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Bad Faith: When Attorneys Act in a Claims Role

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Introduction

Technological advancement, regulatory change and growing competition in a still lean economy create an environment for insurers which exerts significant pressure on insurance professionals to perform their duties in an efficient manner, particularly with respect to the investigation and ultimate adjustment of a claim. What is the significance of ethical claims handling under such pressures?

In the first place, what is the applicable ethical standard, if any, with which the insurance professional should comply? Are such ethical standards found in the industry, by state law, within the company, or a combination of any of these? Although most insurers have systemic means by which to evaluate adjuster performance, do insurers have similar means by which to evaluate the professional and ethical manner in which their claims professionals meet such standards? Aside from considerations of "good faith," might an adjuster's ethical breach expose the insurer to extra-contractual liability?

First, when a claim is initially assigned to a claims professional, what are the parameters for that adjuster to complete the investigation in an ethical manner? If the claim goes into litigation, and the opposing party raises an ethical issue regarding the manner in which the claim was handled, how much of the investigation is discoverable by the opposing party? What is the extent to which privilege may apply to information gathered, the analysis of that information and the sharing of such information with other company representatives?

In the course of investigating a claim, claims are assigned to outside counsel pre-suit and in anticipation of litigation. Outside counsel's assignment may include a request to assist or even direct the investigation of the claim. What ethical standards apply to a claim investigation performed by outside defense counsel? Do litigation privileges attach to any or all materials created by counsel, and does the attorney-client privilege protect communications with the adjuster? Does the subsequent commencement of a suit against an insured alter the standards for privilege with regard to the work of outside defense counsel? What if the suit is against the insurer, rather than an insured of the company? How are evidentiary privileges, such as attorney-client for communications and work product/anticipation of litigation for documents, affected by the filing of a bad faith suit, against the insurer?

Finally, the front line adjuster may seek guidance from in-house counsel. In-house counsel often gives advice and makes recommendations to further proceed with the investigation. However, that in-house attorney also may undertake his or her own independent investigation to assist in the evaluation of the claim. What ethical standards, if any, apply to an in-house attorney in performing this investigation? Might some ethical standards different from those applicable to the practice of law apply to in-house counsel, and if so, what are the implications for privileged communications? Does the attorney-client privilege extend to the work product, information developed and communications of an in-house attorney in performing this claim investigation? If so, what are the limits of the privilege, extended to an in-house attorney performing this claim function?

I. IN THE TRENCHES; THE FRONT LINE ADJUSTER'S ETHICAL INVESTIGATION OF THE CLAIM

A young prosecutor met with her supervisor after only three months on the job. It was time for her first evaluation after disposing of her first few hundred cases. As she walked toward her supervisor's office, she wondered if she did a satisfactory job in the fast-paced, fluid environment in which prosecutors work. It is difficult to measure success in such a fluid work environment, for a prosecutor's success is not measured solely in terms of wins and losses. She read her 90-day evaluation as she sat across from her supervisor. There it was in the middle of the report: "Assimilating well to the role of a prosecutor." Although delighted by the positive comment, a moment of clarity overwhelmed her. Yes, she had a "role" to fulfill in order for the criminal justice system to work effectively, but her success in fulfilling that role had less to do with convictions or acquittals. Rather, her success largely was defined in other terms which related to her role in the overall system.

Is the role of a claim professional any less significant to the success of the claims handling process? Surely the success of a claims professional cannot be defined by the amount of defense costs or indemnity dollars paid or saved. Conversely, the success of a claims professional cannot be defined by the number of disclaimers issued. Found in the myriad insurance rules, employer policy manuals and, yes, the provisions of policies themselves, are many guideposts by which a claim professional can define his or her role in the claim handling process. This is because the manner in which the adjuster successfully fulfills that role includes the practical application of certain ethical requirements that might apply in each claim and case.

The Role Of An Adjuster Is Unique

The special nature of insurance and the part it has played in society has been recognized by courts and legislators for my years.[1] An insurance policy is not obtained for commercial advantage, but for protecting against unanticipated calamities which may, or may not, ever occur. Policyholder lawyers often maintain that the very nature of unexpected loss can put an insured in a vulnerable economic and personal position if the purpose of obtaining insurance is frustrated by an alleged unjustified refusal or delay in the prompt and full payment of monies due under the contract.[2]

[1] William F. Merlin, Jr. and Mary Kestenbaum, *Claims Adjustment Rules: What Insurance Companies Recognize, Lawyers Need To Learn And Judges Must Recognize*, American Trial Lawyers Annual Convention Bad Faith Litigation Group, July, 2002, http://merlinlawgroup.com/sites/merlinlawgroup/resources/claim-adjustment-rules.pdf.

[2] *Id*. at 5.

Noteworthy, just as a prosecutor should not be preoccupied with win/loss statistics as the sole measure of success, some would maintain that this same principle applies to an insurance adjuster. If the objective of an adjuster is to succeed within this narrow definition, a claimant might assert that the purpose of insurance is defeated by any subjective manipulation of the claim adjustment process.

A claim professional typically performs duties as prescribed by the insurer, but such guidelines afford broad discretion to the claim professional in the evaluation of each claim. Indeed, it is the exercise of an insurance professional's discretion that is often the focus of a bad faith claim by a policyholder. In the first-party context, claimants generally allege the insurer committed bad faith on one or more of the following grounds:

1) it arbitrarily and capriciously denied a claim;
2) it unscrupulously denied a claim, placing its own interests over those of the insured;
3) it denied a reasonable claim on grounds not fairly debatable;
4) it denied a claim where there was no *bona fide* dispute; or
5) it denied a claim without adequate investigation.

In the third-party context, claimants generally allege the insurer:

1) failed to provide a defense for a third-party claim in good faith;
2) failed to properly settle the claim of a third party within the policy limits; or
3) failed to provide an adequate defense.[3]

The failure of a claims professional to correctly understand an adjuster's role in the claim adjustment process, or the legal parameters in which a claim may be denied, could lead to untoward consequences for that professional and potential liability exposure for the insurer. What role should ethical considerations play into this process?

A. Ethical Standards Potentially Applicable To The Front Line Adjuster When Investigating a Claim.

An attorney for a policyholder alleging bad faith might contend that a claim adjuster has a conflict of interest with his/her own duties derived merely by the nature of the employment relationship with an insurer. Indeed, a bad faith claim could include an assertion that, contrary to the expectations of the policyholder, the adjuster did not have the policyholder's best interests in mind, but instead favored the insurer's interests. Courts have found that such conduct by an adjuster amounts to bad faith.[4] However erroneous or unfounded such an assertion might be, it is a frequent argument made in "bad faith" lawsuits.

Claim professionals should be mindful of any such predisposition of a policyholder during the claim handling process. Claims professionals also should be conversant about any applicable adjuster's code of ethics because a violation of such a code, where applicable, could result in a

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[3] Thomas F. Segalla, *Bad Faith As A Continuum: From Claim to Trial*, Federation of Defense and Corporate Counsel, http://www.thefederation.org/documents/segalla.htm.

[4] *See Specialty Surplus Ins. Co. v. Second Chance, Inc.,* 2006 WL 2459092 (W.D. Wash. Aug. 23, 2006).

policyholder contending that an adjuster's violation of any applicable code of ethics is imputable evidence of the insurers' "bad-faith" claims handling.[5]

Potential Industry Ethical Standards

The American Institute for Chartered Property Casualty Underwriters ("CPCU") is an industry leader in property-casualty insurance education, research and ethics. The CPCU has a Code of Professional Conduct ("Code") which directs all CPCUs and CPCU candidates to perform their professional duties ethically.[6] The CPCU's Code, which was introduced in 1976, prescribes a minimum standard by which all CPCUs are expected to comply.[7] The Code provides Canons and Rules regarding ethical conduct, as well as disciplinary rules, procedures and penalties that explain the process by which it is administered and enforced.[8]

The Code provides both a Canon and a "Rule of Professional Conduct." The Canons are as follows:

Canon 1	Insurance professionals should endeavor to place the public interest above their own.
Canon 2	Insurance professionals should seek continually to maintain and improve their professional knowledge, skills, and competence.
Canon 3	Insurance professionals should obey all laws and regulations, and should avoid any conduct or activity that would cause unjust harm to others.
Canon 4	Insurance professionals should be diligent in the performance of their occupational duties and should continually strive to improve the functioning of the insurance mechanism.
Canon 5	Insurance professionals should aspire to raise the professional and ethical standards of the insurance and risk management profession.
Canon 6	Insurance professionals should strive to establish and maintain dignified and honorable relationships with those whom they serve, with fellow insurance professionals, and with members of other professions.
Canon 7	Insurance professionals should assist in improving the public understanding of insurance and risk management.
Canon 8	CPCUs should honor the integrity of the CPCU designation and respect the limitations placed on its use.
Canon 9	CPCUs should assist in maintaining the integrity of the CPCU Code of Professional Conduct.[9]

[5] John J. Pappas, *Adjuster's Code of Ethics*, Mealey's Litigation Report, October 18, 2005, http://www.butlerpappas.com/78.

[6] *The Canons, Rules, and Guidelines of the CPCU Code of Professional Conduct*, The Institutes, 1st Edition, 3rd Printing, July 2013, http://www.theinstitutes.org/doc/canons.pdf

[7] *Id*.

[8] *Id*.

[9] *Id*.

