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Leveling the Bad-Faith Playing Field: How to Seek Discovery of Plaintiffs' Counsel's Privileged Communications and Work Product

I. Introduction

The attorney-client privilege frequently arises as an issue when a policyholder seeks discovery of its insurer's claim file in a bad faith or coverage action. Traditionally, coverage counsel's communications with the insurer are privileged so long as the lawyer truly serves his or her position as a legal advisor, subject to limited and well-known waiver exceptions for the "advice of counsel" defense to bad faith[1] and the "crime fraud exception.[2] See *Aetna Cas. & Sur. Co. v. Superior Court*, 153 Cal. App. 3d 467, 476, 200 Cal. Rptr. 471, 476 (Ct. App. 1984). However, several states have weakened or destroyed the insurer's testimonial and work product privileges in bad faith litigation concerning first party claims. This typically is based on a determination (or assumption) that insurer coverage counsel performed the functions of claims adjustment. Points that may trigger a determination that coverage counsel is undertaking the function of an adjuster include where coverage counsel undertakes "adjuster activities" such as: investigation, evaluation, or processing of a claim; (2) communication or negotiation with the insured; (3) takes an examination of the insured under oath; or (4) performs other "claims adjuster" activities that are part of the ordinary process of claims handling. This implicates that coverage counsel's actions, communications, documents, evaluations, opinions, and recommendations may be discoverable. While this creates undeniable problems in its current form, which is applicable only to the privilege as applied to insurer's and coverage counsel, it also opens new opportunities to use those same principles to make the insurer's case for discovery of policyholders' pre-suit communications with counsel and work product.

II. Denial of the Attorney-Client Privilege to Coverage Counsel and Insurers in Bad Faith Claims

States that have diminished or destroyed the traditional privileges applicable to the files and work product of insurers and coverage counsel in first party bad faith actions broadly fall

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[1] *Shorter v. State*, 33 So. 3d 512, 518 (Miss. Ct. App. 2009); *Murphy & Demory, Ltd. v. Murphy*, 1994 WL 1031072 (Va. Cir. Ct. 1994); *People v. Superior Court (Bauman & Rose)*, 37 Cal. App. 4th 1757, 44 Cal. Rptr. 2d 734 (2d Dist. 1995).

[2] *See* Restatement (Third) of the Law Governing Lawyers § 80 (2000); *The Bobrick Corp. v. Dwyer, Schraff, Meyer, Grant & Green*, 2008 WL 4173619, *1 (D. Raw. 2008); *Computer Associates Intl, Inc. v. Simple.com, Inc.*, 2006 WL 3050883, *2 (E.D.N.Y. 2006); *Ropak Corp. v. Plastican, Inc.*, 2006 WL 1005406, *6 (N.D. Ill. 2006); *Henry v. Quicken Loans, Inc.*, 263 F.R.D. 458, 468 (ED. Mich. 2008).

into two categories: states where there is a *presumption* that the attorney/ client privilege does not exist for the insurer or coverage counsel, and states where no privilege applies to the insurer's claim file prior to denial of the claim, but privileges are retained for coverage counsel's file.

A. States with a Presumption of No Privilege: Washington, Idaho, Alaska (split), Louisiana (Maybe)

The leading case in states that have adopted a presumption that the attorney-client privilege does not apply to the insurer/coverage counsel relationship is *Cedell v. Farmers Ins. Co. of Washington,* 295 P.3d 239 (Wash. 2013). The Washington Supreme Court in that decision declared that in first party bad faith actions based upon "the handling and processing of claims", "there is a presumption of no attorney-client privilege". *Cedell,* at 247. The burden is shifted to the insurer who must convince the trial court judge that the privilege attaches to such communications and work product, but only after the insurer produces the "privileged" communications to the court for an *in-camera* review. *Id. Cedell* involved a first-party bad faith action against an insurer arising out of a fire that destroyed the insured's residence. Even though the fire department and the insurer's own arson investigation determined that the fire was accidental, the insurer delayed its coverage determination based on alleged inconsistent statements given by the insured's girlfriend who was not insured under the policy. The insurer estimated its exposure under the policy and retained coverage counsel to assist in making a coverage determination. The Court specifically noted that the insurer "hired [coverage counsel] to do more than give legal opinions." The Court further noted that the record suggested that coverage counsel "assisted in the investigation" of the claim by conducting an examination under oath of the insured and his girlfriend and corresponding with the insured. Additionally, coverage counsel "assisted in the adjustment of the claim" by negotiating with the insured. *Id*. at 247. Coverage counsel also "assisted in adjusting the claim" by sending the insured a letter making a "'one-time offer in an amount considerably less than the insurer's acknowledge exposure and threatening denial of the claim if the offer was not accepted within 10 days. *Id*. at 247. At the time this offer was made, the insured had been out of his house for seven months. The insured retained counsel who sued the insurer for bad faith in handling the claim. When plaintiff's counsel requested the insurer to produce its entire claim file, the insurer responded by producing "a heavily redacted claims file, asserting that the redacted information was not relevant or was privileged" under the attorney-client privilege. Id. at 242. The trial court required an *in-camera* inspection and then ordered the insurer to produce the disputed documents.

