and/or the work product doctrine" or "AC/WP" should not be used. *See, e.g.*, *Westfield Ins. Co. v. Carpenter Reclamation, Inc.*, 301 F.R.D 235, 247 (S.D.W. Va. 2014); *Ingenco Holdings*, *supra*, at *5. Credibility with the court is essential, and therefore, attorney–client privilege should not be asserted when a document is only protected by work product doctrine. Moreover, insurers should not attempt to cast a blanket privilege over their claim investigation activities. If a document has actually been prepared for non-litigation purposes it must be produced, even where a document can be characterized as being helpful or important to the coverage litigation.

> The insurer resisting discovery of the claims file in federal court should argue that, even if the court determines that some of the documents in the claims file must be disclosed, the Federal Rules still *mandate* that the mental impressions, conclusions, opinions, and legal theories of the insurer be redacted or in some other way "protect[ed] against disclosure."

The privilege log must also be accurate since whether to conduct an *in camera* inspection, and what exactly that entails, is left to the trial court's discretion. Some judges will review and carefully scrutinize each individual document and determine whether the document is privileged. Other judges will determine whether the documents are privileged only by reviewing the privilege log. Accordingly, the privilege log should be sufficiently detailed to permit the court to determine whether all elements of the privilege are present for each document. If a privilege log is sufficiently detailed, it may provide enough information for the court to rule in favor of protection without an *in camera* review of the documents themselves. If a privilege log is not sufficiently detailed, the court may be more likely to scrutinize each document, or worse, to grant a motion to compel without reviewing the documents. In some jurisdictions, the failure to timely produce or the production of an inadequate privilege log may constitute waiver of any asserted privileges. *See, e.g.*, *Atteberry v. Longmont United Hosp.*, 221 F.R.D 644, 649 (D. Colo. 2004).

Maintain Separate Files for Defense and Coverage Issues

When an attorney provides coverage advice to the insurer, there is no fiduciary duty to the insured. However, the courts suggest when that attorney investigates the facts of a claim, he or she owes a quasi-fiduciary duty to the insured. These two roles must be kept separate. When an attorney is fact gathering, most courts treat the lawyer as a claims adjuster and hold that there is no blanket attorney–client privilege. To receive the protection of attorney—client privilege, the insurer must show that the communication had been made for the purpose of obtaining or rendering legal advice. Therefore, to optimally protect privileged communications, the insurer should set up and maintain two separate files: One for coverage issues and one for the defense of the insured. In *Cedell*, the Supreme Court of Washington wisely cautioned that "[w]here an attorney is acting in more than one role, insurers may wish to set up and maintain separate files so as not to co-mingle different functions." *Cedell*, *supra*, 295 P.3d at 246 n.5.

Admittedly, this is easier said than done. However, if an insurance company wants to protect its privileged communications from

discovery, then such effort is necessary. *See, e.g.*, *Stewart Tit. Guar. Co. v. Credit Suisse, Cayman Is. Branch*, 1:11-CV-227-BLW, 2013 WL 1385264, at *5 (D. Idaho Apr. 3, 2013) ("Stewart Title apparently did not set up such separate files because it appears from the privilege log that coverage communications may be mixed together with unprivileged claim investigation communications. And as *Cedell* makes clear, not all coverage communications are protected but only those that have no relevance to the [insured's] bad faith claims").

By keeping privileged communications separate from non-privileged communications, an insurance company and their attorney decreases the likelihood that the document will be subject to discovery. Although separate files may not protect all coverage communications from disclosure, it should help the court identify and protect "those that have no relevance" to the insured's bad faith claims.

Keep Facts and Legal Opinions Separate as Much as Possible

Another practical pointer concerns the coverage opinion itself. When writing a coverage opinion, the coverage attorney should keep facts and legal opinion separate as much as possible. When a coverage attorney mixes law and fact, often referred to by the courts as "mixed reports," the attorney risks the coverage opinion becoming discoverable. *See, e.g.*, *Lalka*, *supra*, 128 A.D.3d at 1509. The court may require the insurer to produce a redacted form of the coverage opinion, particularly when the coverage opinion is heavily fact-specific. Although the legal analysis has been be redacted, the party seeking discovery typically can discern or at least get a good idea about the insurer's legal strategy.

A better approach to the coverage opinion is keeping facts and law separate as much as possible. The coverage lawyer should write separate reports concerning the factual investigation and the legal advice given. The first document should objectively state the facts. Legal advice based on the fact gathering should be offered in a separate document—marked "privileged and confidential." Thus, when the judge reviews the documents *in camera*, the judge could simply hand the page concerning the underlying facts to the plaintiff and hand the coverage opinion to the insurer as protected by attorney–client privilege. Obviously it is often necessary to discuss the facts in providing a coverage opinion; therefore, where the attorney is providing a report combining factual investigations and legal advice, the attorney should cite to case law as relevant to establish that the report is legal strategy protected by attorney–client privilege.

Conclusion

Based on recent trends and decisions, it is clear that insurance companies cannot assume that the legal advice they receive will remain confidential. These seven practical pointers should aid insurers and their counsel in protecting their coverage communications from discovery. Although we can recommend strategies to insurers, an insurance company still has no guarantee that the court will protect these communications under the work-product doctrine or attorney–client privilege.

On the surface this may appear to be problematic for the insurance industry only. However, this disturbing trend signifies a broader threat to corporate attorney–client privilege and work product protection. Other corporations and industries should take notice that, in the future, the courts may look to erode other corporations' or industries' rights to attorney–client privilege and work product protection.