The "Rules" which accompany each Canon are far more definitive with regard to the expected standard of conduct for CPCUs. Although the rules are far too voluminous to restate here, one example of a Rule is:

> R3.2: A CPCU shall not allow the pursuit of financial gain or other personal benefit to interfere with the exercise of sound professional judgment and skills.

The American Association of Insurance Management Consultants ("AAIMCo") is another professional organization dedicated to providing a medium for the exchange of ideas for its members through organized conferences and seminars.[10] The AAIMCo also has a code of ethics which is directed primarily at insuring and safeguarding the quality of services provided by the members of the AAIMCo to the public it serves.[11] The AAIMCo's Code of Ethics provides a set of standards which members regard as a minimum level of acceptable professional conduct because it clarifies the nature of behavior which professional colleagues deem essential for maintaining the reputation of the profession and the services it provides.[12] Similar to the CPCU, the AAIMCo Code provides both standards and the procedures through which potential allegations of ethical misconduct shall be addressed.

The Society of Claim Law Associates (SCLA) is an organization of insurance claim professionals formed in 1992 for individuals that have earned claims law designations from the American Education Institute (AEI).[13] The AEI and SCLA are partners in claims law education and are committed to providing insurance claim professionals with educational resources.
The SCLA imposes a code of ethics on its members. Also, the SCLA encourages its members to maintain a high level of competence and adhere to high ethical standards with the following Code of Ethics:

> 1. Members of the Society shall adhere to the highest of ethical standards in their dealings with the public and other professionals both within and outside of the industry. This includes, but is not limited to, claim professionals, physicians, attorneys, insureds, claimants and experts.
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> 2. Members of the Society shall conduct themselves in such a manner as to command respect and confidence and shall approach claim investigations and evaluations with an unprejudiced and open mind.
>
> 3. Members of the Society shall make truthful and unbiased reports of the facts and shall maintain a standard of fairness and integrity in all their professional duties.

[10] "About the Association – AAIMCo: American Association of Insurance Management Consultants," 2009, http://www.aaimco.com/profile.html.

[11] *Id*.

[12] *Id*.

[13] Society of Claim Law Associates, The Voice of Claims Professionals, http://www.sclasociety.org/index.asp.

4. Members of the Society shall remain current on the laws and regulations affecting their professional responsibilities by attending such classes, seminars and training as necessary.

5. Members of the Society shall not injure the reputation or professional practice of colleagues.[14]

On the policyholder side, the National Association of Public Insurance Adjusters ("NAPIA") has Rules of Professional Conduct and Ethics applicable to all of its members.[15] NAPIA represents that it is an association of experts in the profession of public insurance adjusting that have joined together for the express purpose of professional education, obtaining certification and promoting a rigid code of professional conduct and ethics. NAPIA's abbreviated rules mirror the ethical codes of similar adjuster organizations to the extent that the rules of professional conduct are intended to impose upon their members a spirit of fairness and justice to their clients, the insurance companies, as well as to the public. As such, insurers should be aware of these Rules applicable to the involvement of NAPIA member public adjusters who are involved in any aspect of the claims process, including appraisals.

The themes common to most codes established by such organizations appear to mirror those adopted by the CPCU. Generally, the CPCU standards urge that its members must serve the interests of the general public, maintain professional standards in the form of obeying applicable laws and regulations, act professionally by performing duties in a civil, courteous manner, instill trust by refraining from misrepresentation and agree to honor membership in the organization by complying with the organization's code.[16]

Statutory Schemes

A number of states have established a statutory scheme for regulating insurance professionals and their activities with regard to adjusting claims. Florida's Administrative Code provides ethical requirements for insurance adjusters. *See* 69B-220.201, F.A.C. The Florida Code introduces its State's requirements with the following:

> Code of Ethics. The work of adjusting insurance claims engages the public trust. An adjuster shall put the duty for fair and honest treatment of the claimant above the adjuster's own interests in every instance. The following are standards of conduct that define ethical behavior, and shall constitute a code of ethics that shall be binding on all adjusters. 69B-220.201(3) F.A.C.

The Florida Code, which went into effect on September 3, 2006, contains requirements for adjusters and public adjusters and, significantly, Section 69B-220.201(2)(a) provides that a violation of any provision of the rule shall constitute grounds for administrative action against the licensee.

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[14] *Id*.

[15] National Association of Public Insurance Adjusters ("NAPIA"), http://www.napia.com/learn/code-conduct.asp.

[16] Jerry Fazio and Jana S. Reist, *Ethics Update: An Ethical Guide for Insurance Adjusters*, http://www.owenfazio.com/publications/Ethics_Update.pdf.

Similarly, Texas has a provision which pertains to the professional and ethical requirements for insurance adjusters. 28 TEX. ADMIN. CODE § 19.713 (2008) (Tex. Dept. Ins.). Although much shorter than the Florida statute, the Texas code codifies similar standards of conduct:

> (a) This section states legal and ethical requirements that are of prime importance for public insurance adjusters' professional conduct. This section does not exhaust the legal or ethical requirements that govern public insurance adjusters. This section details requirements similar to the codes of ethics adopted by local and national public insurance adjusters' professional organizations.
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> (b) All public insurance adjuster licensees must comply with the following requirements:
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> > (1) Licensees must conduct business fairly with their clients, insurance companies, and the public.
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> > (2) Licensees must not employ any improper solicitation that would violate Insurance Code Chapter 4102 and applicable rules.
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> > (3) Licensees must not make a misrepresentation, in violation of Insurance Code Chapter 4102, to an insured or to an insurance company in the conduct of their actions as public insurance adjusters.
> >
> > (4) Licensees must charge only commissions that comply with the requirements set forth in Insurance Code Chapter 4102 and applicable rules.
> >
> > (5) Licensees must complete continuing education as required by Insurance Code Chapter 4102 and this subchapter.
> >
> > (6) Licensees must have appropriate knowledge and experience for the work they undertake and should obtain competent technical assistance, when necessary, to help handle claims and losses outside their area of expertise.
> >
> > (7) Licensees must not engage in the unauthorized practice of law.
> >
> > (8) Licensees must avoid conflicts of interest, including acquiring any interest in salvaged property or participating in any way, directly or indirectly, in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the licensee, except as allowed in Insurance Code Chapter 4102 and this subchapter.

> (9) Licensees must not disseminate or use any form of agreement, advertising, or other communication, regardless of format or medium, in this state that is harmful to the profession of public insurance adjusting and that does not comply with Insurance Code Chapter 4102, this subchapter, or other provisions of the Insurance Code.
>
> (10) Licensees must use only contracts that comply with Insurance Code Chapter 4102 and this subchapter.

28 TAC § 19.713 (2014).

B. Ethical Considerations In Claim Investigation

The discretion of a claims professional in adjusting a claim is where the ethical "rubber meets the road." This includes fact gathering, the speed with which the claim is processed, the question whether coverage applies (taking into account all policy conditions and exclusions), and finally, the resolution of first party claims made by the insured, as well as indemnifying the insured for liability in third party claims. In the push-pull of the claims adjustment process, a claim professional must consider the interests of several parties, and it is possible that the ethical or moral compass of the claims person could be tested by the interests of such parties. In the extreme and most rare case, this could include his/her own self-interest or that of the insurer-employer.

Truth And Honesty

An adjuster should understand that complying with his/her ethical obligations in adjusting the claim will likely result in a resolution which is fair to all parties to the claim, including the insured, the claimant, the insurer and attorneys litigating the case. One of the principal duties of a claim investigator is to gather facts related to the cause of loss, the extent of damage and the means by which to resolve the claim through settlement or litigation.

Are there "clean hands" throughout the claims process? During the claim investigation process, an investigation can yield information which may be implausible and/or wholly inaccurate. However arbitrary, granting deference to such information because it favors one outcome over another could derail a claim investigation and likely frustrate any attempt to resolve the claim. Canon 3 of the CPCU Code of Professional Ethics provides that a CPCU shall obey all law and regulations and should avoid any conduct or activity that would cause unjust harm to others.[17] Rule 3.1 states further that a CPCU ". . . shall not willfully misrepresent or conceal any fact or information, or fail to furnish any fact or information that is material to the business or professional activity."[18]

Claim professionals are confronted with many challenges in what is likely a large number of claims. The premise of the CPCU Code of Professional Ethics is to create standards of conduct to which each of its members endeavor to satisfy. Perhaps it is the distinction of conducting business in a professional manner that facilitates a CPCU member's desire to obtain compliance with such ethical standards, but there are other untoward consequences of performing in a less than

[17] *The Canons, Rules, and Guidelines of the CPCU Code of Professional Conduct*, *supra*.

[18] *Id*.

professional manner. Ethical thinking is a state of mind which should be ingrained in all insurance professionals because, notwithstanding the legal outfall, ethical thinking is simply good business.[19] Ethics is not so much obedience to rules as it is the upkeep of one's personal and company character and their good names.[20]

Avoiding Conflicts Of Interest

Most ethical difficulties for lawyers stem from a conflict between a lawyer's professional responsibility to a client and the lawyer's own interest in remaining an ethical professional. Conflicts sometimes arise for a claim professional in much the same way. Part of the problem is a relationship-based issue. What interest does the insurance professional attempt to serve in the claim adjustment process? The claim person works for the insurer and is asked to evaluate a claim presented by a policyholder. The potential conflict, if one even arguably exists, is not difficult to assess and is later asserted in subsequent litigation. The policyholder maintains that he/she purchased the policy for protection from unforeseen calamity. The policyholder might assert an argument that once the loss occurs, only indemnity from the insurer will make the policyholder whole; however, every indemnity dollar paid/approved by the claims person reduces the profit that can be realized from premium. In this context, indemnity dollars are not the only source of a potential conflict. Significant defense costs may also create tension in the insurer/insured relationship, especially in cases where the cost of defense rivals or greatly surpasses the potential amount to be paid in indemnity. Although, the cost of defense may have some correlation to the amount paid for indemnity, *i.e.*, a more effective defense should minimize the amount of loss.