The discovery dispute landed at the Washington Supreme Court and was resolved with draconian results. The Court created an analytical framework where trial courts in first-party bad faith actions start with the presumption that the attorney-client privilege does not apply to insurer claim files. The Court stated:

> [I]n first party insurance claims by insured's [sic] claiming bad faith in the handling and processing of claims . . . there is a presumption of no attorney-client privilege. However, the insurer may assert an attorney-client privilege upon a showing

> in camera that the attorney was providing counsel to the insurer and not engaged in a quasi-fiduciary function. 9 Upon such a showing, the insured may be entitled to pierce the attorney-client privilege. If the civil fraud exception is asserted, the court must engage in a two-step process. First, upon a showing that a reasonable person would have a reasonable belief that an act of bad faith has occurred, the trial court will perform an *in-camera* review of the claimed privileged materials. Second, after in camera review and upon a finding there is a foundation to permit a claim of bad faith to proceed, the attorney-client privilege shall be deemed to be waived.

Id. at 246-247.

In short, the *Cedell* Court found that there is a presumption that the attorney client privilege does not exist in a first-party bad faith case when the claim is based upon claims "handling and processing". Id. at 246. To rebut the presumption and show that the communications are privileged, the insurer first must produce to the trial judge the disputed (i.e., "privileged") documents *in camera*, prove that coverage counsel provided legal counsel or advice only, and coverage counsel was not performing any quasi-fiduciary function similar in nature to those performed by an insurance adjuster in adjusting the first party claim. Even then, however, should the trial court rule that the communications are privileged, the policyholder has a second bite at the apple by arguing waiver under the civil fraud exception. The Court structured a two-step process requiring only that the insured show that the insurer acted in bad faith and that there is a foundation to permit a bad faith claim to proceed. See *Id*.[3]

Whenever insurance coverage counsel is engaged by the insurer, the "Presumption" rule created by the *Cedell* Court automatically assumes that coverage counsel has performed "quasi-fiduciary" adjusting tasks, the same as those performed by the claim's adjuster. This is so even though the scope of coverage counsel's assignment goes far beyond that of the adjusters. Equally troubling is the Court's holding that in undertaking the *in-camera* review, the trial court's finding of sufficient facts supporting a bad faith claim was the equivalent of the crime-fraud exception to the attorney-client privilege.[4] Now potentially discoverable are coverage counsel's opinion letters or portions thereof, notes and work product. And

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[3] Within weeks of being handed down, *Cedell* was adopted by an Idaho federal court in *Stewart Title Guar. Co. v. Credit Suisse, Cayman Islands Branch*, 2013 WL 1385264, at *4-5 (D. Idaho Apr. 3, 2013). In *Stewart Title*, the court stated that, "the Washington Supreme Court issued a well-reasoned decision concerning the extent of the attorney/client privilege in bad faith cases ... [and] "if the Idaho Supreme Court were faced with the facts of this case, they would apply the holding in *Cedell."* Similarly, in *Shaw Grp., Inc. v. Zurich Am. Ins. Co.*, WL 199626, at *2 (M.D. La. Jan. 15, 2014), the United States District Court for the Middle District of Louisiana, applying a choice of law rule, held that Washington state law applied to the claim, and used the *Cedell* framework. Significantly, the Court did not hold that the *Cedell* rule violated Louisiana public policy with respect to Louisiana's attorney/client privilege, thus leaving open the question whether the *Cedell* framework might apply to bad faith actions under Louisiana law. Note also the Alaska decisions reflecting a split in the adoption of Cedell in that jurisdiction, *Haynen v. Allstate Ins. Co*., 2013 WL 12171613 (D. Alaska); *Johnson v. RLI Ins. Co.*, 2015 WL 12699418 (D. Alaska).

