THE ATTORNEY-CLIENT/WORK PRODUCT PRIVILEGES AND SURETY INVESTIGATIVE INFORMATION: APPLYING OLD RULES TO TURN NEW TRICKS

Amy L. Fischer

Analyses of the attorney-client and work product privileges are not often touted as being among the law's most dynamic, "cutting-edge" or "sexy" topics. The attorney-client privilege is recognized as the oldest privilege[1] of what is probably the second oldest profession.[2] The attorney-work product privilege was enshrined as an inviolable right of attorneys by the Supreme Court two generations ago in *Hickman v. Taylor*.[3] The basic elements of these privileges have remained essentially the same. New technologies have required more of an adaptation, rather than a radical reevaluation of the basic premises underlying these privileges. So another article to address any facet of this seemingly well-settled area of law could be deemed superfluous.

The application of the attorney-client and work product privileges in the insurance context has received extensive and conflicting treatments by courts and commentators;[4] however, the intricacies of these doctrines as

1. Wigmore contends that the attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961), *cited in* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

2. While there is no definitive research to establish what is in fact the oldest profession, anecdotal evidence and common sense suggest that the oldest profession known in the civilized world is probably that of tax collector.

3. 329 U.S. 495 (1947).

4. This article explores at length courts' analyses of the privilege in the insurance context. Articles on the privilege as applied to insurers and their claims files are also not in short supply and are cited herein at length, including: Kirk A. Pasich, *The Application of the Attorney-Client Privilege and the Work-Product Doctrine to Communications between Insureds and Insurance Carriers*, ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION, ABA Tort and Insurance Practice

Amy L. Fischer is an associate with the Cunningham Law Firm in West Palm Beach, Florida.

applied in surety cases have received far less attention.[5] Although insurance cases offer some guidance in the surety setting, the nuances of the tripartite surety relationship among surety, principal, and obligee have not been specifically analyzed.

This article discusses the application of seemingly constant concepts to the courts' changing and unsettled perception of the insurance/suretyship business. The application of the attorney-client and work product privileges is based on how courts define the allied and adversarial relationship between the principal and surety. However, as surety case law is limited, defining the privilege in surety contexts must be extrapolated (with a significant allowance for error) from insurance cases. Insofar as insurance and surety claims handling is the same, case law on privilege is equally applicable. To the extent that the legal relationships create different dynamics, insurance cases offer a point of departure. The elements of suretyship that distinguish it from insurance and other legal relationships offer the focal point for analyzing the applicability of privileges and precedent.

Application of the attorney-client and work product privileges in insurance cases has caused disagreement among courts because claims handling is inherently litigious and often the prelude to litigation. If insurers are often teetering on the edge of litigation, the surety faced with a performance claim walks a tightrope with the principal pulling on one side and the obligee tugging on the other, each threatening to topple the surety into the abyss of litigation. Just like insurers, prudent sureties anticipate litigation with everything they do (or do not do). In applying the privileges, courts must decide whether claims handling is more of an "ordinary business" function or "prelitigation preparation." Courts disagree not so much with the elements of the privileges as with the definition of the claims adjustment process. This same philosophical conflict (or definitional ambiguity) exists in surety claims.

In suretyship, this ambiguity is compounded by the inherently dualistic nature of the surety/principal relationship. While the insurer and insured may at certain stages be allies and at others antagonists, the surety and principal are at war and in alliance at the same time. Few courts have spoken directly to the common interest privilege (or lack thereof) between the surety and its principal, or the inherently adversarial aspects of the relationship that render the analogy to insurance inapplicable. This article

Section (2d ed.); Michael Keeley, *The Attorney-Client Privilege and Work Product Doctrine: The Boundaries of Protected Communications Between Insureds and Insurers*, 33 TORT & INS. L.J. 1169 (1998).

5. In fidelity bond claims, the waiver issue under the offensive use doctrine and due to disclosure to governmental entities outside the privileged relationship commonly arise, and a substantial body of case law explores this unique privilege waiver issue, as discussed in section III. Case law addressing privilege in other surety contexts is far more limited.

uses insurance cases as a framework for determining how privilege issues could be analyzed in the surety context.

Section I defines the basic elements of the attorney-client and work product privileges and implied waiver of these privileges. Section II considers the difference between nonprivileged business functions and the privileged attorney services. Section III defines the common interest doctrine and waiver under this doctrine, explores its application to insurer-insured communications, and then considers the applicability of the doctrine to surety-principal communications. After considering the differing approaches to applying the attorney-work product privilege to insurance investigative files, section IV considers the applicability of these rationales to surety claims. Section V discusses select expert issues: (1) the distinction between litigation consultants and business consultants; (2) the discoverability of attorney work product of, by, and through expert witnesses; and (3) the discoverability of opinions of a "de-designated" expert.

On a practical note, this article addresses whether any privilege protects the following communications:

(1) Facts known by (or only by) counsel and counsel's investigations, and whether copying another on attorney correspondence "blows" the privilege;

(2) Prelitigation communications between the surety and the principal (or its counsel) about a pending claim and whether tendering the defense affects the outcome;

(3) Communications between the surety claims adjuster and in-house counsel or between the adjuster and other departments in the company, including periodic status reports, case-specific memos, and compilations of litigation statistics;

(4) Claims investigative files and notes by the claims adjuster and whether the adjuster's status as an attorney affects the outcome;

(5) Communications and reports from claims consultants (and how to protect them); and

(6) Hard drives, computer diaries, e-mails, etc.

I. GENERAL PRINCIPLES: DEFINING THE EXTENT OF ATTORNEY-CLIENT/ WORK PRODUCT PRIVILEGES

A. *The Attorney-Client Privilege: You Know It When You See It*[6]

The attorney-client privilege protects communications between an attorney and the client when the attorney is rendering legal advice. The burden

6. The universally accepted maxim for defining seemingly simple matters that no one can really define in objective terms, like the attorney-client privilege, true love, and obscenity, is that you know it when you see it.

of establishing the attorney-client privilege rests on the party claiming it.[7] The elements of the privilege are commonly defined as follows:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed, and (b) not waived by the client.[8]

The attorney-client privilege that extends solely to communications between the lawyer and the client does not preclude the disclosure of the underlying facts, nor that part of a document that does not contain the lawyer-client communication.[9] Facts known only to counsel are discoverable like any other facts. For example, where counsel alone attends meetings and conducts the surety's investigations, counsel may be the representative with the most knowledge of the facts supporting the surety's defense.[10] Thus, attorneys who participate in the surety's business decision

7. Fisher v. United States, 425 U.S. 391 (1976).

8. United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950).

9. As the U.S. Supreme Court noted in *Upjohn:*

> [T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "what did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

Upjohn Co. v. United States, 449 U.S. at 383, 396 (citing Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa 1962)). *See also* Diversified Industries v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977) ("[W]e note that the litigants are not foreclosed from obtaining the same information from non-privileged sources. Litigants may still examine business documents, depose corporate employees and interview nonemployees, obtaining preexisting documents and financial records not prepared by Diversified for the purpose of communications with the law firm in confidence."); *In re* Bieter Co., 16 F.3d 929, 940 (8th Cir. 1994) ("[O]ur holding today merely inconveniences the respondents, and . . . in no way prevents them from learning facts relevant to the dispute."); Mims v. Alfa Mut. Ins. Co., 631 So. 2d 858 (Ala. 1993) (deposition of general counsel to discover facts upon which he instructed cocounsel to threaten sanction is unprotected by attorney-client privilege).

10. Permitting the opponent to delve into the facts known to counsel raises some conceptual problems. Counsel's understanding of the "facts" invariably reveals thought processes because facts are inextricably intertwined with organizing concepts:

> Facts themselves are not just "out there" and we should be willing to accept L. J. Henderson's definition of "fact" as an empirically verifiable *statement* . . . about phenomena in terms of a conceptual scheme.

CRANE BRINTON, THE ANATOMY OF REVOLUTION 9 (1965). Thus, delving into counsel's "facts" may offer some insight into counsel's conceptual scheme and strategy, which is deemed absolutely privileged.

to undertake performance or stand behind the principal have been deposed regarding the facts underlying this business decision.[11]

Where the attorney is the *only* person with knowledge regarding certain facts or occurrences, the attorney may become a witness or even the subject of a motion to disqualify on that basis.[12] Because of the potential for abuse, courts disfavor such motions to disqualify.[13] The disqualification threat can be reduced by showing that the evidence can be gathered from alternative sources, that the attorney is not an essential witness, or that the facts are not relevant or admissible, as in the case of certain settlement discussions.[14]

The recurring theme in all analyses of the attorney-client privilege is the inherent conflict between protecting client confidences and permitting full disclosure:

> [T]he attorney-client privilege both advances and impedes the administration of justice. Preserving client-counsel confidences promotes full and frank communication so that the course of legal representation may not "founder in the absence of the client's subjective freedom of mind." . . . At the same time, the privilege operates to obstruct access to otherwise discoverable evidence, contrary to the precept that "the public has a claim to every man's evidence."[15]

The tension between promoting full and frank disclosure to counsel and full and open access to information gives rise to differing opinions on the discoverability of insurer/insured communications, as well as those between the surety and principal, as discussed in section III.

Exceptions to the attorney-client privilege have evolved to afford access to information where the societal interest in obtaining the information

11. *See, e.g.*, City of Elmira v. Larry Walter, Inc., 89 A.D. 2d 645, 453 N.Y.S.2d 259 (N.Y. App. Div. 1982) (performance surety's attorney who was also responsible for making surety's business decision to stand behind its principal and not complete project was subject to deposition because counsel "certainly possessed knowledge of facts that were subject to discovery").

12. Because an attorney cannot act as both advocate and witness, the surety cannot expect to call its own attorney as a witness. The Rules of Professional Conduct, accepted in some form by all jurisdictions, require that a lawyer who must be a witness as to a contested matter (other than fees) to relinquish the role as advocate. *See, e.g.*, R. REGULATING FLA. BAR 4–3.7, *Lawyer as Witness*, providing that lawyer shall not act as witness for client unless matter is uncontested, relates to matter of formality, relates to nature and value of legal services in case, or would work substantial hardship on client; however, lawyer may act as advocate where another member of firm will be witness unless precluded from doing so by another rule.

13. *See, e.g.*, Galarowicz v. Ward, 230 P.2d 576 (Utah 1951) (purpose of rule is to avoid predicament of attorney arguing own credibility); Singer Island Ltd. v. Budget Constr. Co., Inc., 714 So. 2d 651 (Fla. Dist. Ct. App. 1998) (affirming denial of motion to disqualify filed by owner that moved to disqualify contractor's counsel who wrote letters before litigation; motion alleged no more than possibility that disqualification may be necessary); *see also* Optyl Eyewear Fashion International Corp. v. Style Cos., Ltd. 760 F.2d 1045 (9th Cir. 1985) (denying motion to disqualify where only reason for calling opposing counsel as witness is to use it as predicate for disqualification).

14. *See, e.g.*, Arcara v. Phillip M. Warren, P.A., 574 So. 2d 325 (Fla. Dist. Ct. App. 1991).

15. Bairnco Corp. Securities Litigation v. Keene Corp., 148 F.R.D. 91, 96 (S.D.N.Y. 1993).

outweighs the interest in maintaining the attorney-client relationship.[16] For example, under the "crime-fraud exception" to the attorney-client privilege, counsel cannot be retained for the express purpose of promoting or continuing criminal or fraudulent activity.[17] Cases involving claims against tobacco companies are the latest opinions detailing the elements and the standard of proof for establishing the crime-fraud exception.[18]

The starting point in any legal analysis is determining the applicable law.[19] The attorney-client privilege in litigation involving a federal question is a matter of federal law.[20] Where state law provides the rule of decision, as in diversity cases, the state law on attorney-client privilege applies.[21] In cases of pendent jurisdiction, federal law controls the privilege question[22] unless the privileged communication relates only to the pendent state law claim. State law would determine the applicability of the privilege in most

16. *See, e.g.*, Leonen v. Johns-Manville, 135 F.R.D. 94,100 (D.N.J. 1990) (allowing disclosure of internal memoranda that might show when defendant became aware of health risk of asbestos); Leucadia, Inc. v. Reliance Ins. Co., 101 F.R.D. 674 (S.D.N.Y. 1983) (Even "where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure."). Resolving all discovery questions involves a balancing of the competing interests served by granting discovery or denying it, with courts denying discovery where the public interest outweighs the grounds asserted for the discovery. *See, e.g.*, Dade County Medical Ass'n v. Hlis, 372 So. 2d 117, 121 (Fla. Dist. Ct. App. 1979) (denying discovery of ethics committee records by medical malpractice claimant because, while disclosure was not prohibited by statute, public interest outweighed asserted need for discovery).

17. State of Arizona v. Fodor, 880 P.2d 662, 670 (Ariz. 1994); *see also* X Corp. v. Doe, 805 F. Supp. 1298, 1307 (E.D. Va. 1992) (opposing privilege requires only prima facie showing that communications either (i) were made for unlawful purpose or to further illegal scheme or (ii) reflect ongoing or future unlawful or illegal scheme or activity; purported crime or fraud need not be proved); *cf. In re* Burlington Northern, Inc., 822 F.2d 518 (5th Cir. 1987) (rejecting lower court's holding that documents created by counsel in antitrust suit were in furtherance of illegal conspiracy involving filing and defending lawsuits for anticompetitive purpose, and thus subject to crime-fraud exception).

18. Haines v. Liggett Group, Inc., 975 F.2d 81, 95–96 (3d Cir. 1992) (requiring only prima facie showing; party seeking discovery must present evidence that, if believed by fact finder, would be sufficient to support finding that elements of crime-fraud exception were met); American Tobacco Co. v. State of Florida, 697 So. 2d 1249, 1255–56 (Fla. Dist. Ct. App. 1997) (citing jurisdictions adopting prima facie evidence standard; in adopting *Haines* procedure, court defines it as incorporating weighing function of preponderance of evidence standard by affording parties right to present argument).

19. That is, the first step *after* getting the retainer.

20. *In re* Bieter Co., 16 F.3d 929, 935 (8th Cir. 1994); Arcuri v. Trump Taj Mahal Assocs., 154 F.R.D. 97, 100–01 (D.N.J. 1994).

21. Rule 501, FED. R. EVID. (1998), provides:

> [I]n civil actions and proceedings, with respect to an element of a claim or defense to which State law provides the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law.