Still, a conflict of interest may arguably arise when defending the insured under a reservation of rights. In the vast majority of jurisdictions, the insurer has the right to select defense counsel for the policyholder when defending under a reservation of rights, as long as defense counsel cannot manipulate or steer the underlying lawsuit in or out of coverage.[21] By contrast, a minority of courts have recognized that potential conflicts develop as a matter of law whenever the insurer defends insured under a reservation of rights.[22]

Added to this is the question, who is defense counsel's client? Although the answer to that question may vary from state to state,[23] the importance of the question confirms that a claim

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[19] Peter R. Kensicki, *A Question Of Ethics: Do Ethical Mandates Go Beyond Merely Following The Letter Of The Law?"*, National Underwriter Property & Casualty, October 28, 2000 (Mr. Kensicki references a book by Robert Solomon and Kristine Hanson, *Its Good Business*, and notes several rules of ethical thinking for insurance professionals, such as "Ethical thinking goes beyond mere legal compliance. Many things that are not illegal, such as taking advantage of trust, are unethical.").

[20] *Id*.

[21] *Blanchard v. State Farm Fire & Cas. Co.*, 2 Cal. App. 4th 345, 350, 2 Cal. Rptr. 2d 884 (2d Dist. 1991); *Fed. Ins. Co. v. X-Rite, Inc.*, 748 F. Supp. 1223, 1229 (W.D. Mich. 1990); *L&S Roofing Supp. Co. v. St. Paul Fire & Marine Ins. Co., Inc.*, 521 So. 2d 1298 (Ala. 1987); *Tank v. State Farm Fire & Cas. Co.*, 105 Wash. 2d 381 (1986); *Nandorf, Inc. v. CNA Ins. Cos.*, 134 Ill. App. 3d 134, 137, 479 N.E.2d 988 (1st Dist. 1985); *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 401, 425 N.E.2d 810 (1981).

[22] *See e.g., Moeller v. Am. Guar. & Liab. Ins. Co.,* 707 So. 2d 1062, 1069 (Miss. 1996); *Union Ins. Co. v. Knife Co., Inc.,* 902 F. Supp. 877, 880 (W.D. Ark. 1995); *Howard v. Russell Storver Candies, Inc.,* 649 F.2d 620, 625 (8th Cir. 1981).

[23] If panel counsel defends the insured, there is a split among the jurisdictions just who the "client" is. For example, in Minnesota and Alabama, the insured and insurer are "dual" or "joint clients." *Shelby Mut. Ins. Co. v. Kleman*, 255

professional's ethics can have the potential to influence the effectiveness of a defense and, therefore, conflict with the interests of the insured. For example, some authors hone in on the pressure exerted on defense counsel by the insurer, which retains the fiscal control over the preparation of the defense, and opine that insurer's attempts to moderate the cost of defense prevent defense counsel from providing a vigorous, independent defense. These authors assert that these controls give rise to a conflict that compromises defense counsel's duties to his client, the insured.[24]

Policyholders also argue that because the insurer is paying for the cost of defense, it can, in some instances, adversely affect the outcome of a litigation. The substantive nature of a conflict of interest may vary, but in some jurisdictions, courts find significant the inevitably conflicting interests that arise in the context of claim resolution.[25]

A claim professional who aspires to comply with a potentially applicable ethical code or state legislative scheme may be better positioned to avoid conflict issues. Five themes of most codes promulgated by professional societies and legislative schemes include:

- Serve the public interest;
- Maintain professional standards;
- Be respectful;
- Be trustworthy;
- Always uphold the code.[26]

A claim professional's awareness of rules consistent with such themes will allow that person to be more sensitive to a potential conflict of interest and avoid the exercise of poor judgment.

Avoiding The Appearance Of Impropriety

One of the core objectives of most ethical codes for adjusters is the need to establish trust, not only with the particular policyholder, but also for the industry and claim adjuster profession. The CPCU's Sixth Cannon provides:

> Insurance professionals should strive to establish and maintain dignified and honorable relationships with those whom they serve, with fellow insurance professionals, and with members of other professions.

Trust is a core value for most codes, and vigilance in earning and maintaining that trust with others in the claim adjustment process is at the heart of most standards articulated in such codes. Avoiding the appearance of impropriety offers a means by which to comply with this standard. A commitment to honest, ethical and legal behavior should be fundamental to the philosophy of most companies because, quite simply, it is good business. Such a commitment will engender

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N.W.2d 231 (Minn. 1977); *Mitchum v. Hudgens*, 533 So. 2d 194 (Ala. 1988). In Arizona, California, and New York, the insured is the "primary" client. *Paradigm Ins. Co. v. Langerman Law Offices,* 24 P.3d 593, 602 (Ariz. 2001); *State Farm Mut. Auto v. Fed. Ins. Co.,* 86 Cal Rptr. 2d 20 (1999). However, in Texas, Montana, Michigan and Connecticut, the insured is the only client. *See Safeway Managing Gen. Agency, Inc. v. Clark & Gamble*, 985 S.W.2d 166, 168 (Tex. App.-San Antonio 1998).

[24] Jerry Fazio and Jana S. Reist, *Ethics Update: An Ethical Guide For Insurance Adjusters*, *supra*.

[25] *See Specialty Surplus Ins. Co. v. Second Chance, Inc.,* 2006 WL 2459092 (W.D. Wash. Aug. 23, 2006).

[26] *Id*.

goodwill with customers and should result in an environment of trust and cooperation among claim professionals. Cost savings should be realized in the form of worker productivity and better morale which should, in turn, result in employee retention. Such a commitment to ethical behavior by a company should also minimize the possibility of bad faith claims and litigation.

Using Social Media

Social networking research is a vital claim investigative tool. The abundance of information on social networking sites offers a claim professional the opportunity to make use of such information and discover relevant information about claimants and insureds. Information on the Internet can provide an excellent source of information about the loss, as well as post-accident activity by the claimant, such as medical treatment, the effectiveness of such treatment or, perhaps, the disingenuous nature of a claimant's assertions. In particular, the spontaneous nature of a Twitter or Facebook account could offer valuable insight as to the extent or legitimacy of a particular claim. What claim professional would not be interested in obtaining the "stream of consciousness" articulated by a claimant immediately after an occurrence or in the daily struggle which follows an alleged loss? The public lives on the Internet, and any window into the unbridled sharing of information about one's life could be priceless for purposes of a claim investigation.

The more difficult question is how far a claim professional may ethically go to avail themselves of such information. While there is nothing unethical about accessing publicly available information, an adjuster may not use impersonation to trick someone into releasing personal information.[27] Although most adjusters know better than to speak with a represented claimant, social media provides an opportunity to do that by "friending" or connecting with a claimant on social networking sites.[28] However, an insurance professional should not engage in online discussions to elicit information because such conduct could be a violation of an ethical obligation of good faith claims handling, and moreover, such actions could violate their company's guidelines.[29]

Private Investigators And Consultants

Just as a lawyer is prohibited from engaging in contacting a claimant or plaintiff, so too is a private investigator or third party retained by the claims professional to assist in a claim investigation.[30] In fact, attorneys can be disciplined for enlisting a third party to "friend" a witness or claimant on a social networking site. Although there is a dearth of literature on this precise issue, it does not take a leap of faith to conclude that a claim professional cannot retain an investigator or other claim consultant to do that which the claim adjuster is ethically forbidden from doing. It is unlikely that a claim professional would be given any greater latitude in retaining an investigator. Noteworthy, state and national bar association rules of professional conduct

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[27] Denise Johnson, *Using Social Media in Claims Investigations*, Claims Journal, November 5, 2012, http://www.claimsjournal.com/news/national/2012/11/05/216789.htm.

[28] *Id*.

[29] Dan D. Kohane, *Ethical Use of Social Media in Claims Investigations*, Insurance Coverage and Claims, April 2013, http://www.hurwitzfine.com/shownews.php?type=coverage&id=498.

[30] Deborah A. Jujan, *Speaking of: Social Media Intelligence*, Claims Magazine, February 2, 2011.

prohibit attorneys from engaging in activities that could be viewed as dishonest, fraudulent, or a misrepresentation, so it is most likely that such activity would be similarly precluded by any code of ethics with which insurance adjusters must comply.[31]

C. Potential Liability for an Ethical Breach

All of the ethical codes of conduct and ethical standards discussed above, at least in theory, could be used in one fashion or another in bad faith litigation. There are no reported decisions where the violation of a professional code of ethics has been cited as the basis for a finding of bad faith. This, however, would not necessarily prevent a "bad faith" expert from opining that a professional organization's code of ethics provides a "standard of care" for an adjuster who is a member of the particular professional association. It is with this in mind that the practical application of ethical considerations are examined. The potential for liability resulting from an alleged violation of an applicable ethical code offers an excellent incentive for a claim professional to be mindful of such codes, if a member. On the other hand, the ability of a claim professional to demonstrate compliance with a potentially applicable ethical code section could be of significant benefit in refuting an attempt by an insured to challenge the judgment of that claims person.