[4] i.e., "bad faith" equals "crime-fraud", even when no insurer crime or fraud is supported by the facts.

coverage counsel's deposition may be taken. Communications between coverage counsel and the insurer arising out of what the *Cedell* Court would deem to be truly, and solely legal work nonetheless are not privileged unless and until the insurer produces them *in camera* and succeeds in convincing the trial court that the privilege applies.

Another troubling aspect of *Cedell,* from coverage counsel's standpoint, is the mere assumption that coverage counsel's work preparatory to rendering legal advice to the insurer *de facto* is the equivalent of claims handling. Before insurer coverage counsel, or policyholder counsel for that matter, can render a coverage analysis and/or opinion regarding the claim (while meeting the standard of care imposed on coverage counsel), counsel often is required to perform legal due diligence by: 1) investigating and marshalling the relevant and material facts; 2) in first party claims, take the insured's statement under oath; 3) where the insured is not represented, communicate with the insured; and 4) negotiate with the insured. This does not in and of itself, as reasoned by the *Cedell* Court, render coverage counsel to that of an adjuster, for these functions often are merely a part of the whole of legal services provided by counsel to the insurer. Because of their knowledge of the law with respect to the specific claim or legal issue, referral to coverage counsel is often necessary for the insurer to act on the claim. Such might require coverage counsel to undertake tasks similar in nature to "claims handling" if these are a necessary predicate for counsel to render legal advice to the insurer. Simply put, this is called the practice of law.

Another troubling aspect of *Cedell* is that it offers the mischance, or perhaps the unforeseen consequence, that the trial court determines the existence of a triable issue of bad faith when making the *in-camera* inspection during the early phase of document production motion practice. Such things should be left for substantive motion practice such as summary judgment. But under the scheme engineered by the Washington Supreme Court, the trial court can make substantive rulings on the sufficiency of evidence supporting the bad faith claim long before discovery is finished.

Cedell may — and ought to — be of limited application in other jurisdictions. The Court's holding is partly based upon its finding that in first party insurance claims, the insurer acts as the policyholder's quasi-fiduciary. See *Cedell,* 176 Wash.2d at 696. The duties a quasi-fiduciary owes to the principal are of a higher nature, and a quasi-fiduciary has a higher standard of care. *Id.* (citing *Van Noy v. State Farm Mut. Auto. Ins. Co.,* 142 Wash. 2d 784, 791 (Wash. 2001)). However, the overwhelming majority rule in this country is that an insurer does not owe fiduciary duties to the first party insured.[5]

B. States where the Insurer's Claims File is not Privileged prior to Denial of the claim: New York, Ohio, Florida

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[5] *See Metro Renovation, Inc. v. Allied Grp., Inc.*, 389 F. Supp. 2d 1131, 1135 (D. Neb. 2005) (holding that "Nebraska would adopt the general rule and not allow a fiduciary-duty claim in this first-party insurance dispute."); *Crabb v. State Farm Fire & Cas. Co.*, No. 2:04-CV-00454 PGC, 2006 WL 1214998, at *10 (D. Utah May 4, 2006) ("in a first-party relationship between an insurer and its insured, the duties and obligations of the parties are contractual rather than fiduciary"); *Gorman v. Se. Fid. Ins. Co.*, 621 F. Supp. 33, 38 (S.D. Miss.) affd 775 F.2d 655 (5th Cir. 1985) ("[u]nder Mississippi law, there is no fiduciary relationship or duty between an insurance company and its insured in a first party insurance contract.")

The states that fall into the second category have denied the existence of any privilege applicable to the insurer's claim file prior to the denial of the claim. However, this does not extend to the coverage counsel's file. New York courts have developed restrictions on the attorney-client privilege like those applied in *Cedell* where the insured alleges bad faith against the insurer. In *Nat'l Union Fire Ins. Co. of Pittsburgh v. TransCanada Energy USA, Inc.,* 119 A.D.3d 492, 990 N.Y.S.2d 510, 511-12 (2014), the Supreme Court of New York determined that the attorney-client privilege offered no protection to insurer documents that were created prior to the denial of an insured's claim where the insured alleged bad faith against the insurer. Specifically, the court stated:

