Privilege and Work Product Issues

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While courts routinely categorize claim investigation and analysis by outside counsel as ordinary business functions, you can still take measures to establish elements of privilege in your communications.

In most cases, in-house claims professionals, some of whom may be lawyers, adjust insurance claims. However, insurers also retain outside counsel to manage complex or high-exposure claims. In these situations, in addition to functioning in the traditional manner by providing legal advice, an outside counsel may wear several hats, serving as claims adjuster, investigator and coverage counsel. This lawyer may investigate the facts of a particular claim or series of claims; evaluate potential liability and damages; formulate claim-handling or trial strategy; and make reserve recommendations. In some cases, this lawyer may evaluate the potential for coverage litigation with an insured or “bad-faith” exposure. Accordingly, whether communications and materials prepared by the outside lawyer have attorney-client privilege or work product doctrine protection becomes paramount.

As detailed below, the specific role played by the lawyer is of principal importance in disputes over the production of communications prepared by an outside counsel.

While the law regarding the role of counsel in other business contexts is generally well settled, determining how the attorney-client privilege or work product doctrine applies to protect communications with an attorney and attorney work product in the insurance context is not so clear. As one court has said:

In the insurance context, the question of whether a communication falls within the attorney-client privilege can often be a difficult one because of the investigatory nature of the insurance business. The line between what constitutes claim handling and the rendition of legal advice is often more cloudy than crystalline.


This article will address the general rules regarding the attorney-client privilege and work product doctrine and their application to outside counsel retained by an insurance company, not as defense counsel, but to assist in investigating or adjusting a claim. As detailed below, most courts have determined that communications and materials prepared by outside counsel...
The Role of Outside Counsel

It is well settled that an attorney may act in a capacity other than that of an attorney. *U.S. v. Davis*, 636 F.2d 1028, 1044 (5th Cir. 1981). In the insurance context, insurers often retain outside counsel to serve many roles, including acting as a claims adjustor, a claim process supervisor, or a claim investigation monitor. *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 671 (S.D. Ind. 1991). Further, an outside counsel’s role can range from directing defense counsel how to handle a specific claim to advising the company on coverage issues. Outside counsel handle claims for many reasons, including expertise, experience, geographic location, or something as simple as workload of the in-house claims staff.

Privilege and how it is applied to communications and materials prepared by outside counsel usually becomes an issue in the event of litigation with an insured. In that situation, an insured seeks production of materials prepared by outside counsel in discovery, and the insurer asserts that the materials are protected from disclosure because of the attorney-client privilege or the work-product doctrine. Most often, a trial judge will decide whether the materials at issue have protection or an insurer must produce them after an in camera inspection. In determining whether an insurer will produce disputed materials, the judge will balance the interests of the discovery rules of most states, requiring production of anything relevant to any issue and the case, with the rules regarding privilege, mandating that the judge construe the privilege narrowly. Some communications and materials are easily classified as protected by privilege and withheld from production. With others, it is easy to determine that privilege does not apply, and an insurer must produce the materials. Still other materials may contain both privileged and non-privileged information.

Because an insurer is in the business of evaluating and adjusting insurance claims and making coverage determinations short of litigation, an insured frequently will argue that neither the attorney-client privilege nor the work product doctrine shields communications or documents prepared by outside counsel that would have been created in the normal course by an insurer in adjusting a claim.

General Rules

Over time, the courts have developed some general rules about the privileges afforded attorneys when representing clients to serve the public interests of the law.

Attorney-Client Privilege

The attorney-client privilege is the oldest privilege recognized at common law. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Case law generally provides that the attorney-client privilege protects confidential communications by a client to an attorney as a legal adviser and the advice furnished by the lawyer in the course of representing the client. The privilege applies not only to communications made by a client to a lawyer, but also to communications from the lawyer to the client. *Schwimmer v. U.S.*, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956). The privilege also extends to written materials reflecting the substance of an attorney-client communication. *Green v. IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982). The purpose of the privilege is to encourage full and frank communication between lawyers and their clients and to promote the broader public interests in the observation of law and the administration of justice. *Upjohn* at 389. Specifically, the courts have determined that a lawyer’s ability to provide sound legal advice depends on obtaining complete and full information from a client, which requires alleviating the client’s fear.