Statutory ethical requirements are more likely to be implicated in bad faith litigation. For example, subsection (b) of Section 69B-220.201(2) of Florida's Administrative Code provides that a breach of any provision of that rule shall constitute an "unfair claims settlement practice. This is significant to the extent that, in Florida, the question whether an insurer has acted in bad faith in handling claims against the insured is determined according to the "totality of the circumstances."[32] Hence, each case is determined on its own facts. Ordinarily, the question of failure to act in good faith with due regard for the interests of the insured is for the jury to decide.[33] Reasonable diligence and ordinary care, which are material elements in determining bad faith, are considerations of fact, not law.[34] As such, there is an argument that any deviation or breach from the statutory code of ethics would offer grounds for a bad faith claim.

With respect to the Texas Code, which became effective January 1, 2014, the impact of codifying such standards is not clear with respect to claims against insurers or insurance professionals. Before the codification of these ethical standards, Texas courts had held that an insurer has a common law duty to deal fairly and in good faith with its insured in the processing and payment of claims, and that an insurer will be liable if it denies a claim despite knowing it was reasonably clear the claim was covered.[35] Notably, at the time the court decided *Aleman*, Texas Code § 541.060 (2009) identified nine categories of unfair settlement practices and imposed a "reasonably clear" standard identical to the common law bad faith standard.[36] Significantly, the issue whether the insurer breached its duty to good faith and fair dealing focuses not on whether

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[31] *Id*.

[32] *Goheagan v. Am. Vehicle Ins. Co.*, 107 So. 3d 433, 438 (Fla. 4th DCA 2012).

[33] *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980).

[34] *Berges v. Infinity Ins. Co.*, 896 So. 2d 665 (Fla. 2004).

[35] *Aleman v. Zenith Ins. Co.*, 343 S.W.3d 817 (Tex. App.-El Paso 2011).

[36] *Mid-Century Ins. Co. of Texas v. Boyte*, 80 S.W.3d 546, 549 (Tex. 2002).

the claim was valid, but on the "reasonableness of the insurer's" conduct in handling the claim.[37] The codification of standards likely clarifies what might be considered reasonable under the circumstances.

Statutory codes of conduct present the opportunity to eliminate ambiguity or judgment calls in evaluating the conduct of the claim professional which could, in turn, give rise to a bad faith claim involving that insurance professional. If so, the focus should be less on establishing the particular standard of care (by expert testimony or otherwise) and more on what was done and when, as evidenced by documents in the claim file.

All of the aforementioned codes of conduct and ethical standards have the potential to be used in one fashion or another in bad faith litigation. It is with this in mind that the practical application of ethical considerations are examined. Moreover, if an adjuster is accused of an ethical breach in litigation and such becomes the subject or a component of litigation, to what extent do legally recognized privileges apply? Focusing on claim documents will surely involve great consideration of what must be produced and what may be withheld on the basis of privilege.

D. Privilege Issues and Claims for Ethical Breaches Applicable to the Front Line Adjuster Inside the Trenches

This subject is discussed in greater detail in the following sections of this paper. However, a summary for the front line adjuster is provided here. If an adjuster's ethical conduct in investigating a claim becomes an issue in a subsequent suit against the insurer for bad faith, immediate discovery issues arise. And, in these bad faith actions, not ***all*** claim documents are completely immune from discovery, not even communications between a claim professional and counsel.

There are two basic objections raised by insurer outside counsel to requests to produce a claims files in litigation. One objection is based upon claim file documents prepared in anticipation of litigation, or the work product protection. The other is based upon the attorney-client privilege. The determination whether documents from an insurer's file have been prepared by the front line adjuster in anticipation of litigation of a claim against the insured or insurer is subject to the trial court's discretion on a case-by-case basis based upon the applicable rule of civil procedure.[38] Where the work of counsel is involved, the issue whether privilege attaches can vary from jurisdiction to jurisdiction and often focuses on whether counsel acted in a legal advisor or strictly business capacity at the time. When policyholders challenge an insurer's claim handling practice, and claim file documents from counsel are sought in discovery, insurance companies frequently assert work product and the attorney-client privilege as a shield from disclosure.[39]

As discussed in the following section, insurance companies, when investigating claims, commonly use lawyers to perform the function of addressing liability and coverage issues by

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[37] *Aleman*, 343 S.W.3d at 822.
[38] *See Haynes v. Anderson*, 597 So. 2d 615, 619 (Miss. 1992).

[39] Caroline R. Hurtado, *Is The Attorney-Client Privilege Bulletproof When Insurance Companies Use It To Disguise Bad Faith Claim-Handling?*, Corporate Counsel, March 2010, http://www.andersonkill.com/webpdfext/CorpCounsel-March2010.pdf.

providing assistance in investigating the liability or coverage aspects of a claim, providing advice for adjusting liability claims and coverage issues, monitoring the investigation of claims or even supervising the claims process. Often this is done in anticipation of a coverage dispute.[40] The probability of privilege attaching to a particular document or communication likely will depend on the context in which it was created or made (business or legal, or a mixture of both), and the capacity in which the attorney was acting at the time of its preparation.

Generally, unless prepared in anticipation of litigation, reports of insurance investigators or adjusters created during the processing of a claim are discoverable if made in the regular course of the insurance company's business.[41] Also, documents prepared in the ordinary course of an insurance company's investigation to determine whether to accept or reject coverage and to evaluate the extent of a claimant's loss are not privileged as work product if not prepared in anticipation of litigation. Such documents do not fall within the veil of the protection "merely because an investigation was conducted by an attorney."[42] By contrast, where counsel is involved in the claim pre-suit, file documents falling under the work product protection might apply only to documents prepared by counsel acting as an attorney which are the product of the lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy.[43]

Claim professionals frequently seek guidance from or report to in-house counsel during a claim investigation to which the attorney-client privilege usually attaches. In order for attorney-client communications to be privileged, the document must be primarily or predominantly a communication of a legal character.[44] However, in some instances, the adjuster herself also is a licensed attorney. In such instances, policyholders in bad faith cases frequently argue that the insurer attempted to turn their attorney-adjuster's, as well as in-house and outside counsel's, activities into a tactical advantage by asserting the attorney-client privilege for work done on a claim by adjusters with law degrees or in-house (and even outside counsel) assisting in a claim.[45] Generally, reports prepared by in-house attorneys performing a routine investigation of insurance claims on behalf of an insurance company, done in the ordinary course of business, are not privileged.[46]

Protecting the front line adjuster's file: anticipation of litigation/work product

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[40] *Id*.

[41] *Roman Catholic Church of the Good Shepherd v. Tempco Sys.*, 202 A.D.2d 257, 608 N.Y.S.2d 647 (1st Dept. 1994).

[42] *Spectrum Sys. Intl. Corp. v. Chem. Bank*, 78 N.Y.2d 371, 379 (1991).

[43] *Id*.; *see also ACWOO Intl. Steel Corp. v. Frenkel & Co.*, 165 A.D.2d 752, 564 N.Y.S.2d 40 (1st Dept. 1990).

[44] *Spectrum*, 78 N.Y.2d at 378.

[45] Joe Cahill, *Insurers Are Hiring Lawyers, With An Eye On Privilege*, ABA Journal Law News Now, March 1, 2013, http://www.abajournal.com/magazine/article/insurers_are_hiring_lawyers_with_an_eye_on_privilege/.

[46] Bruce D. Celebrezze, *The Role of In-House Lawyers And Maintaining Appropriate Privilege And Protection*, The Federation of Defense and Corporate Counsel, http://www.thefederation.org/documents/The%20Role%20of%20the%20In%20House%20Lawyer.pdf.

If litigation is initiated to challenge a coverage position taken by an insurer or to assert a bad faith claim arising out of an excess judgment and an alleged failure to settle, an attorney for a policyholder (or the underlying claimant) will undoubtedly serve upon the insurer a request for the production of documents from the insurer's claim file. It is reasonable to expect that documents in the claim file, if fully disclosed, could offer the policyholder's counsel great insight into the steps taken to investigate the claim, formulate a strategy for handling the claim, and/or to justify a coverage position.

An insurer's outside counsel may invoke the work product protection to prevent the disclosure of documents prepared by the insurer in anticipation of litigation, but Rule 26(b)(3) may not protect all insurance claim documents from discovery. The Federal Rules of Civil Procedure provide 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. If the party seeking the discovery can satisfy certain conditions, however, a court might compel the insurer to produce such claim file documents.[47]

Rule 26(b)(3)(A) provides:

> 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 …. But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> (i) they are otherwise discoverable under Rule 26(b)(1); and
>
> (ii) 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.

Typically, to determine whether a document has been prepared in anticipation of litigation, the court must ascertain: (1) whether that document was prepared because of a party's subjective anticipation of litigation, as contrasted with ordinary business purpose; and (2) whether that subjective anticipation was objectively reasonable.[48] The overarching rule throughout the country is that discovery of the insurer's claim files is generally not allowed in a third-party's liability action against the insured, even where the insurer is joined as a party to the action.[49] Courts have ruled that "it is hard to dispute [an insurer's] claim that it acted . . . with an eye toward litigation" following receipt of a claimant's letter of representation.[50]

The front line adjuster's communications with in-house and outside counsel

[47] *Scott Elliot Smith, LPA v. Travelers Cas. Ins. Co.*, 2014 U.S. Dist. LEXIS 4612 (S.D. Ohio 2014).