> The motion court properly found that most of the documents sought to be withheld are not protected by the attorney-client privilege or the work product doctrine or as materials prepared in anticipation of litigation. Following an *in-camera* review, the court determined that certain documents were privileged because they contained legal advice. As for the remaining documents, the court found that the insurance companies had not met their burden of demonstrating privilege. The record shows that the insurance companies retained counsel to provide a coverage opinion, i.e., an opinion as to whether the insurance companies should pay or deny the claims. Further, the record shows that counsel were primarily engaged in claims handling—an ordinary business activity for an insurance company. Documents prepared in the ordinary course of an insurer's investigation of whether to pay or deny a claim are not privileged, and do not become so 'merely because [the] investigation was conducted by an attorney' *(see Brooklyn Union Gas Co. v American Home Assur. Co.,* 23 AD3d 190, 191 [1st Dept 2005]).

Id. at 511-12.

Like *Cedell,* the Court in *TransCanada* held that certain documents and communications might fall under the attorney-client privilege where they contain legal advice. And like *Cedell,* the *TransCanada* Court held that the attorney-client privilege did not exist where coverage counsel's work was deemed to be "primarily claims handling." However, the Court in *TransCanada* did not specify whether a coverage opinion falls under the protection of the attorney-client privilege. *Id.* As such, there is an argument that a coverage opinion is privileged if it contains only legal opinions and advice to the insurer regarding the interpretation of certain policy provisions. But the precise issue of whether a coverage opinion constitutes a privileged communication under the attorney-client privilege was not addressed in *TransCanada.* Insurers and insurance coverage attorneys are faced with the potential that a coverage opinion does not constitute a protected attorney-client communication if it was authored prior to the denial of coverage and created in the "ordinary course of an insurer's investigation of whether to pay or deny a claim." *Id.*

The Ohio Supreme Court, meanwhile, held in *Boone v. Vanliner Insurance Company,* 91 Ohio St.3d 209 (Ohio 2001), that "in an action alleging bad faith denial of insurance

coverage, the insured is entitled to discover claim file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage." *Id.* At 213-214. Arguably, the holding in *Boone* stands for the proposition that insurance coverage opinions containing legal advice about policy provisions issued prior to a denial of coverage are discoverable, and that the attorney-client privilege will not apply. Under the *Boone* framework, this arguably would be true regardless of whether insurance coverage counsel performed the same function of or otherwise acted in the capacity of a claim's adjuster. The *Boone* Court reasoned that "[a]t that stage of the claims handling, the claims file materials will not contain work product, *i.e.,* things prepared in anticipation of litigation, because at that point it has not yet been determined whether coverage exists."

Boone was modified by the Ohio legislature in 2007 when the statute regarding privileged communications was amended as follows:

> The following persons shall not testify in certain respects:
> An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima-facie showing of bad faith, fraud, or criminal misconduct by the client.

Ohio Rev. Code Ann. § 2317.02(A). Under the modified statute, there is now a presumption that the attorney-client privilege applies even if the insured alleges bad faith. To compel production of the privileged communication, the amended statute now requires the insured to make a prima-facie showing of bad faith and provides for an *in-camera* inspection by the court with respect to the communications between insurer and attorney.

Some Ohio courts have either refused or paid no heed to the applicability of the legislative amendment to § 2317.02(A). These courts have reasoned that the legislative amendment does not apply to written communications or claim documents:[6] Other courts have simply continued to apply *Boone* without any recognition of the legislative amendment.[7] Thus, there remains uncertainty as to whether attorney-client communications predating the denial of a claim are discoverable upon a prima facie showing of bad faith after an *in camera* review, or whether such communications are discoverable by simply alleging that the insurer committed bad faith.

While taking different routes, Washington, New York, Idaho, Alaska, and, to a limited extent, Ohio[8] courts refuse to recognize the attorney-client privilege for communications between insurer and its coverage counsel made prior to the denial of a claim, certain work product such as coverage opinions may retain the protection of the privilege.

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[6] *See Little Italy Dev., LLC v. Chicago Title Ins. Co.*, 2011 WL 4944259, at *2 (N.D. Ohio Oct. 17, 2011)

[7] *See DeMarco v. Allstate Ins. Co.*, 2014 WL 1327846 (Ohio App. 2014); *Park-Ohio Holdings, Corp. v. Liberty Mut. Fire Ins. Co.*, 2015 WL 5055947, at *2 (N.D. Ohio Aug/ 5. 2015)

[8] And maybe Louisiana.