See also Bowne of New York City v. AmBase Corp., 161 F.R.D. 258 (S.D.N.Y. 1995); Garvey v. National Grange Mut. Ins. Co.,167 F.R.D. 391, 394 (E.D. Pa. 1996); EDO Corp. v. Newark Ins. Co., 145 F.R.D. 18, 21 (E.D. Conn. 1992).

22. Smith v. Alice Peck Day Memorial Hospital, 148 F.R.D. 51 (D.N.H. 1993); Von Bulow by Averspery v. Von Bulow, 811 F.2d 136, 141 (2d Cir. 1987).

fidelity cases because state law governs the underlying contract claim, even if the claim is pending in federal court. In actions involving federal Miller Act bond claims, the privilege would be governed by federal law. In cases involving both state and federal law, an infrequent occurrence in fidelity bond claims but common in payment/performance claims on federal projects that include a contract action, the difficulty of applying federal law to the federal claims and state law to the pendent state claims is often resolved by simply applying the federal law on privileges.[23]

Considering the elements of the attorney-client privilege raises issues that are not necessarily unique to the surety context: (1) to which individuals the privilege pertains; (2) the duration of the privilege; and (3) the waiver of the privilege.

1. With Whom Do You Have a Relationship?

An attorney-client relationship can arise without the attorney being retained.[24] A communication is privileged as long as it was for the purpose of obtaining legal advice. Thus, the parties need not consummate the relationship in order for a privilege to arise.[25]

Representing corporations raises the issue of which particular individuals constitute the "corporation" for the purposes of the privilege. Courts have responded with the "subject matter" test, a not necessarily bright-line "control group" test, or an acknowledgment that no hard and fast rule applies (more commonly referred to as a "totality of the circumstances" approach or some variant of it).

The Seventh Circuit in *Harper & Row Publishers, Inc. v. Decker*[26] articulated the subject matter test to determine the scope of the attorney-client privilege:

> [A]n employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation

23. Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 458 (N.D. Cal. 1978); Thompson v. General Nutrition Corp., Inc. 671 F.2d 100, 104 (3d Cir. 1982) (when federal law claims are presented with state law claims, federal rule favoring admissibility, rather than any state law privilege, controls).

24. United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950); *see also* Dean v. Dean, 607 So. 2d 494 (Fla. Dist. Ct. App. 1992) (client needs only to consult with attorney about legal issue with view of employing attorney professionally). Thus, whether it was paid for is not dispositive in determining if a privileged relationship applies.

25. Conversely, one can have some contact with an attorney without any privilege arising; the existence of a relationship depends on the nature of the exchange or interchange.

26. 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by an equally divided court*, 400 U.S. 348 (1971).

> and dealt with in the communication is the performance by the employee of the duties of his employment.

The Eighth Circuit refined the subject matter test in *Diversified Industries v. Meredith*[27] to focus on why the attorney was consulted so as to prevent the routine channeling of otherwise discoverable information through the attorney to prevent subsequent disclosure.[28]

To promote clarity and full disclosure (requiring the narrowest possible scope for the privilege), the Illinois Supreme Court reaffirmed its adherence to the "control group" test in *Consolidation Coal Co. v. Bucyrus-Erie Co.*,[29] which limits the privilege to communications with the "control group," defined as follows:

> [A]n employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority, is properly within the control group. However, the individuals upon whom he may rely for supplying information are not members of the control group.[30]

The control group test, while lauded for ease of application and promoting full disclosure, has two inherent problems: defining who is really (as opposed to apparently) in control[31] and the fact that those in control often do not know what is going on (so they have to rely on subordinates to stay in touch with reality).[32]

Although not critiquing the control group test in exactly these terms, the U.S. Supreme Court in *Upjohn Co. v. United States*[33] rejected any formalistic, narrow application of the privilege that limits the protection af-

27. 572 F.2d 596 (8th Cir. 1977).

28. Under the *Diversified Industries* test, the attorney-client privilege applies if: (1) communication was made for purpose of securing legal advice; (2) employee making communication did so at direction of corporate superior; (3) superior made request so that corporation could secure legal advice; (4) subject matter of communication is within scope of employee's corporate duties; and (5) communication is not disseminated beyond those who, because of corporate structure, need to know its contents.

29. 432 N.E.2d 250 (Ill. 1982). The "control group" test was first articulated much earlier in *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962).

30. *Id.* at 258. Starting from the notion that the purpose of discovery is the "ultimate ascertainment of the truth," the court adopted the narrowest possible limit for the privilege. *Id.* at 257.

31. Inherent in the problem of discerning who is in the "control group" is the fact that those really in control stay in control by letting others think that they are in control.

32. *See, e.g.*, Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1381 (Fla. 1994) (while acknowledging that some have found the control group test easy to apply, "the test fails to recognize the crucial role middle and lower-level employees play in the corporation's activities . . ." including implementing decisions of the control group; thus, corporate counsel "is charged with gathering the facts from the employees with information, . . . regardless of their rank.")

33. 449 U.S. 383 (1981).

forded to corporate communications to those between the corporation's counsel and members of the corporation's "control group." The Supreme Court found that the narrow approach "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."[34] The Supreme Court's functional test determines the applicability of the privilege based upon a totality of the circumstances, on a case-by-case basis. In holding that the privilege applied to communications between Upjohn's counsel and middle and lower level employees, the Court considered the following factors:

> (1) Information from middle and lower employees was needed to provide legal advice;
> (2) The communications concerned matters within the scope of the employees' corporate duties;
> (3) The employees were sufficiently aware that they were being questioned so that the corporation could obtain legal advice;
> (4) The questionnaire identified the sender as the company's general counsel;
> (5) A policy statement accompanying the questionnaire disclosed the legal implications of the investigation; and
> (6) Pursuant to express instructions from the company's chairman, the communications were considered "highly confidential."[35]

Courts adhering to *Upjohn* have extended the attorney-client privilege to communications among corporate parents and subsidiaries,[36] although other courts have limited the privilege to situations where the parties share a common legal interest or where the disclosure was made solely or principally for legal advice.[37] Communications with a nonlawyer (such as a paralegal, investigator, or accountant) can still be protected by the attorney-client privilege.[38]

Some states have adopted the *Upjohn* "totality of the circumstances"

34. *Id.* at 392.

35. *Id.* at 394–95.

36. *See, e.g.*, Admiral Ins. Co. v. U.S. Dist. Court, 881 F.2d 1486, 1493 (9th Cir. 1988) ("communications between employees of a subsidiary corporation and counsel for the parent corporation . . . would be privileged if the employee possesses information critical to the representation of the parent company and the communications concern matters within the scope of employment").

37. Bowne, Inc. v. AmBase Corp., 150 F.R.D. 465, 491 (S.D.N.Y. 1993) (courts that have extended privilege for communications between related corporations have done so only upon showing that common attorney was representing both entities or that the two corporations shared common legal interest and thus came within joint-client rule, or that disclosure was made to employee of subsidiary for principal or sole purpose of eliciting assistance of attorney for legal advice or other legal services).

38. *In re* Bieter Co., 16 F.3d 929 (8th Cir. 1994) (privilege extended to consultant); McCaugherty v. Sifferman, 132 F.R.D. 234 (N.D. Cal. 1990) (under rationale of *Upjohn*, privilege extends to consultants).

view,[39] but not all. Florida has adopted what it describes as a modified subject matter test as its criteria for applying the attorney-client privilege to corporate communications.[40] Several courts adhere to the "control group" test,[41] while some states have enacted statutes that are the functional equivalent of a "control group" test.[42]

The Arizona Supreme Court critiqued the standard approaches in *Samaritan Foundation v. Goodfarb*.[43] Noting that the "control group" test was both over- and underinclusive and that the "subject matter" test was overinclusive, the court adopted a "narrow reading" of the *Upjohn* approach that focused on the relationship between the communicator and the need for legal services. Thus, employee-initiated communications to corporate counsel that seek legal advice for the corporation are privileged. When one other than the employee initiates the communication, "a factual communication by a corporate employee to corporate counsel is within the corporation's privilege if it concerns the employee's own conduct within the scope of his or her employment and is made to assist the lawyer in assessing or responding to the legal consequences of that conduct for the corporate client."[44] Excluded from the privilege are "communications of those who, but for their status as officers, agents or employees, are witnesses."[45] Thus, in a malpractice action against a hospital, statements of nurses present at the surgery giving rise to the claim, taken by a paralegal at the instruction of corporate counsel, were not subject to any attorney-client privilege because they were merely witness statements and not gathered to assist the hospital in "assessing or responding to the legal consequences of the speaker's conduct, but to the consequences for the corporation of the physician's conduct."[46]

39. *See, e.g.*, Wardleigh v. Second Judicial District Court of Nevada, 891 P.2d 1180, 1185 (Nev. 1995).

40. In *Southern Bell Telephone & Telegraph Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994), the Florida Supreme Court combined the tests established in *Harper & Row* and *Diversified Industries, Inc. v. Meredith* to derive the following criteria to judge whether a corporation's communications are protected by the attorney-client privilege: (1) communication would not have been made but for contemplation of legal services; (2) employee making communication did so at direction of corporate superior; (3) superior made request of employee as part of corporation's effort to secure legal advice or services; (4) content of communication relates to legal services being rendered, and subject matter of communication is within the scope of employee's duties; (5) communication is not disseminated beyond those persons who, because of corporate structure, need to know its contents.

41. *See, e.g.*, Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 254–58 (Ill. 1982); National Tank Co. v. Brotherton, 851 S.W.2d 193, 197–98 (Tex. 1993) (Texas rules of evidence adopt control group test).

42. *See, e.g.*, ALASKA R. EVID. 503(a)(2) (1996); ARK. R. EVID. 502(a)(2) (1996); ME. R. EVID. 502 (1996).

43. 862 P.2d 870 (Ariz. 1993).

44. *Id.* at 878, 880.

45. *Id.* at 876.

46. *Id.* at 880.

In response to the uncertainty created by the *Samaritan Foundation* approach, the Arizona legislature codified the attorney-client privilege to extend the protection to any communication between an employee and corporate counsel if the communication is to provide legal advice to the entity or to obtain information to provide such advice.[47] Thus, the statutory privilege now extends to the witness statements deemed not privileged in *Samaritan Foundation.*

In insurance/surety claims investigations, the issue of whether an attorney-client privilege arises as to insured's/principal's statements commonly arise (as discussed in section III(B)). Assuming that the jurisdiction recognizes a privilege for communications between the insurer and the insured (not all do), the next question is which individuals in the corporation constitute the "insured" or "principal"? Which particular communications are privileged is a function of whether the jurisdiction adheres to the control group, *Upjohn* or some variant of the subject matter standard. The California Supreme Court outlined criteria related to the employee's status and the purpose of the communication for determining when the insured-employee's communications to the insurer are subject to an attorney-client privilege in *D.I. Chadbourne, Inc. v. Superior Court of San Francisco.*[48] The surety should likewise be aware of the criteria applied in the jurisdiction for employees' communications in various circumstances, as explored below in section III.

For surety counsel, identifying the individual who is the *client* representative is usually not an issue because the designated claims agent would satisfy even the most restrictive "control group" test. However, difficulties may arise from circulating otherwise privileged communications to individuals not involved in the litigation. Copying the communication to individuals not recognized by the court as being within the privileged relationship for the particular communication can waive the privilege.[49] For

47. ARIZ. REV. STAT. ANN. § 12-2234 (West 1996).

48. 60 Cal. 2d 723, 726-27, 388 P.2d 700, 36 Cal. Rptr. 468 (1964) (attorney-client privilege does not apply when: (i) employee is not defendant or potential codefendant, except where employee is individual authorized to speak for corporation; (ii) at request of carrier, employer directs employee to make statement to carrier to be sent to employer's attorney if carrier has not advised employer that statement is to be obtained and so used; (iii) when employee is a mere witness and has no other connection to the matter other than as witness; or (iv) when employee has not been expressly directed by employer to make a statement and does not know statement is confidential or does not intend statement to be confidential; privilege applies when: (i) employee is or may be charged with liability and (ii) employee makes report as part of normal business duties or if employer requests report to be made for "dominant purpose" for confidential transmission to counsel).

49. *See, e.g.*, Bowne of New York City v. AmBase Corp., 150 F.R.D. 465, 491 (S.D.N.Y. 1993) (placing burden on corporation to provide information regarding internal security practices to support confidentiality; "If a corporation wants the benefit of the privilege it should enforce a fairly firm 'need to know' of the communication rule.").

example, courts applying a variant of the subject matter test consider to whom the communication is disseminated when analyzing if any privilege even arises.[50]

Financial institution bond loss investigations often involve communications between the bank's lawyer and the bank's middle and lower level employees. The resolution of the privilege issue depends upon which standard the jurisdiction uses for corporate communications. A court applying the *Upjohn* standard has deemed interviews of employees to be privileged.[51] In a jurisdiction adhering to the "control group" or the *Samaritan Foundation* or the *D.I. Chadbourne* standards, communications initiated by counsel to lower level employees to investigate wrongdoing by an officer or other employee may not be subject to any attorney-client privilege. Although an attorney work product privilege may apply, this privilege is not absolute and may be overcome by a showing of need.[52]

2. The Duration of the Privilege: Longer than Marriage

The vow of marriage only lasts until death.[53] The U.S. Supreme Court has recently had occasion to reaffirm that the attorney-client privilege continues even after the death of the client.[54]

3. Waiver of the Privilege: Consorting with Anyone Outside the Relationship Betrays It (But All Might Be Forgiven, Depending on the Circumstances)

Since the purpose of the attorney-client relationship is to protect the confidentiality of the communication, disclosures of the information to those outside the relationship have been deemed to waive it.

Although both intentional and inadvertent disclosures have been deemed to waive the privilege, not surprisingly, courts disagree over the effect of inadvertent disclosure.[55] The "out-the-barn-door" rationale holds that any

50. *See, e.g.*, Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1383 (Fla. 1994) (including as factor that communication is not disseminated beyond those who need to know).

51. *See, e.g.*, Admiral Ins. Co. v. U.S. Dist. Ct., 881 F.2d 1486, 1493 (9th Cir. 1988) (interview of vice president and assistant secretary of surety that issued bonds guaranteeing repayments of notes by surety's counsel defending securities litigation in which surety was defendant was privileged).

52. For example, in *Samaritan Foundation*, the court permitted disclosure of witness statements with counsel's opinion redacted because the witnesses could not remember what had happened in the operating room four years after the event.

53. Marriage may not last that long, but death does discharge the duty of fidelity, returning the widow/er to free-agent status.

54. Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998). While continuation of the attorney-client privilege beyond the death of the claimant of the privilege has been generally accepted by courts without much debate, this principle has recently come under attack.