The elements of the attorney-client privilege are as follows: “(1) Where legal advice of any kind is sought; (2) from a professional legal advisor in his capacity as such; (3) the communications relating to that purpose; (4) are made in confidence; (5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or by the legal advisor; (8) except if the protection is waived.” *U.S. v. El Paso Co.*, 682 F.2d 530, 539 n.9 (5th Cir. 1982) (citing 8 J. Wigmore on Evidence §2292 at 554 (J. McNaughton rev. 1961). Significantly, the privilege does not protect communications regarding underlying facts but only the legal advice regarding facts. *Upjohn* at 389. Further, the privilege may not protect legal advice if it was “incidental” to a business purpose. *United States v. International Business Machines*, 66 F.R.D. 206 (S.D.N.Y. 1974).

Work Product Doctrine

The work product doctrine protects from discovery documents and tangible things prepared in anticipation of litigation by or for a party, or by or for that party’s representative. *U.S.A. v. Patrick J. Roxworthy*, 457 F.3d 590 (6th Cir. 2006) (citing the Fed. R. Civ. Proc. 26 (b) (3)). The doctrine is “distinct and broader than the attorney-client privilege.” *Hickman v. Taylor*, 329 U.S. 495, 508 (1947). The purpose of the doctrine is “to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy ‘with an eye toward’ litigation free from unnecessary intrusion by his adversaries.” *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) (citing, *Hickman v. Taylor*, 329 U.S. 495 (1947)).

In applying the doctrine, courts consider the nature of the document for which protection is sought, as well as the facts surrounding its creation and distribution.
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Courts follow different standards for determining whether a document is “prepared in anticipation of litigation.” Some courts follow a “because of” test, finding that a document is protected if it was “prepared or obtained because of the prospect of litigation.” United States v. Adlman (Adlman II), 134 F.3d 1194, 1202 (2d Cir. 1998); Binks Mfg. Co. v. Nat’l Preston Indus., Inc., 709 F.2d 1109, 1119 (7th Cir. 1983); In re Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir. 1979). Other courts follow a narrower, “primary motivation,” or “primary purpose,” test for determining the applicability of work product protection, under which documents are deemed to have been prepared in anticipation of litigation when the “primary motivating purpose behind the creation of the document was to aid in possible future litigation.” United States v. El Paso Co., 682 F.2d 530, 542 (5th Cir. 1982). In October, 2009, the United States Court of Appeals for the First Circuit applied an alternate test. Applying this test, only documents “prepared for litigation would have work product protection. United States v. Textron, Inc., 577 F.3d 21 (1st Cir. 2009).

Broad Discovery Scope and Privilege Application
Federal Rule of Civil Procedure 26(b)(1) sets forth a very broad scope of discovery: any matter, not privileged, which is relevant to the subject matter involved in the pending action.... The information need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

It is a well-settled principle that courts will accord broad and liberal treatment to the discovery rules in accordance with their purpose. Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947). Under the federal rules, discovery is meant to enable litigants to obtain the fullest possible knowledge of the issues and facts before trial. Id. at 500.

However, the attorney-client privilege and work product doctrine do limit the disclosure Fed. R. Civ. P. 26(b)(1) parameters. Courts have recognized that the assertion of a privilege obstructs the search for the truth and must be “strictly confined within the narrowest possible limits.” In re Grand Jury Investigation, 599 F.2d at 1235 (quoting 8 Wigmore on Evidence §2291 at 545 (1961)). Consequently, the party claiming the privilege bears the burden of proving that it applies to the communication at issue. Hickman v. Taylor, 329 U.S. 295, 506 (1947); United States v. Landorg, 591 F.2d 36, 38 (9th Cir. 1978); Hodges Grant & Kauffmann v. U.S. Gov., 768 F.2d 719 (5th Cir. 1985).

Application of the Attorney-Client Privilege and Work Product Doctrine to Outside Counsel
Based on the general rules discussed above, in most cases, communications between a lawyer and a client are protected from disclosure. There are, of course, exceptions to every rule. How the attorney-client privilege and work product doctrine apply to communications between an insurer and outside counsel retained by the insurer offer good examples.

Documents prepared in the ordinary course of business are generally not considered to have been created in anticipation of litigation and are not covered by the work product doctrine. Further, a document produced in the ordinary course of business is not protected from disclosure merely because it was sent to an attorney. Simon v. G.D. Seacle & Co., 816 F.2d 397, 403 (8th Cir. 1987). Crucially, as discussed in greater detail below, these general principles are especially relevant in the insurance context. As one court put it:

Application of the work product rule to insurer investigative documents is one of the most difficult and often-litigated discovery issues because it is the very nature of an insurer’s business to investigate events which, either directly or indirectly, or as a consequence of the insurers’ decisions, often result in litigation. Stout v. Illinois Farmers Ins. Co., 150 F.R.D. 594, 597, (1993).