III. Building an Argument for discovery of Policyholder's pre-suit communications with counsel and work product.

The following is a proposed framework for the insurer to turn the discovery tables on the plaintiff-policyholder in first party property bad faith actions. There are no reported decisions. The discussion, hopefully, can assist the insurer and bad faith defense counsel to build an argument supportive of a motion to compel when seeking discovery of the policyholder's and counsel's pre-suit communications and associated work product.

A. Insured's Misconduct as a Defense and Comparative Bad Faith

In most jurisdictions, an insured's misconduct[9] can be used as a defense to allegations of bad faith.[10] This offers an opportunity for insurer bad faith defense counsel to attack the attorney-client privilege related to communications between policyholder and counsel and counsel's work product. To attack the privilege, the insurer must assert **bad faith** misconduct against the insured, often referred to as comparative bad faith or reverse bad faith. However, defense counsel must be knowledgeable whether the forum state prohibits this bad faith defense.[11] On the other hand, there are states with reported decisions permitting this defense, and those states with no rule at all provide fertile ground to argue the point.

Bad faith misconduct by the insured (reverse bad faith) may be based upon breach of duties owed to the insurer. Contractual duties, most often found in the Conditions section of the policy, that can support a claim of misconduct by the insured if violated include: prompt notice of loss; protection of property from further damage; resumption of operations as quickly as possible; inventory damaged and undamaged property; permitting inspection of property, books and records; honesty in the sworn proof of loss; participation in an examination under oath and/or provision of a recorded statement; cooperation and full compliance with policy conditions pursuant to the cooperation clause; and no commission of fraud, misrepresentation, untruthfulness, or concealment.[12] The covenant of good faith and fair dealing also may apply to the policyholder, though not in all states. In Tennessee particularly, Tenn. Code Ann Sec. 56-7-106 creates a statutory right of recovery for an insurer against an insured who brings an action in bad faith.

Comparative bad faith is an affirmative defense to insurance bad faith claims based upon standards of comparative fault and is available in some jurisdictions. A case in the Middle District of Pennsylvania, *Shannon v. New York Central Mut. Ins. Co*. is illustrative of the use of insured's misconduct as a defense. 2013 U.S. Dist. LEXUS 165280 (Pa. 11/21/2013). The insurer raised an affirmative defense alleging that the insured's conduct, including breach of duties arising out of conditions in the policy, constituted a bad faith set-up. That defense was allowed

[9] By extension, legal counsel for the insured.

[10] For a listing of jurisdictions where this defense is available, see DRI Insurance Bad Faith, A Compendium of State Law (2015-2016).

[11] Defense counsel also must be aware if a choice of law determination by the court might prevent use of the defense.

[12] Be mindful that in many states the breach of a condition may require the insurer to prove that it was prejudiced as a result of the breach, before the breach can serve as a defense to the insured's claims.

by the Court, although it noted no Pennsylvania appellate decisions were cited for that proposition, indicating the possibility of the use of the insured's misconduct as a defense to a bad faith claim.

Assertions of the insured's bad faith misconduct are necessary to attack the attorney-client privilege between the policyholder and counsel.[13]

B. Turning the Tables: Treating Policyholder Counsel as a Public Adjuster

1. *If the Policyholder/ Counsel relationship is analogous to that of an insured and a public adjuster, it should be subject to the same arguments as insurer coverage counsel performing "adjuster functions" for the insurer.*

The denial of the traditional attorney/client privilege to communications and work product arising out of the relationship of insurers and coverage counsel has been largely premised on the theory that coverage counsel is performing "adjuster" functions that are associated with the ordinary business activity of the insurer in handling a claim. However, thus far the application of this theory has been wholly one sided. The communications and work product of insurer coverage counsel is not entitled to the attorney client privilege in states that have adopted this approach because they are deemed to have functioned as an "adjuster" on behalf of the insurer.

As opposed to an insurer's adjuster, a public adjuster is retained by policyholders to assist in preparing, filing, and adjusting insurance claims.[14] Working closely with policyholders to attempt to reach an equitable settlement as promptly as possible, the public adjuster manages every detail of the claim, The public adjuster inspects the loss site, analyzes and estimates damages, estimates the dollar amount of the loss, prepares or assists in preparing the proof of loss, assembles data to support the claim, reviews and analyzes coverage under the policy, and determines costs. These functions often are identical to those of policyholder's counsel.