55. *See* Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936 (S.D. Fla. 1991), *aff'd on other grounds*, 991 F.2d 1533 (11th Cir. 1993), *rev'd in part on other grounds*, 47 F.3d 1099 (11th Cir. 1995) (describing different approaches taken by courts and concluding that

disclosure that destroys confidentiality irreparably destroys an element of the privilege.[56] At the opposite end are courts that deem waiver to require an intentional relinquishment of a right, and thus an inadvertent disclosure cannot waive the privilege.[57] The third approach, adopted by courts seeking a middle ground, requires a balancing of facts and circumstances, including the number of documents produced, precautions taken to prevent the disclosure of privileged communications, and promptness of measures to remedy the mistake, to determine if the disclosure results in waiver.[58] Courts also differ as to the scope of the waiver occasioned by an inadvertent disclosure, with some limiting the disclosure of the particular document[59] and others extending it to all communications on the same subject.[60]

As explained below, a waiver of the attorney-client privilege can arise without *any* actual disclosure of confidences. An implied waiver, also referred to as the "at-issue" exception or the "offensive use doctrine," arises from a party's reliance on a privileged communication as an essential part of its claim or defense. Furthermore, offering selected attorney communications to support a claim may waive any privilege as to the undisclosed communications, some of which may be damaging.[61]

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mere inadvertent production did not effect waiver); *see also* Thomas J. Leach, *Loss of Attorney-Client Privilege through Inadvertent Disclosure, Attorney-Client Privilege in Civil Litigation*, ABA Tort and Insurance Practice Section, p. 119.

56. *See In re* Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir. 1979); *In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (to preserve privilege, client must treat attorney-client communications "like jewels"). Undoubtedly, if counsel adopted this attitude there would be far fewer inadvertent losses of the privilege; what attorney would want to lose his jewels?

57. Mendenhall v. Barber-Green Co., 531 F. Supp. 951 (N.D. Ill. 1982).

58. Hydraflow v. Endine, 145 F.R.D. 437, 637 (W.D.N.Y. 1993) (outlining five-factor test: (i) reasonableness of precautions taken to prevent inadvertent disclosure in view of extent of document production; (ii) number of inadvertent disclosures; (iii) extent of the disclosure; (iv) any delay and measures taken to rectify disclosures; and (v) whether overriding interests of justice would be served by relieving party of its error). *See also* Abamar Housing and Development, Inc. v. Lisa Daly Lady Decor, Inc., 698 So. 2d 276, 277 (Fla. Dist. Ct. App. 1997) (adopting same criteria); Cunningham v. Connecticut Mut. Life Ins., 845 F. Supp. 1403 (S.D. Cal. 1994) (court applying relevant circumstances test ruled that production of four-page letter among four boxes of documents produced constituted waiver of privilege); Liggett Group v. Brown & Williamson Tobacco Corp., 116 F.R.D. 205, 208 (M.D.N.C. 1986) (no special circumstances would relieve proponent of privilege from finding of waiver because although document discovery in case was extensive, counsel had ample time to "screen" box of documents in which privileged documents were produced and court was "not satisfied that Brown & Williamson undertook reasonable precautions to prevent inadvertent disclosure of allegedly privileged documents. . . ."); Ray v. Cutter Laboratories, 746 F. Supp. 86 (M.D. Fla. 1990) (magistrate's finding of waiver arising from production of memorandum within total production of 900 pages would not be overturned).

59. Smith v. Armour Pharmaceutical Co., 838 F. Supp. 1573, 1575 (S.D. Fla. 1993).

60. *In re* Grand Jury Proceedings October 12, 1995, 78 F.3d 251 (6th Cir. 1996); Bowne of New York City v. AmBase Corp., 150 F.R.D. 465, 485 (S.D.N.Y. 1993) (waiver extends beyond original disclosure).

61. *See, e.g.*, Board of Trustees of Leland Stanford Junior University v. Coulter Corp., 118

B. *The Attorney-Work Product Rule: Protecting the Tricks of the Trade*

The work product doctrine, first enunciated by the U.S. Supreme Court in *Hickman v. Taylor*,[62] was specifically intended to prevent unwarranted inquiries into counsel's files and mental impressions. The doctrine, codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure,[63] protects a lawyer's research, analysis, legal theories, mental impressions, and notes and memoranda of witnesses' statements, prepared "in anticipation of litigation or for trial," from disclosure to opposing counsel.[64]

Rule 26 does not require that the work product have been prepared by an attorney to be protected; the rule itself makes specific reference to the "party's representative (including the . . . attorney, consultant, surety, indemnitor, insurer, or agent)."[65] Thus, the work product doctrine is not inapplicable merely because the material was prepared by or for a party's insurer or agents of the insurer[66] or surety. Material prepared by or for a party's insurer has been accorded work product protection, even where the insurer is not a party in the action.[67]

F.R.D. 532 (S.D. Fla. 1987) (waiver of privilege as to counsel's advice because proponent of privilege put advice at issue and offering select communications waived privilege as to others that could be damaging).

62. 329 U.S. 495 (1947).

63. Rule 26(b)(3) of the FEDERAL RULES OF CIVIL PROCEDURE provides:

> . . . a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party concerning the litigation. Unlike the attorney-client privilege, the work product doctrine is not limited to communications, but extends to all materials generated in anticipation of litigation. However, the privilege is not absolute and can be overcome if substantial need is shown for the material sought to be protected.

Id.

64. *Upjohn* at 398.

65. *In re* Air Crash Disaster at Sioux City, Iowa, on July 19, 1989, 133 F.R.D. 515, 520 (N.D. Ill. 1990).

66. *See* Railroad Salvage of Conn., Inc. v. Japan Freight Consolidators (USA), Inc., 97 F.R.D. 37 (E.D.N.Y. 1983), *aff'd*, 779 F.2d 38 (2d Cir. 1985) (correspondence between defendant and its liability insurance carriers protected); Home Ins. Co. v. Ballenger Corp., 74 F.R.D. 93 (N.D. Ga. 1977) (report to plaintiff insurer's home office made by plaintiff's regional claims supervisor protected by work product privilege and thus not discoverable). *Cf.* Holgren v. State Farm Mut. Auto Ins. Co., 976 F.2d 573 (9th Cir. 1992) (work product doctrine applicable, but allowing discovery due to compelling need).

67. United Coal Cos. v. Powell Constr. Co., 839 F.2d 958 (3d Cir. 1988); Basinger v. Glacier Carriers, Inc., 107 F.R.D. 771, 772–73 (M.D. Pa. 1985) (in holding that files were protected by work product privilege, court reasoned if party to litigation is partially protected by FED. R. CIV. P. 26(b)(3) from having to disclose certain information to opponent, requiring nonparty to deliver same kind of information to party that may subsequently join nonparty in case would be unjust).

Work product can take one of two forms: (1) "opinion work product," which, in the language of Rule 26(b)(3), consists of the attorney's "mental impressions, conclusions, opinions, or legal theories"; and (2) "ordinary work product" or "factual work product," which consists of all other materials developed in anticipation of trial. "Opinion work product" is absolutely protected against disclosure,[68] while "ordinary work product" is protected only until the adversary can demonstrate some necessity or justification for obtaining the materials, such as the unavailability of the information through normal discovery devices.[69] The attorney-client privilege has been described as being more absolute than the work product privilege in that it cannot be abrogated upon the showing of unavailability of the information through other sources.[70]

In contrast to the attorney-client privilege, federal law governs the application of the work product doctrine in federal court litigation, even in diversity cases.[71] Thus, a federal court exercising diversity jurisdiction applies state law to attorney-client privilege issues, but federal law to resolve work product issues.[72]

As with the attorney-client privilege, the elements of the work product privilege raise issues not necessarily unique to the surety setting: (1) defining the "anticipation of litigation" standard; (2) determining the duration of the privilege; and (3) waiving the privilege.

1. Anticipation

Materials prepared before and subsequently collected or used in anticipation of litigation are not work product, and documents prepared in the ordinary course of business, even if related to litigation, are not protected.[73] However, courts have taken a broad view of the timing requirement under which spe-

68. 329 U.S. 495, 511–12 (1947); Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377 (Fla. 1994).

69. Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 419 (D. Del. 1992); Employers Ins. of Wausau v. FDIC, No. CIV-3–85–311 and 312, 1986 U.S. Dist. LEXIS 26562 (N.D. Tenn. 1986) (demand for FDIC's examiners' reports derived from documents available to opposing party were protected work product; while party claimed that it could not obtain substantial equivalent without "undue hardship," substantial need was not shown by assertion that discovery would expedite case, facilitate production of proof or narrow issues); Whealton v. Marshall, 631 So. 2d 323 (Fla. Dist. Ct. App. 1994) (access to factual portions of counsel's memo denied where respondents seeking discovery had access to better and more probative evidence regarding expert's opinion and have equal or superior access to their own records so they could show no legitimate need for information in counsel's memo).

70. Admiral Ins. Co. v. U.S. Dist. Ct., 881 F.2d 1486 (9th Cir. 1988).

71. Remington Arms Co. v. Liberty Mutual Insurance Co., 142 F.R.D. 408, 418 (D. Del. 1992).

72. EDD Corp. v. Newark Ins. Co., 145 F.R.D. 18, 21 (E.D. Conn. 1992)

73. Bartley v. Isuzu Motors, 158 F.R.D. 165 (M.D. Ga. 1994) (prior depositions and materials from other sources were not prepared in anticipation of litigation and thus not privileged).

cific circumstances may indicate a reasonable probability of future litigation, although no "event" has yet occurred.[74] "The probability of litigation must be substantial and the commencement of litigation imminent."[75] Thus, the mere contingency that litigation may result is not determinative.

The requirement that the work product be created in anticipation of litigation has both a causal and temporal component: it must be created *because of* or *for* litigation that is pending or imminent. As stated in *National Union Fire Insurance Co. v. Murray Sheet Metal Co.*,[76] the product must be created because of potential litigation:

> [T]he mere fact that litigation does eventually ensue does not, by itself, cloak materials with work product immunity. The document must be prepared *because* of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation. . . . Determining the driving force behind the preparation of each requested document is therefore required in resolving a work product immunity question.

An entire line of insurance cases has focused on the causation requirement, holding that documents created when litigation is imminent, but not for litigation purposes, are not privileged.[77] To what extent claims investigation itself is a "nonlitigation" function is a subject of disagreement among courts, as discussed in section IV.

2. The Extent of the Privilege: Only on Until Over

Unlike the attorney-client privilege, the work product privilege may be limited in duration. Courts have adopted three different views on whether documents that have been afforded the work product privilege in a previous case continue to be protected by that privilege beyond the termination of the litigation: (1) limiting the protection to the specific litigation before the court; (2) extending the protection to all subsequent litigation; (3) limiting the extension of the privilege only to related cases.[78]

74. *See, e.g.*, United States v. Aldman, 68 F.3d 1495, 1501 (2d Cir. 1995) ("no rule . . . bars application of work product protection to documents created prior to the event giving rise to litigation. . . . In many instances, the expected litigation is quite concrete, notwithstanding that the events giving rise to it have not yet occurred.").

75. Stauffer Chem. Co. v. Monsanto Co., 623 F. Supp. 148, 152 (E.D. Mo. 1985).

76. 967 F.2d 980, 984 (4th Cir. 1992) (citations omitted) (emphasis in original) (citing Binks Mfg. Co. v. Nat'l Presto Indust., Inc., 709 F.2d 1109, 1118 (7th Cir. 1983).

77. Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655 (S.D. Ind. 1991); Bogan v. Northwestern Mut. Life Ins., 163 F.R.D. 460, 463 (S.D.N.Y. 1995) (no immunity for documents created in regular course of business); American Ins. Co. v. Elgot Sales Corp., 1998 U.S. Dist. LEXIS 14822 (S.D.N.Y. 1998) (in subrogation action to recover money paid to insured, adjusters' reports were not privileged because although subrogation action was already prospect, reports were prepared in routine course of business).

78. Levingston v. Allis Chalmers Corp., 109 F.R.D. 546, 552 (S.D. Miss. 1985) (describing three divergent views, citing authority supporting each, and adopting intermediate approach); Doubleday v. Ruh, 149 F.R.D. 601, n.4 (E.D. Cal. 1993).

Under the limited protection approach, documents prepared for one case are freely discoverable in another case.[79] These courts hold that the work product privilege applies only if the materials were prepared in anticipation of the pending litigation, making documents prepared for one case discoverable in subsequent cases.[80] The "limited protection" approach poses a problem for sureties that have bonded several projects for a failed principal. The loss of the work product privilege for counsel's analyses of the principal or its management practices (or lack thereof) upon resolution of claims related to the first troubled project could offer fodder for opponents in future litigation on the principal's other failed projects. The surety may try to couch claims against one principal in terms of a single litigation, as opposed to different litigations on different projects; however, this strategy may offer no relief. One practical obstacle to such a strategy is that when projects are in several states, different counsel is engaged for different projects and the surety may even assign different claims representatives to different projects, thereby defining different projects as different and discrete litigation.

Under the "perpetual protection" or "broad protection approach," embraced by the Fourth and Eighth Circuits, reports prepared in previous litigation are not discoverable in subsequent litigation.[81] California and Texas also appear to follow this broad perpetual protection approach,[82] while Florida affords perpetual protection as to opinion work product.[83]

79. United States v. Int'l Business Machines Corp., 66 F.R.D. 154, 178 (S.D.N.Y. 1974) (documents must be prepared in anticipation of litigation in which special immunity accorded to such material is sought); Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117, 119 (M.D. Pa. 1970) (same); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 207 F. Supp. 407, 410 (M.D. Pa. 1960) (must be prepared for case at bar).

80. United States v. IBM, 66 F.R.D. 154 (S.D.N.Y. 1974); *see also* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 207 F. Supp. 407 (M.D. Pa. 1962) (materials must be prepared for case at issue).

81. *See* Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480, 483–84 (4th Cir. 1973); *In re* Murphy, 560 F.2d 326 (8th Cir. 1977); *see also* United States v. O.K. Tire & Rubber Co., 71 F.R.D. 465, 468 n.7 (D. Idaho 1976); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 43 (D. Md. 1974).

82. Fellows v. Superior Court, 108 Cal. App. 3d 55, 62, 166 Cal. Rptr. 274 (1980) ("[T]he attorney's work product privilege . . . survives the termination of the litigation or matter in which the work product is prepared and may be claimed in subsequent litigation—whether related or unrelated to the prior matter—to preclude disclosure of the attorney's work product"); *see also* Iowa-Shook v. Davenport, 497 N.W. 2d 883 (Iowa 1993) (work product privilege applies to materials prepared for terminated litigation); Owens-Corning Fiberglass Corp. v. Caldwell, 818 S.W.2d 749 (Tex. 1991).