Typically, after an insurance company hires outside counsel but before coverage litigation begins, the attorney’s role is similar to that of a claims adjuster. He or she will investigate and analyze claims and determine whether the insurance company should make a payment. Courts routinely categorize this work as an insurance company’s ordinary business functions, as opposed to legal work. Harper v. Auto-Owners, Inc. Co., 138 F.R.D. 655 (S.D. Ind. 1991). Similarly, courts have rejected an insurer’s arguments that communications from an outside lawyer should have protection because the outside lawyer performed an “enhanced” investigation or handled the claim in a nonroutine manner that differed from the insurer’s normal claims-handling process.

Further, many courts have held that an insurance company may not insulate itself from discovery by hiring an attorney to conduct ordinary claims investigations. To the extent that an attorney acts as a claims adjuster, claims process supervisor, or claims investigation monitor, and not as a legal advisor, the attorney-client privilege does not apply. Mission National Ins. Co. v. Lilly, 112 F.R.D. 160, 163 (D. Minn. 1986); First Aviation Services Inc. v. Gulf Ins. Co., 205 F.R.D. 65 (Conn. 2001). The majority of courts have held that if a layman could have just as easily handled a matter as a lawyer, the privilege would not apply to that matter. Merrin Jewelry Co v. St. Paul Fire & Marine Ins. Co., 49 F.R.D. 54 (S.D.N.Y. 1970).

Illustrative Cases
In First Aviation, the plaintiffs, two aviation companies and two individuals, sought damages under a directors’ & officers’ liability and company reimbursement insurance policy issued by Gulf. First Aviation Services Inc. v. Gulf Ins. Co., 205 F.R.D. 65 (Conn. 2001). In particular, they sought

Martin v. Bally’s Park Place Hotel & Casino, 983 F.2d 1252, 1260 (3d Cir. 1993). As with the attorney-client privilege, the party asserting the work product doctrine bears the burden of establishing that the documents he or she seeks to protect were prepared “in anticipation of litigation.” In re Powerhouse Licensing, LLC, 441 F. 3d 467 (6th Cir. 2006).
defense and settlement costs incurred in a third-party lawsuit alleging wrongful termination, breach of contract, and bad faith.

In the course of the coverage dispute, the plaintiffs moved to compel production of all claims documents created by Gulf’s outside attorneys, as well as all claims and underwriting manuals and interpretive documents. The plaintiffs asserted that Gulf retained its outside attorneys to investigate and make coverage determinations about their D & O claim. They contended that this task is normally performed by an insurance company’s claims department, and thus the claims-handling documents were not protected by the attorney-client privilege. Gulf responded that its outside attorneys served as legal advisors and, thus, their communications were entitled to attorney-client privilege protection.

The court explained that the attorney-client privilege does not, in fact, generally protect all transactions that involve an attorney and a client, nor can all the facts known by a party have immunity from discovery simply because the party told them to an attorney. Id. at 68 (citing Reichhold Chemicals, Inc. v. Hartford Accident & Indemnity Co., 2000 Conn. Super. Lexis 2164, 2000 WL 1227306 (Conn. Super. Aug. 15, 2000)). The court further stated that only communications between client and attorney when made in confidence for the purpose of seeking or giving legal advice are privileged. Id. Finally, the court held that a request that an attorney obtain information from outside sources is not privileged. Id. In making its ultimate ruling granting the plaintiffs’ motion to compel, the court relied on the testimony of Gulf’s own expert witness who testified that Gulf’s outside attorneys functioned as claims handlers and primarily made business decisions.

Overall, courts have held that the attorney-client privilege cannot become a mechanism for avoiding disclosure of documents through an assertion of privilege. On similar grounds, a court will not afford work product protection to documents in a claim file that were prepared for an insurance company as part of its ordinary course of business, even if these documents were prepared by an attorney. Courts have recognized that consultations between an insurance company and its attorneys during an investigation “is an important factor which generally weighs in favor of” a court finding that the work product doctrine protects documents. Burr v. United Farm Bureau Mut. Ins. Co., 560 N.E. 2d 1250, 1254 (Ind. Ct. App. 1990). However, more often than not, courts rule that documents prepared for an insurer prior to a coverage determination do not have work product protection because they have been prepared in the ordinary course of the insurer’s business. Pete Rinaldi’s Fast Foods, Inc. v. Great American Ins. Cos., 123 F.R.D. 198, 202 (M.D.N.C. 1988).