When policyholders' counsel performs functions as an adjuster, albeit a public one, and if the specific court recognizes a policyholder's equal duty of good faith and fair dealing, an insurer may be able to argue that communications between policyholder and counsel and counsel's work product are not entitled to the attorney/client privilege through application of the same principles used to deny the privilege to insurers and coverage counsel. As argued by policyholders and their counsel to deny the attorney-client privilege, implicit in every insurance claim is litigation or the threat of litigation, including the insured retaining legal counsel – so there should be no blanket privilege to "conceal unwarranted practices" by the insured or

[13] For further information on misconduct, reverse and comparative bad faith as affirmative defenses, see DRI For the Defense, The Tried, The True, and the New – Defenses to Claims of Bad-Faith Failure to Settle and Law and Practice of Insurance Coverage Litigation, § 28:37 - §28:40 Reverse Bad Faith

[14] All but two states permit public adjusters, though most require a license. The exceptions are Arkansas, which prohibits public adjusters, and Alabama, which does not license or recognize public adjusters but permits attorneys to perform equivalent services. Several states differ in their requirements from the general consensus; Arizona, Michigan, and Oregon require an Adjuster license, rather than a specific public adjuster's license, while North Dakota and Wyoming license public adjusters as insurance consultants, and Kansas permits them only for commercial lines of insurance.

counsel. Insurance contracts, including practices and procedures of *public* adjusters, are "highly regulated" and of "substantial public interest."

2. *Constructing a framework for Motions to Compel production of communications between policyholder and counsel and work product*

While the damage done to the traditional attorney-client privilege between the insurer and coverage counsel presents numerous difficulties, it does present an opportunity to turn the principles used to invade that privilege against the policyholder and their counsel. Utilizing the principles that allow invasion of the privilege if coverage counsel is "acting as an adjuster," an insurer can assert an argument that it should be entitled to production of communications and work product when policyholder's counsel acts as a public adjuster.[15]

To bring a motion to compel production of communications and work product of policyholder's counsel, the insurer must begin laying the groundwork early in the case. First, bad faith defense counsel initially should assert the affirmative defense of comparative or reverse bad faith committed by insured or insured's legal counsel, whether that takes the form of bad faith breach of the covenant of good faith and fair dealing, bad faith set-ups, fraud, misrepresentation, concealment, or other bad faith breaches of the insured's duties under the policy. It is also reasonable to argue the policyholder's continuing duty of good faith and fair dealing after suit is filed. Secondly, the insurer and its defense counsel must document from the claim file and extrinsic evidence how the policyholder's counsel acted as a public adjuster during or before the adjustment phase of the claim, as well as the conduct of the policyholder's counsel if the bad faith suit is based on delay or failure to pay the demanded amount. It is essential to document these issues to build a good factual record for the trial court and, if necessary, appeal.

Bad faith defense counsel will need factual support to build an effective argument for discovery of the policyholder's pre-suit communications with counsel and counsel's work product. Apart from extrinsic evidence of the insured's or counsel's bad faith misconduct, this factual support primarily may come from the claim file - provided it is sufficiently documented. As such, building the argument begins with the adjuster by documenting the policyholder's and counsel's actions and communications that may turn out to be misconduct. A single communication or action may not, in isolation, amount to misconduct. However, over the duration of the claim a well-documented claim file might disclose a "course of misconduct" amounting to bad faith breach of the insured's duties to the insurer. Such provides bad faith defense counsel with an argument that the insured committed reverse or comparative bad faith when viewing the "totality of the circumstances".

It is of vital importance that the adjuster ethically documents the claim file. The following are some ethical considerations, though certainly not exhaustive:

- Avoid mischaracterizing or labeling the insured's/counsel's actions or statements as "misconduct" when, viewed in in the totality, they are not. "Just the facts" without characterizations work best. (These circumstances can include whenever the insured or counsel fails to comply with policy conditions critical to the claim, the breach of which may support denial of the claim.)

[15] This approach is likely to be ineffective in states where insurer is deemed to be a quasi-fiduciary when handling insured's claim, such as Washington and Idaho.