83. *Cf.* State v. Rabin, 495 So. 2d 257 (Fla. Dist. Ct. App. 1986) (differentiating fact and opinion work product and extending perpetual protection to opinion work product, but permitting waiver as to fact work product in subsequent litigation where client waived privilege); *with* Alachua General Hospital Inc. v. Zimmer USA, Inc., 403 So. 2d 1087 (Fla. Dist. Ct. App. 1981) (fact work product retained privilege in subsequent litigation, requiring showing of undue hardship to render it discoverable); *with* Charles B. Pitts Real Estate v. Hater, 602 So. 2d 961, 964 (Fla. Dist. Ct. App. 1992) (memoranda discussing legal issues related to

A third, intermediate approach, followed by a substantial body of federal courts, extends the work product protection only when the two suits are related.[84] These cases reason that where work product materials are prepared for distinct and prior litigation, long completed, the policies underlying the privilege, i.e., preserving the adversary system, have already been achieved.[85]

Under this intermediate approach, the underlying litigation and coverage litigation should be deemed to be closely related, and thus the underlying defense files should not lose any work product privilege in any subsequent coverage litigation. However, the surety in a jurisdiction that follows the intermediate approach may not be in any better position to preserve the privilege for work product than under the limited protection approach. Multiple failed projects of one principal may be deemed to be unrelated litigation. While all bonded projects of one principal arise under one bonding credit line, the default on one project, owned by one obligee, may not be deemed legally related to the default on another project, owned by a different obligee. Although the surety's litigation analysis of a failed or troubled principal may provide work product relevant to claims on several projects, under the intermediate approach, separate bonds may define discrete and separate lawsuits, making adverse information developed in one lawsuit potentially available in subsequent actions. Couching such investigations as being performed in anticipation of litigation under the indemnity agreement may not resolve the issue favorably for the surety. Indemnification actions for losses under one bond could likewise be deemed unrelated to losses incurred under separate bonds.

The surety in a jurisdiction that follows the intermediate approach is faced with yet another problem. A performance bond claim may be prefaced by a rash of payment bond demands and lawsuits. An owner's default is preceded often by grumblings of unpaid subcontractors that abandon the project due to nonpayment, which in turn stops the work and causes the owner to terminate. In this common scenario, the attorney-work product diligently gathered while investigating or defending or settling payment bond claims may be inextricably intertwined with issues arising in any subsequent litigation with the owner on performance bond claims. The former and latter lawsuits should be deemed related because the facts are the same,

previous and subsequent lawsuits retained work product privilege as they disclosed opinions or legal theories of attorney concerning pending litigation).

84. Levingston v. Allis-Chalmers Corp., 109 F.R.D. 546 (S.D. Miss. 1985); Hercules, Inc. v. Exxon Corp, 434 F. Supp. 136, 153 (D. Del. 1977); Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 557 (2d Cir. 1967); Midland Inv. Co. v. Van Alstyne, Noel & Co., 59 F.R.D. 134, 138 (S.D.N.Y. 1973); *see also* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024 (2d ed. 1994).

85. *In re* Grand Jury Proceedings, 73 F.R.D. 647, 653 (M.D. Fla. 1977).

thus extending the privilege accorded to work product developed in the payment bond actions to the subsequent performance bond litigation, right? Maybe not.

The court in *Levingston v. Allis Chalmers Corp.*[86] deemed that the only rational[87] conclusion was that correspondence, reports, and summaries that the surety had created "in the face of scores of pending lawsuits and claims against it" filed by subcontractors were generated "in connection with prior, terminated and wholly unrelated cases." In *Levingston*, the surety, as subrogee, was asserting the principal's destruction of business claim against Allis Chalmers; however, the court never disclosed what the principal's relationship was to Allis Chalmers. While the court concludes that the "instant litigation is inarguably unrelated to the prior litigation" involving payment bond claims, the court also deemed any privilege to be waived because the surety had placed at issue whether or not other factors caused the destruction of the principal's business. If Allis Chalmers had been the obligee on a project on which the payment bonds had been litigated, the conclusion that the claims are unrelated seems questionable. Attorney-work product created in defending payment bond claims would then be discoverable in subsequent payment and performance bond litigation involving the same project.

3. Waiver: Only If It Compromises the System

Since the work product doctrine is designed to protect an attorney's work product from falling into the hands of an adversary, the effect of disclosure to a third party is different than in the case of disclosure of attorney-client confidences. To waive the protection of the work product doctrine, the disclosure must enable an adversary to gain access to the information.[88] Unlike the attorney-client privilege, which belongs to and is waived by the client, the attorney-work product privilege belongs to the attorney and is waived only by disclosures that are inconsistent with maintaining the privileged and confidential nature of the document so as to compromise the adversarial process. As stated by one court:

> The work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent. The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential

86. 109 F.R.D. 546 (S.D. Miss. 1985).

87. AMBROSE BIERCE, THE DEVIL'S DICTIONARY, again defines the operative term: "Rational, adj. Devoid of all delusions save those of observation, experience, and reflection."

88. Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1428 (3d Cir. 1991) (holding that SEC and Department of Justice, in investigating Westinghouse, were in fact adversaries, thus disclosures to agencies waived work product privilege).

> relationship, in order to encourage effective trial preparation. . . . A disclosure made in pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege.[89]

The work product privilege can be compromised without turning the materials over to the opponent. Using attorney notes to testify during a deposition can waive the privilege.[90] In-house counsel waives attorney-client and work product privileges by verifying a complaint.[91] Exploring other facets of implied waiver requires a section of its own.

C. *Implied Waiver of the Privileges*

1. Waiver by Implication—The "Offensive Use Doctrine"

The offensive use doctrine recognizes that a privilege is meant to be used defensively, as a shield against divulging privileged information, rather than offensively as a sword.[92] Thus, when information otherwise protected by the privilege is placed at issue through some affirmative act of the claimant of the privilege for the claimant's benefit, the privilege is waived because protecting the information would be unfair to the party seeking disclosure.[93] The purpose of a privilege is the "protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice."[94] The mere filing of a claim does not cause an implied waiver of all privileges related thereto under the "at issue" doctrine.[95] However, once the holder of the privilege places the privileged communication itself at issue, the essential function of the privilege, protecting a confidence, is no longer served.[96] A partial disclosure of privileged

89. United States v. American Tel. and Tel., 642 F.2d 1285 (D.C. Cir. 1980).

90. Auto Owners Ins. Co. v. Totaltape, Inc., 135 F.R.D. 199 (M.D. Fla. 1990) (after balancing competing interests, insurer compelled to produce file binders reviewed by claims manager in deposition because opponent could not obtain substantial equivalent of claims file from examining witness without reference to file); *see also In re* Joint Eastern & Southern Dist. Asbestos Litig., 119 F.R.D. 4, 5 (S.D.N.Y. 1988) (setting forth balancing test for determining when adverse party may inspect documents used by deponent to refresh recollection).

91. IDS Life Ins. Co. v. SunAmerica, Inc., 1995 U.S. Dist. LEXIS 12116 (N.D. Ill. 1995).

92. *See, e.g.*, Conkling v. Turner, 883 F.2d 431, 434 (5th Cir. 1989) (citing Pitney Bowes, Inc. v. Mestre, 86 F.R.D. 444, 446 (S.D. Fla. 1980)); United States v. Moody, 763 F. Supp. 589, 597 (M.D. Ga. 1991); United States v. Mierzwicki, 500 F. Supp. 1331, 1335 (D. Md. 1980).

93. *See, e.g.*, Conkling v. Turner, 883 F.2d 434, and cases cited therein.; Levingston v. Allis Chalmers Corp., 109 F.R.D. 546 (S.D. Miss. 1985) (surety asserting subrogated destruction of business claim put at issue all payment bond claims that had been made against principal as they may have contributed to destruction of business).

94. 1 McCormick on Evidence 269 (4th ed. 1992).

95. Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 411–16 (D. Del. 1992);

96. *Id.* at 342.

communications may also effect a waiver of the entire communication, related communications,[97] and supporting information.

In the surety context, a privilege may be waived for communications that are relied upon to establish the bond claim. In *Leucadia, Inc. v. Reliance Insurance Co.*,[98] the insured filed a fidelity bond claim, alleging that it discovered the loss when it received its counsel's report. The court found a waiver of the attorney-client privilege to the extent that the insured relied upon its counsel's report to establish the date it discovered its loss.[99]

2. Disclosures to Law Enforcement: Do Your Duty, But Don't Enjoy It

A common issue that arises in fidelity bond claims (and hopefully not in payment and performance bond claims) is whether the disclosure of attorney work product related to criminal wrongdoing to the appropriate law enforcement agencies waives the privilege. Courts, of course, are split. *Permian Corp. v. United States*[100] is the seminal case advocating waiver: a private party's disclosure of information to a law enforcement agency can waive a privilege where the private party makes the disclosure to accrue a private benefit. Other rationales for allowing waiver are based on the analogy to the joint defense privilege. To the extent that the party disclosing the information to law enforcement is not on the same side as the law enforcement agency, the disclosure is not within the confines of a joint defense exception to waiver and is thus discoverable. For example, in *In re Steinhardt Partners, Ltd.*,[101] a memo sent to the SEC lost its work product protection: once a party allows an adversary to share the otherwise privileged thought processes of counsel, the need for the privilege disappears. Under the *Permian* line of cases, the client cannot select among third parties for whom the work product protection is waived for and for whom it applies.

Diversified Industries, Inc. v. Meredith offers the countervailing rationale for maintaining the privilege after disclosure to law enforcement or government agencies is offered.[102] Disclosure for law enforcement purposes is

97. Board of Trustees of Leland Stanford Junior University v. Coulter Corp., 118 F.R.D. 532 (S.D. Fla. 1987) (waiver of privilege arises both from deliberately injecting counsel's advice as defense to claim that actions were willful and from presentation of select communications with counsel, thus waiving privilege as to balance).

98. 101 F.R.D. 674 (S.D.N.Y. 1983).

99. *Id.* at 680 ("I conclude that [the report] constitutes a necessary element in plaintiff's case, or is in any event so critical to plaintiff's case, that the privilege must yield. In the context of this case, counsel's communication with plaintiff constituted an important disputed fact essential to plaintiff's proof. It cannot be withheld.").

100. 665 F.2d 1214 (D.C. Cir. 1981) (corporation that had made disclosures to SEC to expedite approval of its exchange offer could not then resist disclosure in subsequent administrative hearing).

101. 9 F.3d 230 (2d Cir. 1993).

102. 572 F.2d 596 (8th Cir. 1978) (en banc) (disclosure to SEC of material protected by attorney-client privilege during formal investigation effected only selective waiver and did make material discoverable in subsequent civil litigation).

not inconsistent with maintaining the confidentiality of the information, so no waiver should arise. In *G.A.F. Corp. v. Eastman Kodak Co.*,[103] voluntary disclosure of documents to persons not on the same side of the litigation was not deemed to undermine the confidentiality of the work product, and thus the privilege remained. Similarly, in *United States v. American Telephone & Telegraph Co.*[104] the court, adopting the *G.A.F.* rationale, reasoned that the purpose of the work product privilege is to protect information from opponents, not necessarily all other parties.

A surety was faced with waiver of privileges as to material shared with the Justice Department in *First National Bank of Louisville v. Loretta Lustig*.[105] While recognizing that the surety's disclosure to the Department of Justice would not in itself waive the work product privilege, the relationship "went beyond that of mere tipster"; through counsel "they pressed in the most forceful terms for criminal prosecution" and provided questions to be used in the criminal investigation. The court did not dispute the right of a party to turn over information that suggested criminal activity to law enforcement; "however, fairness and due process considerations dictate that potential targets of the investigation be advised," so the attorney can do her duty, but should not try to accrue any collateral benefit. Disclose, but not too much.

II. NO ATTORNEY-CLIENT PRIVILEGE ATTACHES TO COUNSEL'S NONLEGAL COMMUNICATIONS, INVESTIGATIONS, AND ADVICE

A. *Facts—Just the Facts: No Privilege*

Insofar as sureties employ attorneys, whether in-house or as outside counsel, to perform ordinary business functions, no privilege attaches.[106] Thus, the attorney-client privilege does not apply where an attorney is retained primarily to investigate facts, but only where the attorney is rendering legal services and advice.[107] For example, in *In re Kearney*,[108] the court rejected a privilege claim where the bank retained an accounting firm to investigate the loans, examine the bank's records and interview the bank's employees:

103. 85 F.R.D. 46 (S.D.N.Y. 1979).

104. 642 F.2d 1285, 1299 (D.C. Cir. 1980).

105. 1993 U.S. Dist. LEXIS 7903 (E.D. La. 1993).

106. To what extent claims investigation and adjustment is deemed to be an "ordinary" business function, as opposed to an activity in anticipation of litigation, is explored in detail below in the context of the analysis of the applicability of the attorney-work product privilege to investigative files.

107. *See, e.g.*, State *ex rel.* United States Fid. & Guar. Co. v. Canady, 460 S.E.2d 677 (W. Va. 1995); Dawson v. New York Life Insurance Co., 901 F. Supp. 1362 (N.D. Ill. 1995); Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977); United States v. Int'l Bus. Mach. Corp., 66 F.R.D. 206 (S.D.N.Y. 1974); North American Mtge. Investors v. First Wisconsin Nat'l Bank, 69 F.R.D. 9 (E.D. Wis. 1975).

108. 227 F. Supp. 174 (S.D.N.Y. 1964).

"The document is not a confidential communication from the Bank to its counsel for the purpose of securing legal advice, nor does it, as far as I can see, contain any legal advice from the counsel to the Bank. It is a report of factual investigation."[109]

Courts have rejected attempts to impose a "per se rule making ordinary investigative employees, who hold licenses to practice law, attorneys for purposes of the attorney-client privilege."[110] In *United States Fidelity & Guaranty Co. v. Canady*, USF&G retained a lawyer to assist in investigating a suspicious fire claim; in the ensuing litigation it refused to produce its lawyer's report to the insured on the basis of the attorney-client privilege. While recognizing that the report "could be exempted from discovery under the attorney-client privilege," the West Virginia Supreme Court rejected any per se rule as follows:

> To do so could pose an absolute bar to discovery of relevant and material evidentiary facts. In the insurance industry context, it would shield from discovery documents that otherwise would not be entitled to any protection if written by an employee who holds no law license but who performs the same investigation and duties. To enlarge the scope of protection to those *not performing traditional attorney duties* would be fundamentally incompatible with this State's broad discovery policies designed for the ultimate ascertainment of truth.[111]

Thus, investigations and analyses performed by in-house counsel are not afforded any presumption of being privileged by virtue of the fact that the work was performed by an attorney; to the contrary, some courts apply a higher degree of scrutiny to prevent nonlegal communications of in-house counsel from being cloaked in any privilege.[112]

Rendering business advice, as opposed to legal advice, is also not privileged. In *North American Mortgage Investors v. First Wisconsin National Bank*,[113] the court found that an analysis of a participation agreement prepared by a bank officer who was also an attorney in the bank's legal department was not rendering legal advice. The court explained:

> The possession of a law degree and admission to the bar is not enough to establish a person as an attorney for purposes of determining whether the

109. *Id.* at 176.