[48] *Id*., citing *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 439 (6th Cir. 2009), quoting *United States v. Roxworthy*, 457 F.3d 590, 594 (6th Cir. 2006).

[49] *See Kraus v. Maurer*, 138 Ohio App. 3d 163, 740 N.E.2d 722, 725 (8th Dist. 2000).

[50] *See Powell v. McLain*, 105 So. 3d 308, 313 (Miss. 2012).

Generally, insurers will produce claim documents not prepared in anticipation of litigation but assert privilege with regard to communications with counsel. However, the insurer, as well as outside counsel, should be very mindful of a danger that can arise when producing documents involving attorney participation in the claim handling process, namely, the possibility that the attorney will be viewed as performing the same business function as the claim adjuster. Most jurisdictions recognize that privileges/protections will not apply where an attorney acts in a claim adjuster capacity or performs duties related to acting as a claim adjuster rather than as a legal adviser. The court in *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 671 (S.D. Ind. 1991) stated:

> In the insurance context, no privilege attaches when an attorney performs investigative work in the capacity of an insurance claims adjuster, rather than as a lawyer, but simply because the attorney's assigned duties were investigative in nature does not preclude an assertion of the attorney-client privilege. Therefore, the relevant question is not whether the attorney was retained to conduct an investigation, but rather, whether this investigation was related to the rendition of legal services. If it was . . . the privilege is waived. *Cutrale Citrus USA, Inc. v. Zurich American Insurance Group, Northern Insurance Company of New York*, 2004 U.S. Dist. LEXIS 22487; 17 Fla. L. Weekly Fed. D 1166 (M.D. Fla. 2004).

It will be the burden of the insurer's counsel to show that advice was given in a legal capacity and not related to a claim activity.

The front line adjuster's communications with consultants and experts

An outside consultant may, due to his relationship with the client, possess information that the insurer's attorneys need for their representation and may, therefore, qualify as a "functional employee" for purposes of the corporate attorney-client privilege.[51] Yet, privilege will likely be assessed as to each communication or document, and it will be the insurer's burden to establish the propriety of the assertion of privilege.

II. OUTSIDE THE TRENCHES: CONSULTATION WITH OUTSIDE COUNSEL

Frequently, for a complex pre-suit claim, insurers turn to their trusted outside casualty/liability and coverage counsel to assist in the evaluation of the claim. Counsel may be expected to conduct or oversee part of the factual investigation. Coverage counsel may also be expected to help evaluate whether the claim is covered under the policy, including, but not limited to, interpreting the policy language as applied to the factual basis of the claim.

A. The Ethical Requirements of Outside Counsel

As discussed in detail in Section I., claim adjusters should conduct themselves during the investigation and adjustment of a claim with an eye towards certain ethical standards, codes, canons, and requirements, where applicable, and/or the insurer's expectations. Likewise, outside counsel retained to assist in the handling or evaluation of claims should comport themselves in accordance with the standard of good faith applicable to insurers, as well as their state's ethical

[51] *United States v. Balsiger*, 2013 U.S. Dist. LEXIS 96387 (E.D. Wis. July 10, 2013), citing *United States v. Graf*, 610 F.3d 1148, 1157-59 (9th Cir. 2010).

rules and regulations applicable to licensed attorneys.[52] Notably, some courts have specifically held that under certain circumstances an insurer can be responsible for the conduct of retained outside counsel.[53] Further, the benefits that inure to the insurer as a result of its adjuster's ethical conduct would similarly flow from outside counsel acting in accordance with the accepted ethical standards and in good faith. Therefore, outside counsel should strive to conduct his or her pre-suit factual investigation and evaluation of a claim in accordance with the standard of good faith expected of all insurers, including where applicable, but not limited to, conducting a reasonable investigation; accurately representing facts, policy provisions, and coverages to the insured; providing prompt responses to the insured's communications where applicable; and encouraging the prompt, fair, and equitable resolution of the claim.

B. Discovery of Pre-Suit Communications Between Insurer and Outside Counsel: Lawyer As Claim Adjuster or Lawyer As Legal Advisor?

If the claim is ultimately denied, or if there is a dispute as to the value of the claim, litigation may ensue, and with an untoward result, the policyholder may allege that the insurer acted in bad faith. When this situation occurs, the policyholder will seek discovery, which may include communications between the insurer and outside counsel who assisted in the factual investigation and/or evaluation of coverage for the claim. These discovery requests beg the question of whether the communications in the first place are protected by the attorney-client privilege and/or the work product protection.

Fundamentals of the Attorney-Client Privilege

The attorney-client privilege protects full, frank, and confidential legal communications between a client and its attorney.[54] For a communication to be protected under the attorney-client privilege, the insurer must have had with its outside counsel, who was acting in his or her capacity

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[52] *Majorowicz v. Allied Mut. Ins. Co.*, 212 Wis. 2d 513, 523, 528, 569 N.W.2d 472 (Wis. App. 1997) ("Legal matters affecting the insurance contract are handled by counsel and are delegable. Although Allied must delegate performance of the obligation, it may not delegate the responsibility for the performance of the obligation."); *Smoot v. State Farm Mut. Auto. Ins. Co.*, 299 F.2d 525, 530 (5th Cir. 1962) ("Those whom the Insurer selects to execute its promises, whether attorneys, physicians, no less than company-employed adjusters, are its agents for whom it has the customary legal liability.").

[53] *See, e.g., Rose v. St. Paul Fire and Marine Ins. Co.*, 215 W. Va. 250, 259-63, 599 S.E.2d 673 (2004) (Davis, J., concurring) (compiling cases deciding whether defense counsel retained by the insurer to represent the insured in the underlying lawsuit is an agent of the insurer or an independent contractor); *see also Gov't Emp. Ins. Co. v. Prushansky*, 2014 U.S. Dist. LEXIS 1456, at *32-33 (S.D. Fla. Jan. 7, 2014) (for purposes of a claim of vicarious liability alleged against an insurer based on the conduct of defense counsel retained by the insurer to represent the insured in the underlying suit, the court carefully delineated between an attorney that acts as defense counsel and an attorney that performs business functions for the insurer); *Res. Constructors, LLC v. ACE Prop. and Cas. Ins. Co.*, 2006 U.S. Dist. LEXIS 80403, at *41-42 (D. Nev. Nov. 1, 2006) ("the insurer is responsible for supervising the conduct of its agents and is legally liable to the insured for their bad faith conduct in handling the claim regardless of whether they are employees or independent contractors"), citing Couch on Insurance 3d § 48.63; *Givens v. Mullikin*, 75 S.W.3d 383, 394-95 (Tenn. 2002) (although a principal is generally not liable for the tortious acts of an independent contractor, an insurer may be liable for the acts of its retained counsel if the attorney acts pursuant to the insurer's orders, designs, instructions, or directions).

[54] *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L.Ed.2d 584 (1981).

as an attorney, a communication involving the seeking or giving of legal advice, which was made in confidence and not disclosed to a third-party who is not an agent or representative of the attorney or client.[55] Courts characterize the privilege as a "two-way street" that protects communications from a client to a lawyer and from the lawyer to the client.[56]
The attorney-client privilege is of continuing duration unless it is waived.[57] Exceptions to the attorney-client privilege are limited in light of the potential to chill the candor of communications between attorney and client.[58] Nonetheless, because discovery is construed broadly, the scope of the attorney-client privilege is ultimately narrow.[59]

A Highly Suspect Erosion of the Attorney-Client Privilege As Applied to Insurer Claim Files: The Cedell "Contagion"?
In spite of the maxim that the attorney-client privilege survives unless waived, some courts have found a need-based exception to the attorney-client privilege in cases in which bad faith has merely been alleged against an insurer.[60] In 2013, the Washington Supreme Court so held in *Cedell v. Farmers Insurance Co. of Washington*, 176 Wn. 2d 686, 696-99, 295 P.3d 239 (2013). *Cedell* was a first-party bad faith action brought by a policyholder against his homeowners' carrier resulting from Farmers' handling of a claim for fire damage at the insured residence. Cedell alleged that Farmers unreasonably delayed in providing its coverage determination even though the Fire Department and Farmers' own fire investigator concluded that the fire was accidental and not arson.
Notably, Farmers had hired an attorney, Hall, to assist in the coverage determination, including conducting examinations under oath of the insured and his girlfriend. Hall also corresponded with the insured and negotiated an attempted resolution of the claim. In the bad faith action, Cedell sought the production of Farmers' claim file, but Farmers withheld its communications with Hall based on the attorney-client privilege.

In evaluating Farmers' privilege assertion, the Washington Supreme Court proclaimed an analytical framework whereby the courts starts with the presumption that the attorney-client privilege does not apply to claim files in the context of a first-party bad faith claim, and then the insurer must demonstrate, for purposes of an *in camera* review, that outside counsel retained by

[55] *Id*.

[56] *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 152 F.R.D. 132, 137 (N.D. Ill. 1993) ("the key test is whether the communications reflect legal advice given by a legal advisor acting in that capacity").

[57] *Exline v. Exline*, 277 Ill. App. 3d 10, 14, 659 N.E.2d 407 (2d Dist. 1995).

[58] *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 249 Conn. 36, 52, 730 A.2d 51 (1999).

[59] *Bull Data*, 152 F.R.D. at 135.