- When speaking with the insured and/or counsel, accurately document only what was said. After all, the conversation might be recorded in states that permit such recordings to be made without the knowledge of the adjuster.
- Unlike the tactics of some policyholder lawyers, avoid the appearance in the claim file that the insured is being "set up" for a reverse or comparative bad faith defense before the bad faith suit is filed. Do not give the plaintiff counsel an argument that the reverse/comparative bad faith defense was a "set up" before the suit was filed. On the other hand, when policyholder counsel engages in a bad faith trap or set up, every step and communication should be documented. It should be no problem for the insurer if the adjuster documents and comments on a suspected bad faith set up. As a caveat, however, whenever a bad faith trap or set up is suspected, an undocumented consultation with in-house or outside counsel may assist the adjuster in determining whether a potential set up is in process.

3. *Outline for Motion to Compel*

When bad faith defense counsel serves plaintiff with a request for production of documents seeking written communications (i.e., emails, letters, etc.) and documents exchanged between the insured and counsel, the immediate response will be an objection to productions based upon the attorney/client and work product privileges. This paper anticipates that it will be necessary for bad faith defense counsel to file a motion to compel. There are no reported decisions on the insurer's equal discovery rights. As such, this paper also anticipates that the insurer's motion to compel and the trial court's ruling set up an interlocutory appeal taken by the losing side. The following outline is suggested as one approach for the motion to compel:[16]

I. Where permitted, in the Answer to the Complaint defense counsel should assert an affirmative defense of comparative or reverse bad faith based upon wrongful acts or misconduct committed by the insured.[17] Include allegations, if supported, of:
   a. Misconduct amounting to a bad faith breach of the insured's covenant of good faith and fair dealing.
   b. Bad faith set-ups, fraud, intentional misrepresentations, concealment.
   c. Bad faith breaches of the insured's duties under terms of the policy.
   d. If the bad faith action is predicated on the insurer's delay in paying the claim, failure to accept an unreasonable time limit settlement demand, or failure to pay a demanded amount, any misconduct of the insured or counsel (such as an unreasonable refusal to provide requested and needed information).

II. In the motion to compel assert and provide proof that policyholder counsel performed pre-suit public adjuster functions.

[16] The substantive laws and procedural rules in any specific state control the merits – and outcome - of the motion, unless there is no specific applicable law. For example, can the insured's or counsel's grossly negligent breach of the covenant of good faith and fair dealing or other applicable duties amount to reverse or comparative bad faith, as opposed to intentional or flagrant acts?

[17] Bad faith acts/misconduct committed by plaintiff counsel well may be imputed to the insured.

a. However, beforehand research and review how the forum state defines a public adjuster and any limitations on what a public adjuster may or may not do in connection with the type of claim at issue in the bad faith suit. A good source is the website for the National Association of Public Insurance Adjusters https://www.napia.com, including its Code of Conduct https://www.napia.com/codeofconduct.
b. Public adjuster activities, functions, practices, and procedures performed by policyholder counsel may include the following:
    i. Investigating the claim
    ii. Visiting and documenting the loss site
    iii. Evaluating the claim
    iv. Analyzing or interpreting policy provisions at issue
    v. Processing and preparing the insured's claim/proof of loss.
    vi. Analyzing and/or estimating the dollar amount of the loss or value of the insured's claim
    vii. Communicating with the insurer
    viii. Negotiating the claim with the insurer
    ix. Any other tasks or services that a licensed public adjuster would perform with the claim.

III. Review case law from those states permitting the plaintiff to discover the insurer's coverage counsel's privileged communications and work product for:
a. The bases upon which those courts permit the discovery, such as:
    i. Implicit in every insurance claim is litigation or the threat of litigation, and the insurer retaining legal counsel. There should be no blanket privilege to "conceal unwarranted practices". (*Cedell*). Likewise, the same is true for the insured and his/her/its counsel.
    ii. Just as with state regulation of insurers, insurance contracts and related practices and procedures (*Cedell*), the practices and procedures of public adjusters are "highly regulated" and of "substantial public interest".
    iii. Policyholder counsel investigating the insured's claim, evaluating the insured's claim, processing the insured's claim, appearing at, and defending the insured's EUO, etc., performs public adjuster or "adjuster" tasks.
    iv. The insurer needs the requested documents "to prove" its reverse or comparative bad faith defenses. (*Cedell*, NY, Ohio courts.) "Need" is a component of the "no privilege" states.
    v. Alternatively, as in NY and Ohio, if insurer coverage counsel's pre-denial work is not deemed work product because it was not made in anticipation of litigation, neither should policyholder counsel's *pre-denial* work.