110. United States Fidelity & Guaranty Co. v. Canady, 460 S.E.2d 677, 689–90 (W. Va. 1995).

111. *Id.* (emphasis added).

112. *See, e.g.*, Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1383 (Fla. 1994) ("... to minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny). Courts' imposition of a higher degree of scrutiny on in-house lawyers may arise from the widely circulated (and accepted) definition of "lawyer" as "[o]ne skilled in circumvention of the law." AMBROSE BIERCE, THE DEVIL'S DICTIONARY.

113. 69 F.R.D. 9 (E.D. Wis. 1975).

> attorney-client privilege applies. For the privilege to exist, the lawyer must not only be functioning as an advisor, but the advice given must be predominantly legal, as opposed to business, in nature.[114]

Thus, business analyses will not be protected simply because they are performed by an attorney or even have a legal component. Even analyses of potential litigation liability, compiled for business management reasons, are not privileged as attorney services.[115]

B. *Fact Investigation Coupled with Analysis of Impact: Privileged*

Although communications with and by investigative employees are not subject to a privilege, counsel retained to investigate coverage, i.e., the application of facts to the law, may be privileged. In *Aetna Casualty & Surety Co. v. Superior Court*,[116] the insurer retained a law firm to assist in investigating a home owner's casualty loss claim. The insured sought to depose the insurer's claims counsel and to obtain its counsel's investigation files, asserting that the lawyer was acting "as some form of outside claims adjuster, rather than to render legal advice."[117] The court rejected the insured's reliance on cases denying privileged status to an attorney's investigations because in those cases the "client's dominant purpose in retaining the attorney was something other than the request for a legal opinion or advice."[118] The court differentiated third-party from first-party claims in which counsel was engaged "to investigate [the insured's] claim and make a coverage determination under the policy."[119]

> This is a classic example of a client seeking legal advice from an attorney. The attorney was given a legal document (the insurance policy) and was asked to interpret the policy and to investigate the events that resulted in damage to determine whether [insurer] was legally bound to provide coverage . . . for such damage.[120]

How does one distinguish this "classic example" of legal services from the "ordinary" business function of investigating a claim? In claims investigations, the adjustor or investigator is always performing a quasi-legal function: determining the legal duty to pay under a policy. Thus, the distinction the *Aetna Casualty & Surety Co.* court drew for investigating coverage seems to be a distinction without a difference. As most "ordinary

114. *Id.* at 11; *see also* Puerto Rico v. SS Zoe Colocotroni, 61 F.R.D. 653, 660 (D. P.R. 1974).
115. Simon v. G.D. Searle, 816 F.2d 397 (8th Cir. 1987).
116. 200 Cal. Rptr. 471 (Cal. Ct. App. 1984).
117. *Id.* at 476.
118. *Id.*
119. *Id.*
120. *Id.*

business" issues have a legal component, under this rationale, the privilege would envelop all communications related to fact investigations.

The Fifth Circuit applied the same expansive definition of the privilege in *Dunn v. State Farm Fire & Casualty Co.*,[121] where the court rejected the insured's argument that the privilege did not apply to documents prepared by the insurer's attorneys investigating a fire claim:

> The privilege *does not* require the communication to contain purely legal analysis or advice to be privileged. Instead, if a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged. . . . The privilege extends to all communications between [the insurer] and the attorneys it retained for the purpose of ascertaining its legal obligations to the Dunns. The privilege is not waived if the attorneys perform investigative tasks provided that these investigative tasks are related to the rendition of legal services.[122]

Thus, the *Dunn* court broadly defined an attorney's investigation of facts, as well as legal analysis, as privileged. The distinction between an attorney's nonprivileged business function and privileged legal activities collapses when any legal issue arises. The privilege is then indiscriminately applied to all communications. The issue in *Dunn* could have been resolved narrowly on the facts: the attorney was hired after the insured, asserting the fire loss, confessed to arson; thus, any fact investigation by counsel in *Dunn* could not have been to adjust the claim or for any business function other than litigation preparation.

Thus, where counsel does more than act as a mere investigator, exercises "the legal talent and training of an attorney in developing" a report, is in a relationship requiring "the training, skill and knowledge of a lawyer," the services are deemed those of an attorney, subject to protection.[123]

III. APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE TO INSURER-INSURED AND SURETY-PRINCIPAL COMMUNICATIONS

A. *Common Interest Doctrine/Joint Defense "Privilege"*

1. Elements of Doctrine

As explained above, the attorney-client privilege is compromised by any communication outside the privileged relationship because it destroys the necessary element of confidentiality. The "joint defense privilege" or the

121. 927 F.2d 869 (5th Cir. 1991).

122. *Id.* at 875.

123. *See, e.g.*, Connecticut Mut. Life Ins. Co. v. Shields, 16 F.R.D. 5 (S.D.N.Y. 1954) (analyzing attorney-work product privilege).

"common interest doctrine"[124] extends the privilege to communications between an individual and another's attorney when the communications are "part of an on-going and joint effort to set up a common defense strategy."[125] Rather than create a "privilege," the doctrine only preserves an already existing privilege from waiver by disclosure; it does not make otherwise nonprivileged documents privileged. Thus, this "privilege" arises only when the matter communicated is itself privileged;[126] no joint defense privilege can be claimed for documents or communications that are themselves not privileged.[127]

Where two or more parties employ a lawyer as their common attorney, such as where the surety tenders to the principal who engages one counsel on behalf of both, their communications to the attorney are confidential and privileged as against a common adversary. The doctrine also preserves the attorney-work product privilege from claims of waiver when material is disclosed to third parties sharing a common interest.[128]

To assert a joint defense or common interest privilege,[129] the parties must show that they pursued a common interest and had an agreement to do so.[130] Parties asserting a joint defense privilege must generally satisfy three

124. The terms "joint defense privilege" and "common interest doctrine" have been used interchangeably. Some courts fail to draw a distinction:

> Where the third party shares a common interest with the disclosing party which is adverse to the party seeking discovery, an existing privilege is not waived. This is known as the common interest or joint defense doctrine.

Allendale Mut. Ins. Co. v. Bull Data Systems, Inc., 152 F.R.D. 132, 140 (N.D. Ill. 1993) (citations omitted). Courts that have distinguished between the two terms describe the joint defense privilege as "protect[ing] communications between two or more parties and their respective counsel if they are engaged in a joint defense effort." *In re* Sealed Case, 29 F.3d 715, 719 n.5 (D.C. Cir. 1994). In contrast, the common interest doctrine "protects communications between a lawyer and two or more clients regarding a matter of common interest." *Id.* at 19. Both describe the concept of maintaining the attorney-client privilege in a joint defense situation.

125. Eisenberg v. Gaynon, 766 F.2d 770, 787 (3d Cir.), *cert. denied sub nom.*, Weinstein v. Eisenberg, 474 U.S. 946 (1985).

126. *See, e.g., In re* Megan-Racine Assoc., Inc., 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995) (materials assembled in ordinary course of business not shielded by work product immunity and consequently are not protected by joint-defense privilege).

127. *See, e.g.*, International Surplus Lines Ins. Co. and Employers Ins. Co. of Wausau v. Willis Corroon Corp., 1992 U.S. Dist. LEXIS 17332 (N.D. Ill. 1992) (court ordered insurer to produce documents claimed as privileged where insurer failed to show underlying attorney-client or work product privilege, in addition to satisfying criteria for joint defense privilege); Metro Wastewater Reclamation District v. Continental Cas. Co., 142 F.R.D. 471 (D. Colo. 1992).

128. *See, e.g.*, Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., 125 F.R.D. 578, 587 (N.D.N.Y. 1989) ("sharing work product material with a friendly party does not waive the work product protection as it applies to an adverse third party").

129. *See* note 124 *supra.*

130. The "common interest doctrine" has been defined as the "voluntary sharing of information with a third party, where the third party shares a common interest in the outcome of the litigation and where communications in question are made in confidence for the limited

elements: the communication must be (1) intended to be kept confidential; (2) made in pursuit of a joint legal effort; and (3) intended to advance the common legal interests of the parties.[131] Joint defense communications lose their protection to the extent that the information is either unrelated to the common interests of the parties or, in some circumstances, conveyed to someone outside of the confidential relationship.

2. Waiver of Joint Defense: Loss of Consortium

Consistent with the split among courts as to when waiver arises for inadvertent disclosures, three distinct lines of authority have arisen regarding whether the disclosure of a privileged communication to a third party waives the joint defense privilege:[132]

(1) Automatic waiver of any joint defense privilege upon *any* disclosure of privileged information to third parties.[133]

(2) No waiver of a joint defense privilege following the inadvertent production of otherwise privileged material because waiver requires the "intentional relinquishment or abandonment of a known right" and inadvertent production is the antithesis of a knowing relinquishment of rights.[134]

(3) Waiver depends upon the specific facts and circumstances and involves weighing the precautions taken to prevent the disclosure, the number of privileged documents disclosed, the extent of the disclosure, the promptness of measures taken to rectify the disclosure, and whether the interests of justice would be served by finding a waiver.[135]

It has also been held that the joint defense privilege cannot be waived without the consent of all parties to the defense, except in the situation where one of the joint defendants becomes an adverse party in litigation.[136] Thus, a joint defense privilege is generally deemed waived if the codefen-

and restricted purpose of safeguarding shared interest." Lipton Realty, Inc. v. St. Louis Housing Authority, 705 S.W.2d 565 (Mo. Ct. App. 1986).

131. *In re* Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 126 (3d Cir. 1986).

132. FDIC v. Singh, 140 F.R.D. 252 (D. Me. 1992).

133. Wichita Land and Cattle Co. v. American Fed. Bank, 148 F.R.D. 456, 457 (D.D.C. 1992).

134. John Morrell & Co. v. Local Union, 913 F.2d 544 (8th Cir. 1990) (privilege as to internal memorandum written by general counsel, which was turned over to opponent due to another pending lawsuit where expert inadvertently turned it over at deposition was protected by attorney-client, joint defense privilege; no waiver by previous inadvertent production and thus joint defense barred introduction of document). *See also In re* L.T.V. Securities Litig., 89 F.R.D. 595 (N.D. Tex. 1981); Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982). *See also* Berg Electronics, Inc. v. Molex, Inc., 875 F. Supp. 261 (D. Del. 1995), Redland Soccer Club v. Department of the Army, 55 F.3d 827 (3d Cir. 1995) (inadvertent disclosure of documents does not qualify as a voluntary waiver).

135. Edwards v. Whitaker, 868 F. Supp. 226 (M.D. Tenn. 1994).

136. United States v. Moscony, 697 F. Supp. 888 (E.D. Pa. 1988).

dants later litigate against each other.[137] The Fifth Circuit in *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*[138] ruled that when information is exchanged among parties in a joint defense setting, this exchange was not made for the purpose of allowing unlimited publication and use, but rather for the limited purpose of assisting in their common cause. Accordingly, an attorney receiving information for joint defense purposes would breach a fiduciary duty if this information were later used in the representation of another client to the detriment of one of the codefendants.[139]

B. *Application of Joint Defense Doctrine to Insurance Context*

In the third-party insurance context, courts have applied the common interest doctrine to extend the attorney-client privilege to communications between the insured and insurer (and respective counsel) as to the underlying lawsuit against the insured where the insurer has a *common interest* in the subject matter of the communications.[140] Where an insurer and reinsurer share liability under a bond, they have been held to share an identical interest so as to give rise to a joint defense privilege; however, the privilege extends only to communications related to litigation, and not business matters.[141] This rationale extends the attorney-client privilege to insurer/insured communication based on the recognition of the common interest between the insurer and its insured in minimizing exposure in the underlying third-party claims for the benefit of both the insurer and the insured. As stated in *Metro Wastewater Reclamation District v. Continental Casualty Co.*,[142] both the insured and its insurers had "and continue to have, precisely the same interests in (a) preventing further claims against [the insured] . . . , and (b) defeating or favorably resolving by settlement any such claims."[143]

A related rationale for protecting an insured's communications to its

137. Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21 (N.D. Ill. 1980) (citing *In re* Grand Jury Subpoena Duces Tecum, 406 F. Supp. 381, 393–94 (S.D.N.Y. 1975)).

138. 559 F.2d 250, 253 (5th Cir. 1977).

139. *Id.*

140. *See, e.g.*, Metro Wastewater Reclamation Dist. v. Continental Cas. Co., 142 F.R.D. 471, 476 (D. Colo. 1992); Indep. Petrochemical Corp. v. Aetna Cas. & Surety Co., 654 F. Supp. 1334, 1365 (D.D.C. 1986); Trust Ins. Exchange v. St. Paul Fire & Marine Ins. Co., 66 F.R.D. 129, 132 (E.D. Pa. 1975); Car & General Ins. Corp. v. Goldstein, 179 F. Supp. 888, 893 (S.D.N.Y. 1959), *aff'd*, 277 F.2d 162 (2d Cir.1960).

141. Durham Industries, Inc. v. The North River Ins. Co., 1980 U.S. Dist. LEXIS 15154 (S.D.N.Y. 1980); *see also* Aetna Cas. and Sur. Co. v. Certain Underwriters at Lloyd's London, 176 Misc. 2d 605; 676 N.Y.S.2d 727 (Sup. Ct. N.Y. 1998) (minutes reflecting communication among insurers related to reinsurance market was not protected under "common interest" privilege; attorney-client privilege may not be used to protect communications that are business-related or of personal nature).

142. 142 F.R.D. 471 (D. Colo. 1992).