[60] *See Boone v. Vanliner Ins. Co.*, 91 Ohio St. 3d 209, 213, 2001 Ohio 27, 744 N.E.2d 154 (the insured is entitled to discover claim file materials containing attorney-client communications related to coverage and created prior to the denial of coverage, as claim file materials that reveal an insurer's lack of good faith in denying coverage "are unworthy of protection"); *Minter v. Liberty Mut. Fire Ins. Co.*, 2012 U.S. Dist. LEXIS 88199, at *6-7 (W.D. Ky. Jun. 26, 2012) ("Without the claims file, a contemporaneously-prepared history of the handling of the claim, it is difficult to see how an action for first-party bad faith could be maintained without requiring an overwhelming number of depositions, whose costs would thereby render all but the rare wealthy few first-party bad faith claimants financially unable to proceed.").

the insurer was providing legal advice to the insurer and not conducting mere claims adjustment (*i.e.*, "quasi-fiduciary functions"):

> When an insured asserts bad faith against his insurer in the way the insurer has handled the insured's claim, unique considerations arise. … The insured needs access to the insurer's file … in order to discover facts to support a claim of bad faith. Implicit in an insurance company's handling of a claim is litigation or the threat of litigation that involves the advice of counsel. To permit a blanket privilege in insurance bad faith claims because of the participation of lawyers hired or employed by insurers would unreasonably obstruct discovery of meritorious claims and conceal unwarranted practices.
>
> To accommodate the special considerations of first party insurance bad faith claims, the insured is entitled to the claim file.

* * *

> First party bad faith claims by insureds against their own insurer are unique and founded upon two important public policy pillars: that an insurance company has a quasi-fiduciary duty to its insured and that insurance contracts, practices, and procedures and highly regulated and of substantial public interest. … To protect these principles, we adopt [the following approach] …. We start from the presumption that there is no attorney-client privilege relevant between the insured and the insurer in the claims adjusting process, and that the attorney-client and work product privileges are generally not relevant. … However, the insurer may overcome the presumption of discoverability 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 the law. Upon such a showing, the insurance company is entitled to an in camera review of the claims file, and to the 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. If the trial judge finds the attorney-client privilege applies, then the court should next address any claims the insured may have to pierce the attorney-client privilege.[61]

In examining Hall's work for Farmers, the Washington Supreme Court opined that the following investigative activities would not qualify for protection: taking sworn statements from the insured and his girlfriend, corresponding with the insured, and negotiating settlement of the claim. Notably, the Supreme Court encouraged attorneys arguably acting in multiple roles "to set up and maintain separate files so as not to comingle different functions."[62]

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[61] Even if the insurer prevails in demonstrating that its retained outside counsel was providing legal advice and not acting as a claims adjuster, the policyholder may still overcome the attorney-client privilege by showing that the civil fraud exception applies. 176 Wn. 2d at 699-700.

[62] 176 Wn. 2d at 699, fn.5; *see also Palmer v. Sentinel Ins. Co.*, No. C12-5444, 2013 U.S. Dist. LEXIS 95643, at *6-7 (W.D. Wash. July 9, 2013) (explaining that attorneys are not prohibited from "performing mixed duties" for insurers,

Following the publication of *Cedell*, the United States District Court for the Western District of Washington expanded *Cedell's* reach to third-party bad faith claims.[63] Similarly, the United States District Court for the District of Idaho predicted that the Idaho Supreme Court would adopt the *Cedell* framework in connection with a policyholder's bad faith claim.[64]

Despite this assault on insurers' ability to shield from disclosure communications that would otherwise be protected by the attorney-client privilege, if not for an insured's assertion of bad faith, insurers should be mindful that courts have explicitly and correctly rejected this approach to the attorney-client privilege as representing an improper and unjustifiable deprivation of the insurer's right to avail itself of the attorney-client privilege:

> … [A]n 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 ….[65]

Further, many courts have correctly rejected the argument asserted by policyholders and claimants that the attorney-client privilege, like the work product protection, considers the litigation needs of the opposing party.[66]

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but lamenting that the purported "workaround" suggested by the *Cedell* court is not a "practical solution" because counsel's critical mental impressions will likely be found in both files).

[63] *Carolina Cas. Ins. Co. v. Omeros Corp.*, No. C12-287, 2013 U.S. Dist. LEXIS 53225, at *6-7 (W.D. Wash. Apr. 12, 2013) ("The Cedell court grounded its ruling in the quasi-fiduciary duty of an insurer to its insured, along with the public policy interest in regulating the business of insurance. The latter consideration is just as important in a third-party claim."); *see also Shaw Grp. v. Zurich Am. Ins. Co.*, No. 12-257, 2014 U.S. Dist. LEXIS 5058 (M.D. La. Jan. 15, 2014) (applying Washington law to the assertion of attorney-client privilege).

[64] *Stewart Title Guar. Co. v. Credit Suisse*, No. 11-cv-227, 2013 U.S. Dist. LEXIS 49804 (D. Idaho Apr. 3, 2013).

[65] *Aetna Cas. & Sur. Co. v. Superior Court*, 153 Cal. App. 3d 467, 200 Cal. Rptr. 471, 474 (1st Dist. 1984); *see also McCrink*, 2004 U.S. Dist. LEXIS 23990, at *9 ("By preventing a naked allegation of bad faith from eviscerating the attorney-client privilege, these courts preserve the attorney-client privilege, and the public and private interests that the attorney-client privilege serves, in the context of insurance litigation."); *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.*, 174 F.R.D. 7, 17 (D. Mass. 1997) (no blanket exception to the attorney-client privilege in a first-party bad faith case); *Dixie Mill Supply Co., Inc. v. Cont'l Cas. Co.*, 168 F.R.D. 554, 558 (E.D. La. 1996) ("The mere fact that a claim of bad faith … or other claim or defense based on a party's state of mind is involved does not waive the attorney-client privilege.").

[66] *E.g., Genovese v. Provide Life and Accident Ins. Co.*, 74 So. 3d 1064, 1066, 1068 (Fla. 2011) (the rule established in *Ruiz*, *infra*, permitting the discovery of work product in first-party bad faith actions, does not apply to attorney-client privileged communications—allowing a need-based exception to the attorney-client would undoubtedly hamper the purpose of the privilege, *i.e.*, to encourage full and frank communication between attorney and client, because an insurer would be reluctant to communicate certain information to its attorney if that communication could be subsequently revealed to the insured); *cf. Philadelphia Indem. Ins. Co. v. Olympia Early Learning Ctr.*, No. C12-5759, 2013 U.S. Dist. LEXIS 93067, at *9-11 (W.D. Wash. July 2, 2013) (criticizing *Cedell* for improperly conflating the attorney-client privilege and the work product doctrine and questioning the basis for a need-based exception to the attorney-client privilege).

In sum, we do not believe that *Cedell*, although adopted by federal district courts applying Idaho law, represents the future or the beginning or continuation of a trend. Because it is based on an egregious misunderstanding of the attorney-client privilege, it stands to reason that the effect of *Cedell* will not be far-reaching because the far better reasoned view is that the attorney-client privilege is not subject to need-based exceptions like the work product protection. Moreover, it would be grossly unfair to deprive insurers of the benefits of the attorney-client privilege, one of the bedrocks of our civil justice system. Also, courts applying the law of states that do not consider the insurer to stand in the position of a fiduciary or "quasi-fiduciary" *vis a vis* the insured should find that *Cedell* is based on fundamentally inapposite legal principles than the principles giving rise to the insurance jurisprudence in their jurisdiction.

Fundamentals of the Work Product Protection

The work product protection, which is codified at Rule 26(b)(3)(A) of the Federal Rules of Civil Procedure, applies to documents prepared in anticipation of litigation. In particular, it protects from discovery material obtained and prepared by counsel in anticipation of litigation or preparation for trial, including "raw factual information."[67] To determine whether a document is prepared by an insurer in anticipation of litigation, courts ask "whether, 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, *... (and not) in the regular course of business.*"[68]

There are two tiers of protection: (1) ordinary work product, which is discoverable upon a showing of substantial need (and a lack of undue hardship); and (2) opinion work product, *e.g.*, counsel's mental impressions, conclusions, opinion, or legal theories, which some courts afford absolute protection, while others allow it to be discovered upon the showing of a "compelling need."[69]

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[67] *Hickman v. Taylor*, 329 U.S. 495, 509-12, 67 S. Ct. 385, 91 L, Ed. 451 (1947) (there is a limited immunity from discovery for the written statements, private memoranda, and personal recollections prepared by counsel); *see also Falkner v. Gen. Motors Corp*., 200 F.R.D. 620, 623 (S.D. Iowa 2001). The purpose of the protection is "to maintain the adversarial trial process and to ensure that attorneys are adequately prepared for trial by encouraging written preparation." *Brown v. Superior Court*, 137 Ariz. 327, 334, 670 P.2d 725 (1983), citing *Hickman*, 329 U.S. at 511 (an attorney should not be deterred by fear that her efforts would be disclosed to opposing counsel).

[68] *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982), quoting 8 Wright & Miller, Federal Practice & Procedure: Civil § 2024 (1970) (emphasis added); *Falkner*, 200 F.R.D. at 623 (factors include who prepared the documents, the nature of the documents, and the time the documents were prepared); *Harper v. Auto-Owners,* 138 F.R.D. 655, 659-60 (S.D. Ind. 1991) (there must be a substantial and specific threat of litigation and more than a remote prospect, an inchoate possibility, or a likely chance of litigation).