Other courts have looked at the date on which documents were created and whether at that time a lawsuit was likely. Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89, 93 (E.D. Mo. 1980). Still other courts have adopted a case-by-case analysis. Schmidt v. California State Automobile Association, 127 F.R.D. 182, 184 (D. Nev. 1989).

To summarize, documents prepared after an insurance company retains outside counsel are not necessarily protected by the work product doctrine in cases in which the insurance company continues to investigate claims without denying coverage. The retention of outside counsel does not alone indicate a decision to litigate a claim. Accordingly, insurance companies have a difficult time claiming, prior to denying coverage, that documents prepared in the context of investigations enjoy protection because they were prepared in anticipation of litigation. This is because an investigation of a claim often continues even after outside counsel is retained.


In rare cases, courts have held that documents prepared by attorneys for insurance companies were protected by both attorney-client privilege and the work product doctrine, extending those protections to documents prepared during the course of an investigation. For instance, the United States Court of Appeals for the Fifth Circuit upheld a protective order issued for documents prepared by an insurance company’s attorneys during the course of the investigation of a claim. Dunn v. State Farm Fire & Casualty Co., 927 F.2d 869 (5th Cir. 1991). In Dunn, State Farm insured Mollie and Melvin Dunn’s home and it contents. The Dunns separated, and, shortly after, a fire burned their house. The fire department suspected arson, and, a few days after the fire, Mr. Dunn confessed to setting the fire intentionally. Mrs. Dunn filed a claim with State Farm based on her interest in the house and her share of its contents. After conducting an investigation, State Farm denied Mrs. Dunn’s claims based on alleged misrepresentations and suspicions that she had been complicit in the arson. Mrs. Dunn filed a bad-faith suit, and the trial court found in favor of State

Outside Counsel, continued on page 88
Outside Counsel, from page 67

Farm. Mrs. Dunn appealed a partial summary judgment order, as well as a protective order for State Farm’s attorneys’ files. Regarding the protective order, Mrs. Dunn claimed that the attorney-client privilege did not apply because the attorneys had created the documents that she sought when they had been acting as investigators, rather than as attorneys.

The Dunn court relied on the Mississippi Rules of Evidence, as well as a Mississippi Supreme Court case, and the standard that the attorney-client privilege relates to and covers all information that a client received from his or her attorney in his or her professional capacity and in the course of representation of the client. Id. at 875 (citing Barnes v. State, 460 So. 2d 126, 131 (Miss. 1984)). The court noted that privilege protection did not require that a communication contain purely legal analysis or advice. Dunn v. State Farm Fire & Casualty Co., 927 F.2d 869, 875 (5th Cir. 1991). Instead, if a communication between a lawyer and client would facilitate rendering legal services or advice, that communication would become privileged. Id.

The Dunn court held that the attorney-client privilege protected the documents that Mrs. Dunn sought. Id. The court extended the privilege to all communications between State Farm and the outside counsel that it had retained. Id. Furthermore, the court held that “The privilege is not waived if the attorneys perform investigative tasks provided that the investigative tasks are related to the rendition of legal services.” Id.

Conclusion

So, what are outside attorneys working for insurance companies to do? Court decisions place overriding importance on the role that an outside attorney fulfills. As detailed above, courts regard whether an outside lawyer provides legal advice, rather than simply fulfilling a claims handling role, as critically important. When an outside lawyer has a “mixed” role, seeking to withhold documents from production based on the attorney-client privilege or work-product doctrine becomes difficult. However, outside counsel can take certain precautions to strengthen an argument that a court should not require a client to produce a document when retained by insurance companies.

Although you may lose the battle, particularly with investigative facts and materials if you have prepared them when retained as outside counsel before an insurance company has made a definitive decision on coverage for a claim, you can still take measures to establish elements of the attorney-client privilege in your communications with insurers as clients. For example, identify yourself as your client’s attorney in all communications with them. State that the purpose of the communication is to provide legal advice and clearly classify legal opinions and mental impressions as such in your written analyses. State that documents prepared for your client are privileged, attorney-client communications. Finally, exercise care, only sending communications to a client, avoiding additional or unnecessary recipients.