143. *Id.* at 476.

carriers about potentially covered events by the attorney-client privilege is a "delegation of defense" theory, offered by the Illinois Supreme Court in *People v. Ryan*,[144] a leading decision supporting this approach:

> [B]y the terms of the common liability insurance contract, the insured effectively delegates to the insurer the selection of any attorney and the conduct of the defense of any civil litigation. The insured is ordinarily not represented by counsel of his own choosing either at the time of making the communication or during the course of litigation. Under such circumstances we believe that the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured.[145]

Thus, what has been described as a "shrinking majority" of states[146] extends the privilege to communications between the insurer and insured based on the insurer's duty to defend that creates a perceived identity of interests, whether such commonality of purpose or interest actually exists or not.[147]

Recognizing that the insurer and insured's interests are not always necessarily allied, some courts have adopted a more narrowly tailored approach that extends the attorney-client privilege to communications only if (1) the *dominant purpose* of those communications relates to the defense of the insured by counsel retained by the carrier, and (2) the insured had a reasonable expectation of confidentiality.[148] In *D.I. Chadbourne v. Superior Court*,[149] California rejected an absolute approach that makes all commu-

144. 197 N.E.2d 15 (Ill. 1964).

145. *Id.* at 17.

146. Langdon v. Champion, 752 P.2d 999, 1002 (Ala. 1998).

147. *See also* Grand Union Co. v. Patrick, 247 So. 2d 474 (Fla. Dist. Ct. App. 1971) (communication of accident report to carrier protected by attorney-client privilege because communication was, in essence, communication between insured and counsel for defense of case); Braglia v. Cephus, 146 Ill. App. 3d 241, 496 N.E.2d 1171, 1176 (1986) (following *Ryan*); Martin v. Clark, 92 Ill. App. 3d 518, 415 N.E.2d 30, 32 (1980) (following *Ryan* and holding that statement given by insured to carrier was protected by the attorney-client privilege and should not have been subject to discovery); 81 AM. JUR. 2D, *Witnesses*, at 228 (1976) (under broad approach, carrier "is regarded as a mere intermediate agent to transmit the communications to the attorneys of its claims department or to an eventual trial attorney if an action is brought"); 55 A.L.R. 4th 336, 342 (1987). *But see* Shere v. Marshall Field & Co., 26 Ill. App. 3d 728, 327 N.E.2d 92 (1974) (insured's safety director's claim report on form supplied by independent adjusting service was not privileged; attorney-client privilege had never been extended to cover communications to independent contractor who had no duty to defend).

148. *See, e.g.*, State v. Anderson, 247 Minn. 469, 78 N.W.2d 320 (1956) (statements by insured to carrier not privileged because not shown that statements made for exclusive use in insured's defense and in confidence); Jacobi v. Podevels, 23 Wis. 2d 152, 127 N.W.2d 73 (1964) (statements by insured to insurance adjuster not privileged because no action pending or threatened and no counsel retained for insured).

149. D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 731, 388 P.2d 700, 36 Cal. Rptr. 468 (1964) (question of fact as to whether privilege attaches when communication from insured's employee to independent contractor employed by carrier for subsequent transmittal to carrier and then to counsel selected by insurer).

nications from an insured to an insurer privileged and embraced a more narrowly tailored approach that focuses on the nature of the communication and the individual's involvement in the claim.[150]

A substantial and growing minority of courts have held that communications between insureds and carriers are not protected by any attorney-client privilege. These courts focus on the fact that communications between an insured and insurer are unlike communications between a client and an attorney because an insurer may use information obtained from an insured for purposes "inimical to the interests of the insured."[151] As the Wisconsin Supreme Court stated in *Jacobi v. Podevels*:[152]

> When the insured makes such a statement he is ordinarily fulfilling a condition of his policy, requiring him to notify the insurer of the occurrence and circumstances of the accident and to co-operate with the insurer. If the statement be false, the insurer may use it against the insured as foundation for a claim of noncooperation. If the statement discloses facts giving rise to some other defense against the insurer's liability under the policy, the insurer is doubtless free to make use of those facts.[153]

In adopting what it described as the "growing minority and federal rule" rejecting the extension of the privilege to insurer-insured communications, the Alaska Supreme Court reasoned in *Langdon v. Champion*:[154]

> . . . [C]ases according protection to statements between insurers and insureds have extended the attorney-client privilege into areas in which it was never intended to apply. Moreover, the minority rule is more in line with our policy favoring liberal discovery. . . . The purpose of the attorney-client privilege is not served by extending its protection to statements made to insurers in the ordinary course of insurance investigations. . . . We therefore hold that the attorney-client privilege does not extend to statements made by an insured to his insurer, except in those cases where it can be shown that the adjustor received the communication at the express direction of counsel for the insured.[155]

Thus, courts have extended the attorney-client privilege to communications between an insurer and insured based on a commonality of inter-

150. *See also* Gene Compton's Corp. v. Superior Court, 205 Cal. App. 2d 365, 23 Cal. Rptr. 250 (1962) (communication of information intended to be confidential made for predominant purpose of transmittal to attorney selected to defend insured was protected; transmission of privileged communication to attorney through insurer does not destroy privilege); Travelers Ins. Cos. v. Superior Court, 143 Cal. App. 3d 436, 451, 191 Cal. Rptr. 871 (1983) (approving "dominant purpose" test and "left intact *Gene Compton's*. . . .").

151. *Langdon*, 752 P.2d at 1003 (citing Butler v. Doyle, 544 P.2d 204, 207 (Ariz. 1975) and Di Cenzo v. Izawa, 723 P.2d 171, 177 (Haw. 1986)).

152. 127 N.W.2d 73 (Wis. 1964).

153. *Id.* at 76.

154. 752 P.2d 999 (Alaska 1988).

155. *Id. at* 1003–04.

ests. As to a third-party insurance claim, the interests of the insured are allied with the insurer with respect to defending the claim. As parties need not be allied in all aspects to claim a joint defense privilege,[156] conflicts between the insurer and insured on the issue of coverage or other issues do not destroy the common interest in defending the claim. The *Jacobi* and *Langdon* courts that refuse to extend an attorney-client privilege deem the *intent* underlying the disclosure as being for purposes other than entering into a joint defense arrangement, namely, for the ordinary business purpose of making a claim or complying with contract duties of cooperation or disclosure. Accordingly, the surety seeking to protect communications from its principal must analogize to the majority position regarding insurer-insured communications or differentiate insurance from suretyship to avoid the *Jacobi* and *Langdon* holdings.

C. *Privilege Applicable to Surety-Principal Communications: Only When You "Stand by Your Man"*

Courts applying the "common interest" rationale of insurance cases might well apply the same doctrine to surety-principal communications. Courts that reject the extension of the common interest doctrine to insurer-insured communications would have no reason to extend the common interest rationale to communications between the surety and principal. However, once the surety tenders the defense to the principal, counsel for the principal becomes the surety's counsel. All principal-surety communications related to the defense of the obligee's claim (as opposed to issues of indemnification) made after the tender would be privileged. In the absence of or before a tender, the privileged status of surety-principal communications is less certain.

While only some courts reject the common interest theory in the insurer-insured relationship, a greater cognitive dissonance arises from applying this theory to the surety-principal relationship. While the insurer and insured are indisputably allied as to the defense of a third-party claim from the outset, the surety and principal approach an obligee's claim from initially differing, if not opposing, positions. Three differences between the surety-principal and insurer-insured relationships suggest that no attorney-client privilege should protect communications between the surety and principal until the surety decides to stand behind the principal and reject the obligee's claim:

(1) Duty to Defend. While the insurer usually has a contractual duty to defend the insured, the principal owes the surety the duty to defend or pay the cost of defense. Thus, the rationale underlying the cases according an

156. *See, e.g.*, Visual Scene, Inc. v. Pilkington Bros., 508 So. 2d 437 (Fla. Dist. Ct. App. 1987) (no waiver of privileges by disclosure to party with common interest in particular issue).

attorney-client privilege to insurer-insured communications is inapplicable in the surety setting. No "delegation of defense" occurs until the surety concludes its investigation and decides to tender to the principal.

(2) Right to Indemnification. The surety's right to indemnification, absent in the insurance context, creates an inherently adversarial, rather than allied relationship. The *Jacobi* and *Langdon* courts cited potential adversity between the insurer and insured as a basis for refusing to adopt a common interest rationale.

(3) Duty to Obligee. The surety owes a duty not just to its principal, but also to its obligee to undertake a good faith investigation of the claim. Failing to conduct an independent investigation would breach the duty owed to the obligee. Thus, communications with the principal regarding a claim are undertaken in part to discharge a duty owed to the obligee.

At some point in the surety's investigation of an obligee's claim, the surety may decide to stand behind the principal, and thus create a common interest to the extent that the surety endorses the principal's position or is subrogated to the principal's rights and claims. In *Levingston v. Allis Chalmers Corp.*,[157] the court acknowledged the existence of a joint privilege between the surety's counsel and counsel for the principal arising from subrogation. A common interest privilege should likewise exist after the surety agrees to stand behind its principal and deny an obligee's claim.

But what about the communications that precede the decision to tender or stand by the principal? The principal may convey information to the surety in the strictest of confidence, but the surety must have the requisite intent to create a joint defense arrangement before any joint privilege arises to avoid a waiver. Regardless of the intent of the principal in transmitting information, the surety must likewise intend to receive the information in furtherance of a joint defense. Whether any privilege protects the exchange of information depends on whether it is received by the surety in the ordinary course of the surety's business of claims investigation or for the purposes of creating or pursuant to a joint defense, as explored in greater detail below.

Where does all this leave the surety trying to determine whether and when its communications with its principal and counsel are privileged? With uncertain and inexact analogies to insurance cases that in turn adapt the common interest doctrine for a rather loose fit to a distinctly different legal relationship.

D. *The Attorney-Client Privilege and the Cooperation Clause*

Subsections A to C above considered the attorney-client privilege arising between the surety and principal so as to bar the obligee's discovery of these communications. To continue with the analogy to the insurer-insured

157. 109 F.R.D. 546 (S.D. Miss. 1985).

relationship, the surety's right to discovery against the principal can be analogized to and contrasted with the insurer's discovery against the insured under the cooperation clause in insurance contracts.

1. Cooperation Clause in the Insurance Contract

To what extent can an insurer demand disclosure of an insured's communications with counsel when the insurance contract imposes a duty to cooperate? Courts disagree as to whether the cooperation clause, by itself, waives all claims of attorney-client privilege. Some courts maintain that communications between insureds and their attorneys regarding an underlying insurance claim are not privileged because the insured cannot reasonably expect that such communications are private.[158]

Other courts have held that the existence of a cooperation clause, without more, does not require disclosure of information otherwise protected by the attorney-client privilege.[159] In *Rockwell International Corp. v. Superior Court*,[160] the court rejected the insurer's argument that the cooperation clause negates any expectation of confidentiality as to communications that insureds have with their own counsel and requires the insured to disclose the contents of any and all communications with defense counsel.[161] Similarly, in *Bituminous Casualty Corp. v. Tonka Corp.*,[162] the court rejected the contention that the insured, by agreeing to cooperate with the insurer, waived the attorney-client privilege. The court reasoned that "[t]o hold that an insurance policy creates a contractual waiver of the attorney-client privilege, even when the insurance company later sues the insured contending the insured's claim is not covered by the policy, would completely eviscerate the attorney-client privilege."[163]

2. Principal's Obligation to Cooperate with Surety

Unlike the insurer defending a third-party claim, the surety defending a payment or performance bond claim need not coax cooperation from its

158. *See, e.g.*, Waste Management, Inc. v. Int'l Surplus Lines Ins. Co., 579 N.E.2d 322 (Ill. 1991); *In re* Environmental Ins. Declaratory Judgment Actions, 612 A.2d 1338, 1342–43 (N.J. App. 1992); Carrier Corp. v. Home Ins. Co., No. 352383, 1992 WL 478585, at *3 (Conn. Super. Ct., Aug. 18, 1992). *But see* Rockwell Int'l Corp. v. Superior Court, 32 Cal. Rptr. 2d 153 (Cal. Ct. App. 1994) (holding that cooperation clause alone does not negate any expectation of privacy in communications between insured and its counsel).

159. *See, e.g.*, Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 417 (D. Del. 1992) (cooperation clause does not imply duty to produce attorney-client privileged documents in coverage dispute as documents were not sought by insurer for underlying litigation, but to prevail in coverage dispute with insured).

160. 32 Cal. Rptr. 2d 153 (Cal. Ct. App. 1994).

161. *Id.* at 156.

162. 140 F.R.D. 381 (D. Minn. 1992).

163. *Id.* at 386; Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 416–17 (D. Del. 1992); North River Ins. Co. v. Philadelphia Reinsurance Corp., 797 F. Supp. 363, 369 (D.N.J. 1992); Historic Smithville Dev. Co. v. Chelsea Title & Guar. Co., 464 A.2d 1177 (N.J. Sup. Ct. App. Div. 1983).

principal in its defense efforts because the surety has the hammer of indemnification and the right to tender. Upon tendering the defense, the surety has a right to all information relevant to claims held by its own attorney, who is also counsel for the principal.[164] Where the surety does not tender or is adverse to its principal, it still is usually contractually entitled to all its principal's ordinary business records. An analogy can be drawn to the insurance cooperation clause cases to argue that the duty to defend or similar provisions in the indemnity agreement waived any expectation of privacy the principal might have as to attorney-client communications involving the bonded project. Alternatively, the surety can argue that the principal's communications with counsel or materials prepared regarding an obligee's bond claim were not created for or in anticipation of litigation, but for the ordinary business purpose of maintaining its bonding credit and/or responding to the surety's inquiries regarding pending claims.[165] The "ordinary business record doctrine" is explored in greater detail in conjunction with analyzing the applicability of the work product privilege.

IV. INSURER/SURETY CLAIM FILES: ATTORNEY WORK PRODUCT OR ORDINARY BUSINESS RECORDS

Because of the limited number of cases specifically addressing the discoverability of surety investigative claim files, insurance cases again offer the initial framework of analysis. The different approaches courts have adopted to applying the work product privilege to claims files reflect different applications of the "ordinary business record doctrine." Starting with this doctrine (section A) and applying it to insurance claims files (section B)

164. Under the "joint client exception" to the attorney-client privilege where clients retain or consult with an attorney upon a matter of common interest, none of them may claim a privilege as to communication made in the course of the relationship. Aetna Cas. & Sur. Co. v. Superior Court, 153 Cal. App. 3d 467 (1984). The joint client exception prevents the assertion of a privilege as to a matter of common interest, communicated to common counsel, not as to a matter over which the parties are adverse. In *Aetna*, the court rejected the insured's argument that the insurer's duty to conduct a neutral investigation of the claim resulted in a common interest that resulted in insured's attorney being subject to a joint client exception. The joint client exception did not apply because the attorney was consulted by the insurer on the coverage issue only, not any matter of common interest, and attorney did not act as counsel for insured. *See also* Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408 (D. Del. 1992) (rejecting application of joint client exception to attorney-client privilege when attorney never represented party seeking allegedly privileged materials).