[69] *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 663 (3d Cir. 2003). A compelling need is one where information that is directed to a pivotal issue in the litigation "is within the exclusive control of the party from whom discovery is sought, regardless of whether the information might also be obtained from that party through depositions, interrogatories or document production." *Ivy Hotel San Diego, LLC v. Houston Cas. Co.*, 2011 U.S. Dist. LEXIS 119746, at *22 (S.D. Cal. Oct. 27, 2011); *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 262 (Del. 1995).

Although the vast majority of courts apply the standard stated in Rule 26(b)(3), a tiny minority of courts refuse to afford any work product protection to an insurer's claim file materials in a bad faith case. *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1126 (Fla. 2005) (work product protection does not apply in a third- or first-party bad faith failure to settle action, and thus, all documents, memoranda, and letters contained in the insurer's claim file are discoverable); *Garg v. State Auto. Mut. Ins. Co.*, 155 Ohio App. 3d 258, 265, 2003 Ohio 5960, 800 N.E.2d 757

The Effect of the Role of Outside Counsel on the Attorney-Client Privilege and the Work Product Protection

It is a reality of modern insurance coverage and liability claims handling practice that outside counsel tends to "wear many hats." For example, outside counsel may in some circumstances be called upon to review the insurer's investigation and the allegations of the complaint in the underlying lawsuit. Other times counsel may be asked to take a more active role in the investigation of the loss or claim. Further, outside coverage counsel may be asked compare those findings/allegations to the operative policy language. The nature of counsel's responsibilities may have significant implications with respect to the attorney-client privilege and the work product protection. In particular, courts generally hold that the attorney-client privilege and work product protection does not apply where outside counsel acts as a claim adjuster and not as a legal advisor.[70] Courts reason that insurers should not be allowed to insulate factual findings by hiring attorneys to perform routine business activities.[71]

It is easy to delineate in theory that communications from and to a lawyer who is acting as a claim adjuster, generally, are not protected by the attorney-client privilege or the work product protection. By contrast, communications from and to a lawyer who is acting as a legal advisor, generally, are protected from discovery. In other words, are the roles and responsibilities of a claims adjuster distinct from the roles and responsibilities of outside counsel? In practice, especially in consideration of the realities facing the insurance industry today, drawing this line sometimes proves very difficult.

In determining whether outside counsel's communications warrant disclosure, some courts hold that the timing of their creation is crucial. On the one hand, for example, courts tend to find that pre-final coverage determination documents generated by outside counsel are not entitled to protection.[72] On the other hand, some courts recognize that documents generated by outside

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(extending *Boone, infra,* to the work product protection to find that materials in a claim file created prior to the denial of a claim, which reflect whether the insurer acted in bad faith in handling the claim, are discoverable); *Unklesbay v. Fenwick*, 167 Ohio App. 3d 408, 2006 Ohio 2630, 855 N.E.2d 516 (extending *Boone* and *Garg* to bad faith handling and delay in payment actions, even if the insurer does not outright deny the claim—attorney-client privilege and work product protection unavailable to insurer in any bad faith action, not just bad faith denial of coverage action). These courts reason 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 legally 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 …." *Ruiz*, 899 So. 2d at 1128-29.

[70] *Lagestee-Mulder, Inc. v. Consol. Ins. Co.*, 2010 U.S. Dist. LEXIS 121676, at *2 (N.D. Ill. Nov. 17, 2010).

[71] *Illiana Surgery & Med. Ctr. LLC v. Hartford Fire Ins. Co.*, 2012 U.S. Dist. LEXIS 30128, at *10-11 (N.D. Ind. Mar. 7, 2012); *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 197 F.R.D. 620, 636 (N.D. Iowa 2000) ("An insurer cannot shield its entire claims investigation behind the work product privilege simply by hiring an attorney to perform what is in the ordinary course of the insurer's business.").

[72] *Halpin v. Barnegat Bay Dredging Co., Inc.*, 2011 U.S. Dist. LEXIS 68828, at *16 (D.N.J. June 27, 2011) (where the insured contended that mere involvement of counsel in an insurer's claim investigation did not transform the investigation into one undertaken in anticipation of litigation); *Brooklyn Union Gas Co. v. Am. Home Assur. Co.*, 23 A.D.3d 190, 190-91, 803 N.Y.S.2d 532 (1st Dept. 2005) (work product applies only to documents prepared by counsel using a lawyer's learning and skills, "such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy"—not to documents prepared in the ordinary course of an insurer's investigation,

counsel prior to the final coverage determination are entitled to protection, reasoning that although outside counsel undertook or oversaw the factual investigation, that does not, by itself, transform outside counsel's role into that of a claim adjuster.[73]

In the coverage context, the determination becomes more complicated when outside counsel is asked to investigate the claim, analyze coverage for the claim, and communicate with the insured about the carrier's findings and coverage position. As such, where outside counsel is providing a mix of legal opinion and claim investigation/adjustment, most courts consider what the dominant or primary purpose of the attorney's role was.[74] This is a fact-intensive inquiry.[75] Certain factors that the courts consider in evaluating whether an attorney is serving as a claim adjuster/investigator or as a legal advisor are: (1) whether outside counsel serves as the intermediary between the insured and the insurer; (2) the scope of outside counsel's retention or engagement; and (3) whether outside counsel has decision making power or direct influence over the coverage determination.[76] The same analysis would apply to outside counsel assisting in a claim investigation.

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to determine whether to accept or reject coverage, or to evaluate the extent of a claimant's loss). Although these cases examine the issue in the context of the work product doctrine, their reasoning should apply equally under the attorney-client privilege.

[73] *In re Subpoena of Curran*, 2004 U.S. Dist. LEXIS 29914, at *10 (N.D. Tex. Sept. 20, 2004) ("It is not possible to give 'a legal opinion without performing an investigation or collecting information.' … Without facts, [outside counsel] would not have been able to conduct her legal analysis. The letters she wrote, the meetings she attended, and the conversations she had with third parties were to make sure she had the facts needed to provide Defendant with sound legal advice.") (internal citations omitted).

[74] *Ivy Hotel*, 2011 U.S. Dist. LEXIS 119746, at *10-11, 14 ("the intermingling of roles does not relieve the Court of the requirement that it determine the dominant purpose of the relationship"); *Munich Reinsurance Am., Inc. v. Am. Nat'l Ins. Co.*, 2011 U.S. Dist. LEXIS 41826, at *56-57 (D.N.J. Apr. 18, 2011) ("legal advice is often intimately intertwined" with business advice and thus is "difficult, impractical and unrealistic to compartmentalize," which forces courts to determine whether the attorney's role is predominantly to render legal services).

Some courts utilize a "because of" standard, *i.e.*, whether "the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *City of Glendale v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2013 U.S. Dist. LEXIS 60711, at *36 (D. Ariz. Apr. 29, 2013). The "because of" standard is not concerned with whether litigation was a primary or secondary motive for creating the document. *Id*. at 36-37.

[75] *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 164 (D. Minn. 1986) (documents about how the fire started and who was responsible for it are "pure factual investigation"); *Aetna*, 200 Cal. Rptr. at 476 (classic example of client seeking legal advice from an attorney is where outside counsel was retained to interpret the policy and investigate the events that resulted in damage to determine whether the insurer was required to provide coverage); *Elec. Data Sys. Corp. v. Steingraber*, 2003 U.S. Dist. LEXIS 11818, at *8-9, 16, 19-21 (E.D. Tex. July 9, 2003) (where outside counsel was hired to contribute legal expertise to the investigation, including contract interpretation, evaluating the risk of possible litigation, and conducting witness interviews, the lawyer was performing legal services for the insurer); *Hartford Fin. Servs. Grp., Inc. v. Lake Cnty. Park and Recreational Bd.*, 717 N.E.2d 1232, 1236 (Ind. App. 1999) (where outside counsel was retained to investigate the claim, render legal advice, and make a coverage determination, counsel was rendering legal advice); *Commercial Fin.*, 197 F.R.D. at 637 (the point when the insurer merely began to consider a rescission defense, that consideration was part of the coverage determination and in turn, part of an insurer's routine business of claim investigation).

[76] *Alit (No. 1) Ltd. v. Brooks Ins. Agency*, 2012 U.S. Dist. LEXIS 38144, at *24 (D.N.J. Mar. 21, 2012); *Ivy Hotel*, 2011 U.S. Dist. LEXIS 119746, at *13-14, 21(outside counsel was retained to monitor the claim and evaluate coverage for it); *Pengate Holding Sys., Inc. v. Westchester Surplus Lines Ins. Co.*, 2007 U.S. Dist. LEXIS 13303, at

To avoid a finding that outside counsel acted as a claim adjuster, insurers may wish to use the engagement or retention correspondence with outside counsel as an opportunity to clarify their role. In particular, the correspondence should address the purpose of any claim investigation, establishing an attorney-client relationship at the outset, the importance of researching the applicable law for purposes of analyzing the insured's liability or coverage under the policy, and whether outside counsel will serve as the liaison between the insurer and the insured. By creating a contemporaneous memorialization of the expectations of outside counsel, an insurer should be able to rely on that document to demonstrate that outside counsel was serving as its legal advisor, not its claim adjuster.