165. For example, an insured making a fidelity bond claim cannot invoke the work product doctrine unless while conducting its claim investigation, it had reason to believe that a bond claim existed, that the insurer would deny the claim, and that litigation would ensue. In *EDO Corp. v. Newark Ins. Co.*, 145 F.R.D. 18 (D. Conn. 1992), the court held that until the insured received notice that its claim had been denied, it "lacked a reasonable basis to anticipate litigation" for purpose of invoking the work product doctrine.

provides the framework for analyzing the discoverability of surety claims files (section C).

A. *Ordinary Business Record "Doctrine"*

Courts have distinguished privileged materials prepared in anticipation of litigation from ordinary nonprivileged business records.[166] For example, accident reports completed as a matter of policy whenever an "untoward event" has occurred have been deemed discoverable as a report created in the "ordinary line of business and duty."[167] Whether documents were prepared in anticipation of litigation, rather than for an ordinary business function, is a factual determination that Wright and Miller define as follows:

> The test should be 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. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.[168]

The Advisory Committee notes to Rule 26(b)(3) likewise differentiate ordinary business records from privileged work product: "Materials assembled in the ordinary course of business . . . or for other non-litigation purposes are not under the qualified immunity provided by this subdivision."

As discussed above, the requirement that privileged attorney work product be created for or in anticipation of litigation has two components: a causation element and a "reasonableness" limit on a party's anticipation of litigation.[169] As to the first, the production of material must be caused by anticipated litigation. If materials are produced in the ordinary and regular course of an opponent's business, and not to prepare for litigation, they are outside the scope of the work product doctrine, even if litigation is imminent.[170] As for "anticipation of litigation" in the context of accidents, since litigation can be anticipated when almost any accident occurs, some courts require a "substantial and significant threat of litigation" before the

166. *See, e.g.*, Southern Bell Tel. & Tel. v. Deason, 632 So. 2d 1377 (Fla. 1994) (management's personnel summaries containing thoughts and impressions of managers based on counsel's communications and attorney work product were not protected as attorney work product because Southern Bell had *not* proven that panel recommendations were prepared for anything other than ordinary business function regarding disciplining employees).

167. Shotwell v. Winthrop Comm. Hosp., 531 N.E.2d 269 (Mass. App. Ct. 1988).

168. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE at 198–99 (1970).

169. Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655 (S.D. Ind. 1991); *see also* Broadnax v. ABF Freight Systems, Inc., 1998 U.S. Dist. LEXIS 12202 (N.D. Ill. 1998) ("Ordinarily, we have found it helpful to express the elements of the work product doctrine into the concepts of 'causation' and 'reasonable anticipation' of litigation.").

170. *Harper*, 138 F.R.D. at 660; Allendale Mut. Ins. Co. v. Bull Data System Inc., 145 F.R.D. 84, 87 (N.D. Ill. 1992).

anticipation of litigation will be deemed a reasonable and justifiable motivation for creating the document; this requires a showing of objective facts establishing an identifiable resolve to litigate.[171] Other courts deem the mere "prospect" of litigation to suffice,[172] and thus the occurrence of an event that could foreseeably be made the basis of a claim would give rise to a work product privilege.[173]

In accordance with the distinction drawn between litigation and ordinary business records, documents reflecting investigations and analyses performed to fulfill a statutory duty are not privileged, even if the documents have an incidental use in litigation.[174] Similarly, documents required to fulfill a contractual duty have also been deemed ordinary business records.[175]

Although described by some courts as an "exception" to the work product doctrine,[176] documents created in the ordinary course of business are not deemed privileged because they fall outside the confines of the work product privilege, rather than constituting an exception to it. Defining ordinary business records as "nonprivileged," as opposed to excepted from the work product privilege pursuant to an exclusion, clarifies that the burden with respect to asserting and establishing the privilege properly rests with the claimant of the privilege, not the party seeking production. The burden of establishing that documents are not merely ordinary business records rests with the proponent of the privilege; thus, the proponent of the privilege must show that the "ordinary business record exception" does

171. *Allendale*, 145 F.R.D. at 87.

172. Banks v. Wilson, 151 F.R.D. 109, 112 (D. Minn. 1993) (defining test as "whether document can fairly be said to have been prepared or obtained because of the prospect of litigation.").

173. Anchor Nat'l Financial Services, Inc. v. Smeltz, 546 So. 2d 760 (Fla. Dist. Ct. App. 1989); Winn-Dixie, Inc. v. Nakutis, 435 So. 2d 307 (Fla. Dist. Ct. App. 1983); Florida Cypress Gardens, Inc. v. Murphy, 471 So. 2d 203 (Fla. Dist. Ct. App. 1985); *but see* Cotton States Mut. Ins. Co. v. Turtle Reef Assoc., Inc., 444 So. 2d 595 (Fla. Dist. Ct. App. 1984) (requiring more than mere possibility of litigation).

174. *See, e.g.*, Curiale v. Phoenix General Ins. Co., S.A., 1991 U.S. Dist. LEXIS 15493 (S.D.N.Y. 1991) (audit that was undertaken "principally, if not exclusively" to permit discharge of statutory duty to marshal and plan for the disposal of company's assets in dissolution proceeding was ordinary business record); Schmidt v. California State Auto. Ass'n, 127 F.R.D. 182, 184 (D. Nev. 1989) (absent special circumstances, when insurer has duty to investigate, its investigative reports are prepared in ordinary course of business, and not in anticipation of litigation).

175. Ring v. Commercial Union Ins. Co., 159 F.R.D. 653 (M.D.N.C. 1995) (insurer cannot reasonably argue entirety of claims file was accumulated in anticipation of litigation with insured because insurer owes duty to insured to make decision regarding insured's claims).

176. *See, e.g.*, National Tank Co. v. Brotherton, 851 S.W.2d 193, 205–06 (Tex. 1993) (rejecting any "bright-line ordinary course of business exception"); Weiss v. Muccillo, 1997 U.S. Dist. LEXIS 17871 (S.D.N.Y. 1997) ("One focus of that discussion [regarding claims adjusters' reports for third-party claims] has concerned the applicability of an ordinary course of business 'exception' to the work product doctrine.").

not apply. Any ambiguity as to whether a document is or is not an ordinary business record should be resolved against according it any privileged status.[177] Documents produced in part for ordinary business purposes are deemed to be subject to discovery;[178] only documents created solely,[179] or at least primarily,[180] for litigation purposes are protected.

To what extent are business management data on litigation exposure, such as loss reserve data, statistical analyses, and compilations of claims data maintained by insurers and sureties, discoverable? The Eighth Circuit explored these issues in the context of defective product litigation in *Simon v. G.D. Searle & Co.*[181] The case addressed whether corporate risk management documents prepared by nonlawyer corporate officials, but revealing aggregate information compiled from counsel's individual case reserves, were protected from discovery by the work product doctrine or the attorney-client privilege.[182] The special master found that the risk management documents at issue, many of which included litigation reserve information based on counsel's estimates, were generated to keep track of,

177. As the burden of establishing all the elements of the privilege rests with the party asserting the privilege, any ambiguity as to whether a document is privileged, or the absence of proof establishing the existence of a privilege should result in the document being deemed subject to production. *See, e.g.*, Nationwide Mut. Fire Ins. Co. v. Harmon, 580 So. 2d 192 (Fla. Dist. Ct. App. 1991) (petition challenging order compelling production of insurer's investigative files denied where there was no showing whether materials were produced in anticipation of litigation or were investigations conducted during normal business of evaluating claim); Ring v. Commercial Union Ins. Co., 159 F.R.D. 653, 658 (M.D.N.C. 1995) (motion to compel undated document was granted because it may have been created before litigation was anticipated).

178. *See, e.g.*, Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655 (S.D. Ind. 1991) ("Documents prepared for concurrent purposes . . . should not be classified as work product. Such an approach is consistent with the purposes of the work product rule and avoids the impossibility of weighing the motive behind the creation of the document to determine which one is primary."); Henry Enterprises, Inc. v. Smith, 592 P.2d 915 (Kan. 1979) (when statement was taken for two reasons, one of which was to review and evaluate claim properly, i.e., for ordinary business purpose, and other to defend claim should it be filed, document was subject to discovery).

179. *See, e.g.*, Bogan v. Northwestern Mut. Life Ins. Co., 163 F.R.D. 460, 463 (S.D.N.Y. 1995) (affirming trial court's order to produce insurer's documents concerning related disability insurance claim because while litigation was reasonably anticipated, if documents were created in part to process insured's claim and not prepared solely in anticipation of litigation, documents not protected by work product shield).

180. United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981) ("Litigation need not be imminent . . . as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation."); Curiale v. Phoenix General Ins. Co., S.A., 1991 U.S. Dist. LEXIS 15493 (S.D.N.Y. 1991) ("As a general matter, the work-product rule applies only to documents prepared principally or exclusively to assist in anticipated or ongoing litigation.")

181. 816 F.2d 397 (8th Cir. 1987).

182. *Id.* The court also addressed whether Rule 26(b)(2), Federal Rules of Civil Procedure, permitting discovery of insurance agreements, limited discovery of corporate risk management documents to the insurance agreement. The court rejected the attempt to read this rule as a limit on discovery.

control, and anticipate the costs of products liability litigation.[183] In rejecting the attorney-work product privilege claim, the court noted that the risk management department that generated the documents was "not involved in giving legal advice or in mapping litigation strategy in any individual case"; the aggregate reserve information in the risk management documents served "numerous business planning functions," but did not enhance the defense of any particular lawsuit.[184] The manufacturer's argument that its business was health care, not litigation, was rejected: "[The manufacturer's] business involves litigation, just as it involves accounting, marketing, advertising, sales, and many other things. A business corporation may engage in business planning on many fronts, among them litigation."[185]

Although the risk management documents were not themselves prepared in anticipation of litigation, to the extent that they disclosed the individual case reserves calculated by counsel, and thus revealed the attorney's mental impressions, thoughts, and conclusions in evaluating legal claims, they are protected as opinion work product.[186] However, the aggregate reserve information did not reveal any individual case reserves and were not even direct compilations of the individual figures, but rather factored in with other variables, making the determination of any individual case reserve impossible. Thus, the work product doctrine was not violated by allowing discovery of documents that "incorporate a lawyer's thoughts in, at best, such an indirect and diluted manner." As to the attorney-client privilege, the court declined to address whether any privilege attached to particular case reserves, but deemed that the aggregate information did not disclose any individual case reserve information from counsel that could be deemed privileged.

If compilations of litigation reserves are not privileged, as stated in *Simon*, then the surety's compilations of claims data would be discoverable (or at least not privileged). As pointed out in the dissent, the *Simon* rationale extends the privilege to the parts that comprise the total analysis, but not to the total analysis itself; thus, the issue of privilege is resolved on how diluted the attorney's mental impressions are.[187] The dissent also criticizes the conclusion that risk management documents were created in the ordinary course of business because it causes the "exception to swallow the rule and makes the anticipation-of-litigation test meaningless" as applied to employee-prepared documents. The dissent's critique may unduly underplay the causation element of the privilege; however, following the ma-

183. *Id.* at 400.
184. *Id.* at 401.
185. *Id.*
186. *Hickman*, 329 U.S. at 512; *In re* Murphy, 560 F.2d 326, 336 (8th Cir. 1977).
187. *Id.* at 405–06 (Gibson, J., dissenting).

jority's logic[188] to its ultimate conclusion would mean that no in-house surety documents could be privileged because the surety's ordinary business is litigation. Thus, *Simon* seems to apply to "ordinary business records" of entities that are not in the "business of litigation." The application of the ordinary business record doctrine to entities that engage in litigation in the ordinary course of business, such as a surety, has been developed in cases addressing the discoverability of insurance claims files.

B. *Insurance Claims Files as Privileged Work Product (or Not)*

Because a significant part of an insurer's business is to investigate and assess claims, whether or not litigation ensues, the issue arises whether such documents are ordinary business records, subject to production, or privileged and thus immune from discovery. Again, courts have offered three different responses to the issue of whether an insurer's claim investigation is performed in the ordinary course of business, rendering the records subject to production: (1) yes, of course; (2) no, absolutely not; and (3) maybe (the "case-by-case approach").[189]

1. The "Yes, of Course" Majority:[190] Insurer's Claim Investigation Is Performed in Ordinary Course of Business

A majority of the courts applying the federal work product privilege rule recognize that a significant part of an insurance carrier's business is to investigate and assess claims. As the Colorado Supreme Court explained in *Hawkins v. District Court*:[191]

> Because a substantial part of an insurance company's business is to investigate claims made by an insured against the company or by some other party against an insured, it must be presumed that such investigations are part of the normal business activity of the company and that reports and witness' statements compiled by or on behalf of the insurer in the course of such investigations are ordinary business records as distinguished from trial preparation materials.[192]

Courts that define claims investigation as a normal business activity of the insurer deny work product protection to insurance reports prepared after accidents that may generate a claim. *Thomas Organ Co. v. Jadranska Slobodna Plovidba*[193] is cited as the seminal case in the "yes, of course" turn-

188. *See* AMBROSE BIERCE, THE DEVIL'S DICTIONARY: "Logic, n. The art of thinking and reasoning in strict accordance with the limitations and incapacities of the human misunderstanding."

189. Haynes v. Anderson, 597 So. 2d 615, 618–19 (Miss. 1992) (describing three different approaches adopted by courts); Harriman v. Maddocks, 518 A.2d 1027, 1032 (Me. 1986) (describing two categorical approaches and third fact-based analysis).

190. At least one court, which disagrees with the "majority approach," contests whether this is in fact the approach of the majority. *Harriman*, 518 A.2d at 1033 at n.9.

191. 638 P.2d 1372 (Colo. 1982).

192. *Id.* at 1378.