Similarly, outside counsel may wish to reference in his or her reports and correspondence that these are attorney-client protected documents and that the purpose of the document is to communicate legal advice. Specifically for emails, the prudent use of subject lines indicating that outside counsel is providing legal advice, in combination with the use of outside counsel's express disclaimers regarding legal advice, may help signify for courts that the email is intended to address legal—not business—concerns. However, outside counsel should be judicious in labeling documents as "privileged" because if a court subsequently determines that outside counsel overaggressively designated documents as privileged, the court will be more prone to deem questionable documents not privileged.

In sum, it is a reality that insurers need to seek legal advice from outside counsel to make liability and coverage determinations—the fact that outside counsel also undertakes some investigation does not mean that she is not using his or her judgment, experience, and expertise as an attorney.

III. IN THE FORT: CONSULTATION WITH IN-HOUSE COUNSEL

In addition to turning to trusted outside counsel to assist in the evaluation of a claim, claim adjusters tend to use as resources, when available, in-house or corporate legal departments comprised of attorneys who possess broad and deep knowledge of insurance coverage and tort law nationwide. For instance, in-house counsel may provide the claim adjuster with insights, direction, and/or suggestions for how to conduct a proper factual investigation, interpret the policy provisions at issue, and apply the policy provisions to the factual basis for the loss or the allegations of the underlying complaint. These in-house or corporate legal departments also may be the point of contact for outside counsel when the company is involved in litigation defending the insured or litigation over coverage. Further, in-house counsel may be called upon to oversee or monitor claim investigation for claims involving great complexity and substantial exposure. How courts view the role played by in-house counsel may have a significant effect on whether communications between front line claims adjusters and in-house counsel are protectible from discovery pursuant to the attorney-client privilege.

A. The Ethical Requirements of In-House or Corporate Counsel

As discussed in detail in Sections I. and II.A., insurers are generally responsible for the conduct of their claim adjusters and, in some instances, outside counsel in connection with their pre-suit claim investigation and evaluation. Insurers are similarly responsible for the conduct of their in-

*9-11 (M.D. Pa. Feb. 27, 2007) (the manner in which the law firm was hired and the services called upon for it to perform "are of the utmost significance in determining the capacity in which [the firm] was engaged").

house counsel.[77] Hence, it is in the insurer's best interest that its claim adjusters, outside counsel, and in-house coverage counsel all comport themselves in accordance with the applicable ethical standards, codes, canons, requirements, and/or expectations. Moreover, if outside counsel or in-house counsel is ultimately found in subsequent coverage or bad faith litigation to be acting as a claim adjuster, an insurer would be in the best position possible, under the circumstances, if all of its attorneys and agents complied with the ethical standards and requirements applicable to claims adjusters.

B. Attorney-Client Privilege As Applied to Communications with In-House or Corporate Counsel

As with communications between a claims adjuster and outside counsel, whether the attorney-client privilege applies to communications between a claims adjuster and in-house counsel depends on whether in-house counsel is found to have been acting as a legal advisor.[78] However, communications involving in-house counsel are subject to a higher level of scrutiny than communications involving outside counsel, in recognition of the fact that in-house counsel often have business responsibilities in addition to legal responsibilities.[79] In fact, a party seeking to protect communications involving in-house counsel must make a "clear showing" that the communications were for the purpose of securing legal advice.[80]

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[77] *See generally Eaton Corp. v. Frisby*, 2013 Miss. LEXIS 596 (Miss. Nov. 21, 2013).

[78] *Mehta v. ACE Am. Ins. Co.*, 2013 U.S. Dist. LEXIS 84939, at *6-7 (D. Conn. Jun. 18, 2013) ("… [D]ocuments connected to an insurance claims investigation are privileged only if they are 'truly confidential inquiries or responses to counsel concerning legal advice, rather than insurance claims.'").

Moreover, as long as claims adjusters communicate with in-house counsel about matters within the scope of their employment, the threshold *Upjohn* subject matter test applied by the vast majority of courts should be satisfied. *See, e.g., S.E. Pennsylvania Transp. Auth. v. CaremarkPCS Health, L.P.*, 254 F.R.D. 253, 257-58 (E.D. Pa. 2008). Nonetheless, a few courts still use the "control group test," *i.e.*, the attorney-client privilege applies only to communications involving employees who can control or have a substantial role in determining the course of action a corporation takes with respect to the legal advice. *Sullivan v. Alcatel-Lucent USA, Inc.*, 2013 U.S. Dist. LEXIS 82407, at *8-9 (N.D. Ill. Jun. 12, 2013). Thus, which jurisdiction's law applies to a privilege question matters.

[79] *Kincaid v. Wells Fargo Sec.*, LLC, 2012 U.S. Dist. LEXIS 27041, at *5-6 (N.D. Okla. Mar. 1, 2012); *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 797-98 (E.D. La. 2007) ("It is often difficult to apply the attorney-client privilege in the corporate context to communications between in-house corporate counsel and those who personify the corporate entity because modern corporate counsel have become involved in all facets of the enterprises of which they work. As a consequence, in-house legal counsel participates in and renders decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues. … The problem of determining the type of services being rendered by in-house counsel has been exacerbated by the advent of e-mail that has made it so convenient to copy legal counsel on every communication that might be seen as having some legal significance at some time, regardless of whether it is ripe for legal analysis. As a consequence, counsel is brought into business communications at a much earlier stage than she was in the past when communications were through hard-copy memoranda. This, of course, has been beneficial for corporations because the lawyers are some of the most intelligent and informed people within corporations. Lawyers not only help corporate clients avoid legal problems before they arise, their business, technical, scientific, promotional, and public relations judgment has frequently proven invaluable. In addition, because they are part of a word crafting profession, more often than not, they are excellent writers and editors. The benefit from this expanded use of lawyers, however, comes at a cost. The cost is in differentiating between the lawyers' legal and business work when the attorney-client privilege is asserted for their communications within the corporate structure.").

[80] *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984).

Courts use three different standards to determine whether in-house counsel is acting as a legal advisor: (1) but for, *i.e.*, "the communication would not have been made but for the client's need for legal advice or services"; (2) predominantly legal, *i.e.*, "whether the communication is designed to meet problems which can fairly be characterized as predominantly legal"; and (3) primary purpose, *i.e.*, the nonlegal aspects of the communication "are integral to the legal assistance given and the legal assistance is the primary purpose" of the communication.[81] Irrespective of the test used to evaluate the communications, myriad courts have upheld the attorney-client privilege in the context of claims adjuster-in-house counsel communications, after examining the totality of the circumstances surrounding the creation of the document or the context of the communication.[82]

For those communications typically exchanged between a claims adjuster and in-house counsel in the context of claim investigation and evaluation, courts arguably could find that, depending on the specific actual circumstances, in-house counsel was acting as a legal advisor in the following situations:

- Direction to claims adjusters, third-party adjusters, and outside consultants, as to how to best conduct a factual investigation with regard to a loss—this could include how to evaluate a loss for potential liability and defenses to a claim, or under the framework of a policy exclusion
- Analysis of a complaint to ascertain whether it presents covered allegations for purposes of the duty to defend
- Analysis and interpretation of policy language (legal advice does not just involve esoteric discussions, such as "the" insured vs. "an" insured)
- Application or comparison of the interpreted policy language to the facts/allegations of the claim
- Facilitating communication between the claims departments and the underwriting department with respect to defenses of late notice, material misrepresentation, and reformation
- Analysis of outside counsel's opinion on liability or coverage
- Analysis of whether to accept outside counsel's recommended course of action
- Drafting and reworking coverage position letters and reservation of rights letters, including editorial, style, and substantive revisions—also providing direction on the regulatory requirements associated with a coverage position letter sent to an insured in a particular jurisdiction
- Choosing which coverage defenses to assert in a coverage position letter
- Comments following a call with outside counsel or an internal roundtable

[81] *See, e.g., Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 628-36 (D. Nev. Mar. 29, 2013); *Spiniello Cos. v. Hartford Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 53509, at *5-6 (D.N.J. July 14, 2008) (cc'ing in-house counsel on an email is insufficient to establish the privilege); *In re CV Therapeutics, Inc. Sec. Litig.*, 2006 U.S. Dist. LEXIS 41568, at *8-13 (N.D. Cal. Jun. 16, 2006).

[82] *E.g., Robertson v. Allstate Ins. Co.*, at *17 n.6 (E.D. Pa. Mar. 10, 1999). Notably, in-house counsel's title, job description, and place on the insurer's organizational chart may weigh for or against application of the privilege. However, in-house counsel must be licensed in a U.S. jurisdiction for the attorney-client privilege to apply. *Fin. Techs. Int'l, Inc. v. Smith*, 2000 U.S. Dist. LEXIS 18220, at *18-21 (S.D.N.Y. Dec. 19, 2000).

- Providing direction on how to most effectively execute counsel's recommended course of action

Ultimately, the inquiry as to whether the attorney-client privilege applies to communications between a claims adjuster and in-house counsel will be fact-intensive, and the outcome will be driven by the specific circumstances associated with the creation of the document or the occurrence of the communication.[83] Nonetheless, with detailed affidavits from the claims adjuster and in-house counsel regarding the nature and scope of legal advice sought from in-house counsel and the typical advisor role that in-house counsel occupies, insurers should be in the best position possible to oppose the disclosure of its confidential internal communications regarding pre-suit evaluation of complex claims.

[83] *Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y.2d 588, 594, 540 N.E.2d 703 (1989) (that a communication from in-house counsel does not reflect the conducting of legal research is not determinative of whether in-house counsel has provided legal advice—in-house counsel may also offer his or her professional skills, such as legal judgment, acumen, or strategy).