193. 54 F.R.D. 367 (N.D. Ill. 1972).

it-over school. In *Thomas Organ*, involving the investigation of a vessel's cargo loss, the court found:

> [A]ny report or statement made by or to a party's agent (other than to any attorney acting in the role of counselor), which has not been requested by nor prepared for an attorney nor which otherwise reflects the employment of an attorney's legal expertise must be conclusively presumed to have been made in the ordinary course of business and thus not within the purview of the limited privilege of . . . Rule 26(b)(3) and (b)(4). . . .
>
> . . . .
>
> An insurance company by the nature of its business is not called into action until one of its insureds has suffered some form of injury and has a potential claim against some other party and/or the insurer itself. At this point, the insurer must conduct a review of the factual data underlying the claim . . . deciding whether to resist the claim, to reimburse the insured and seek subrogation . . . or to reimburse the insured and forget about the claim thereafter. . . . We do not believe that Rule 26(b)(3) was designed to so insulate insurance companies merely because they always deal with potential claims.[194]

Thus, the insurer's conclusory assertion of a work product privilege for a marine surveyor's reports regarding damages was rejected because claims investigations are performed in the ordinary course of business: "If every time a party prepared a document in the ordinary course of business to guide claim handling this document was deemed to be in anticipation of litigation it is difficult to see what would be discoverable."

Courts in this "produce it" school hold that unless the carrier's investigation was performed at the behest of or under the direction of counsel, all materials resulting from the investigation are "conclusively presumed to have been made in the ordinary course of business and not in anticipation of litigation."[195] Even in-house reports "prepared in order to determine whether to anticipate litigation," as opposed to defending litigation, have been deemed ordinary business records.[196] *Thomas Organ* has been construed as meaning that the lack of attorney involvement is dispositive

194. *Id.* at 372–73.

195. Henry Enterprise, Inc. v. Smith, 592 P.2d 915, 920 (Kan. 1979). *Accord* Western Nat'l Bank v. Employers Ins. of Wausau, 109 F.R.D. 55 (D. Colo. 1985); APL Corp. v. Aetna Cas. & Sur. Co., 91 F.R.D. 10, 17 (D. Md. 1980) ("[W]hile litigation often results from an insurance company's denial of a claim, it cannot be said that any document prepared by an insurance company after such a claim has arisen is prepared in anticipation of litigation within the meaning of Rule 26(b)(3)"); Langdon v. Champion, 752 P.2d 999, 1007 (Alaska 1988) ("An insurance company routinely investigates possible claims whether or not there is any possibility of litigation, and we do not believe that [the work product doctrine] was intended to insulate insurers from discovery merely because they regularly deal with potential claims").

196. McFadden v. Norton Co., 118 F.R.D. 625 (D. Neb. 1988) (report prepared to determine whether to anticipate litigation "was in keeping with the defendant's prudent business policies of evaluating claims in-house, prior to determining its response to the letter notifying it of the subrogation claim").

in *denying* a privilege claim.[197] The converse, that the involvement of counsel in any capacity gives rise to a privilege, is not necessarily true. The *Thomas Organ* case may have turned out the same way even if an attorney had been involved if the attorney's sole function had been to perform the business function of adjusting the claim, as explained above. For courts that define claims adjustment and the initial fact investigation as ordinary business functions of an insurer, retaining a law firm to perform the claims assessment will not protect the claims file from discovery.[198] For other courts, the involvement of outside counsel is "highly relevant," but not determinative in of itself as to whether the investigation was performed for anything but ordinary business reasons.[199]

Courts that define claims investigation and adjusting as a normal business function of insurers are nonetheless faced with the unavoidable fact that at some point unresolved claims end up in litigation. When counsel is engaged is not a satisfactory criterion in and of itself for determining when the privilege begins because with the prevalence of bad faith litigation, insurers often engage counsel to assist with the ordinary business function of adjusting a claim.[200] As noted by the court in *Carver v. Allstate Insurance Co.*, "At some point, however, an insurance company's activity shifts from mere claims evaluation to a strong anticipation of litigation."[201] Whenever an insurer has a general suspicion about a claim that gives the insurer reason to believe it will deny the claim, the insurer may anticipate litigation.

> When the insurer has knowledge of specific and articulable facts which give it a reasonable suspicion about the validity of the claim, the insurer can assume

197. Professor Moore criticized the *Thomas Organ* approach for making the involvement of an attorney a "prerequisite to the application of Rule 26(b)(3)." 4 J. MOORE, MOORE'S FEDERAL PRACTICE § 26.64[2], at 358–60 (1984); *see also* Harriman v. Maddocks, 518 A.2d 1027, 1033 (Me. 1986) (adopting Moore's critique); Cigna-INA/Aetna v. Hagerman-Shambaugh, 473 N.E.2d 1033, 1039 n.2 (Ind. Ct. App. 1985) (criticizing that portion of *Thomas Organ* opinion stating conclusive presumption that reports not prepared at direction of attorney are not privileged; adopting proposition that applying blanket privilege to insurer files is inequitable).

198. *See* Mission Nat'l Ins. Co. v. Lilly, 112 F.R.D. 160 (D. Minn. 1986).

199. Ring v. Commercial Union Ins. Co., 159 F.R.D. 653 (M.D.N.C. 1995).

200. Dunn v. State Farm Fire & Cas. Co., 122 F.R.D. 507, 510 (N.D. Miss. 1988) (because courts scrutinize acts of insurer, "insurance companies retain counsel to help evaluate the claim and advise the insurer whether the insurer has an arguable reason to deny the claim"; thus, attorney who helps adjust claim becomes part of regular course of insurer's business); National Farmers Union Property and Cas. Co. v. District Court of Denver, 718 P.2d 1044 (Colo. 1986) (insurer may not avail itself of work product doctrine simply because it hired attorneys to perform factual investigation into whether claim should be paid; as attorneys were performing function of claims adjuster, their report was ordinary business record).

201. 94 F.R.D. 131, 134 (S.D. Ga. 1982); *see also* Cotton States Mut. Ins. Co. v. Turtle Assoc., Inc., 444 So. 2d 595, 596 (Fla. Dist. Ct. App. 1984) (when "the object is to determine whether to honor the claim or resist it, and whether to seek subrogation against a third party these investigations are performed in the ordinary course of business and documents related to these preliminary investigations are not deemed to be privileged work-product").

> litigation is imminent. When this occurs, the attorney's role changes from a legal adviser to the insurer's adjusting process to a barrister preparing for a lawsuit. The insurer must demonstrate when this point in time was reached by showing when it was aware of specific and articulable facts which made it suspicious of the insured's claim.[202]

Courts have also referred to "the need for establishing an identifiable resolve to litigate" before the work product doctrine becomes applicable.[203]

Thus, the courts that start with the premise that claims handling is the insurer's ordinary business must define when nonprivileged claims analysis ends and privileged prelitigation preparation begins. The *Carver* approach requires the court to define a point in time to serve as a line of demarcation between ordinary claims adjusting and litigation preparation. This approach has been criticized for eliminating the causation component for the attorney-work product privilege.[204] In focusing on determining when the insurer reasonably anticipated litigation, the courts eliminate the requirement that the document also be prepared for the purpose of litigation.

Another problem is defining an objective standard for determining when litigation is first reasonably deemed anticipated. The denial of the claim is often cited as the point of demarcation between ordinary business and litigation preparation, when the work product privilege arises.[205] Some

202. Dunn v. State Farm Fire & Cas. Co., 122 F.R.D. 507, 510 (N.D. Miss. 1988).

203. Joyner v. Continental Ins. Cos., 101 F.R.D. 414, 416 (S.D. Ga. 1983); *see also* Fine v. Bellefonte Underwriters Ins. Co., 91 F.R.D. 420 (S.D.N.Y. 1981); Pete Rinaldi's Fast Foods v. Great American Ins., 123 F.R.D. 198 (M.D.N.C. 1988).

204. Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 662 (S.D. Ind. 1991) (". . . focusing solely on the point of time when litigation could reasonably have been foreseen ignores the fundamental requirement of the Rule that the documents be produced because of the threat of litigation, for the purpose of litigation."); *see also* Bogan v. Northwestern Mut. Life Ins. Co., 163 F.R.D. 460, 464 (S.D.N.Y. 1995) (while prospect of litigation may have been reasonable, insurer must still satisfy causation requirement, which is fact-specific inquiry into purpose that motivated creation of documents).

205. *See, e.g.*, Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 663 (S.D. Ind. 1991) ("[A] document or thing produced or used by an insurer to evaluate an insured's claim in order to arrive at a claims decision in the ordinary and regular course of business is not work product. . . ."); State Farm Fire & Cas. Co. v. Perrigan, 102 F.R.D. 235 (W.D. Va. 1984) (investigator's report was prepared in ordinary course of business, and not in anticipation of trial, and thus was discoverable despite work product claim because report was prepared while insurer was adjusting claim and before deciding whether to pay loss or become involved in litigation); Cigna-INA/Aetna v. Hagerman-Shambaugh, 473 N.E.2d 1033 (Ind. Ct. App. 1985) (documents could be deemed to have been created as part of insurer's evaluation leading up to its payment or denial of claim, and thus denial of privilege was not improper); APL Corp. v. Aetna Cas. & Sur. Co., 91 F.R.D. 10, 21 (D. Md. 1980) (only after investigation is completed and resulting denial of claim has occurred did substantial probability of litigation arise). *Cf.* Bogan v. Northwestern Mut. Life Ins. Co., 163 F.R.D. 460, 464 (S.D.N.Y. 1995) (fact that there has not been denial is only one factor among others to consider); Ring v. Commercial Union Ins. Co., 159 F.R.D. 653, 656 (M.D.N.C. 1995) (while stating that "general rule" is that "reasonable possibility of litigation" only arises after insurer decides about claim, making only documents accumulated after claim denial as done in anticipation of litigation, threat of litigation was established earlier; insurer satisfied burden of persuasion by presenting specific proof demonstrating "resolve to litigate" claim soon after initiating investigation).

courts have even defined documents created after denial of the claim as being ordinary business records that are subject to discovery.[206] Conversely, circumstances surrounding a claim may make litigation imminent long before the claim is denied.[207] The analysis of the particular facts and circumstances implicit in the *Carver* approach makes these cases close to the case-by-case methodology adopted by some courts (described below as the "maybe" category).[208]

Although not apparent in the rationale of *Thomas Organ* or in its progeny, courts have drawn a distinction between first- and third-party insurance claims, noting that most cases that deny work product protection to adjusters' reports are "first party," as opposed to third-party insurance claims, which involve claims that can only be established by litigation.[209] As third-party insurance, unlike first-party coverage, is essentially "litigation insurance," some courts deem adjuster reports created in these situations as being more likely to have been prepared in anticipation of litigation.[210]

2. The "No, Absolutely Not" Minority: Insurer's Claim Investigation File Is Prepared in Anticipation of Litigation

Some courts disagreeing with the liberal discovery and restrictive application of the privilege adopted in *Thomas Organ* have applied a per se work product privilege to insurance reports prepared following incidents.[211] Under the minority federal view, courts define all insurers' investigations as

206. *See, e.g.*, Westhemeco Ltd. v. New Hampshire Ins. Co., 82 F.R.D. 702, 708–09 (S.D.N.Y. 1979) ("At a certain point an insurance company's activity shifts from the ordinary course of business to anticipation of litigation"; however, documents created by insurer's investigator after denial of coverage but created "in the usual course of business of an insurer, namely investigating a claim," are discoverable).

207. *See, e.g.*, Lett v. State Farm Fire and Cas. Co., 115 F.R.D. 501 (N.D. Ga. 1987) (point where probability of litigating claim was substantial and imminent was date claim file was turned over to special investigation unit and copied to counsel with notation expressing concern that insured was possibly involved in causing loss); Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869 (5th Cir. 1991) (signed confession as to having intentionally set fire gave cause to anticipate litigation over fire loss claim).

208. Haynes v. Anderson, 597 So. 2d 615, 618 (Miss. 1992) (describing *Carver* as adhering to "case-by-case" approach).

209. McCullough v. Standard Pressing Machines Co., 39 Va. Cir. 191; 1996 Va. Cir. LEXIS 131 (1996).

210. Ring v. Commercial Union Ins. Co., 159 F.R.D. 653, 656 n.1 (M.D.N.C. 1995) (in third-party litigation, where insurer investigates accident caused by insured, litigation may be anticipated very early in investigation).

211. *See, e.g.*, Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89 (E.D. Mo. 1980); Basinger v. Glacier Carriers, Inc., 107 F.R.D. 771, 773–74 (M.D. Pa. 1985); Almaguer v. Chicago, R.I. & P.R. Co., 55 F.R.D. 147 (D. Neb. 1972); Fireman's Fund Ins. Co. v. McAlpine, 391 A.2d 84 (R.I. 1978); *see also* Winn Dixie Stores, Inc. v. Nakutis, 435 So. 2d 307, 308 (Fla. Dist. Ct. App. 1983) ("It is hardly arguable that an accident report of a slip and fall . . . prepared by the grocery store employees . . . is not a document prepared in anticipation of litigation.").

being undertaken in anticipation of litigation. As the Iowa Supreme Court observed in *Ashmead v. Harris*:

> In our litigious society, when an insured reports to his insurer that he has been involved in an incident involving another person, the insurer can reasonably anticipate that some action will be taken by the other party. The seeds of prospective litigation have been sown, and the prudent party, anticipating this fact, will begin to prepare his case. Although a claim may be settled short of the instigation of legal action, there is an ever-present possibility of a claim's ending in litigation. The recognition of this possibility provides, in any given case, the impetus for the insurer to garner information regarding the circumstances of a claim.[212]

If claims are deemed to be adjusted in anticipation of litigation, then almost all information in an insurer's claim file is protected from discovery by the work product doctrine. While the minority view may not permit the insured to discover certain claim documents in coverage litigation against a carrier, it does protect the insured and the carrier from being forced to disclose potentially damaging documents to an underlying claimant.

A virtue of the minority approach is certainty, which lends itself to ease of application:[213] this approach denies all discovery. In *Harriman v. Maddocks*, the Maine Supreme Court rejected the "factual assumption that the case file compiled by an insurance adjuster in the ordinary course of his business is not 'prepared in anticipation of litigation' within the meaning of Rule 26(b)(3)." The court adopted the absolute approach in part because of its ease of application: "In light of the need for efficient resolution of discovery motions," any detailed analysis was deemed "unworkable."[214] Considering the actual facts would be a "complex and time consuming procedure"; performing any analysis could be avoided altogether by adopting the rule that "a document prepared in the regular course of business may be prepared in anticipation of litigation when the party's business is to prepare for litigation."[215]

As discussed in the previous section, some courts suggest that the protection afforded under the minority "absolutely, no" view may apply only to cases involving third-party, and not first-party insurance claims.

The Alaska Supreme Court criticized the minority approach:

212. 336 N.W.2d 197, 201 (Iowa 1983) (quoting Fireman's Fund Ins. Co. v. McAlpine, 391 A.2d 84, 89–90 (R.I. 1978)).

213. Death and taxes are also certain, but not necessarily desirable. One might also note that no one values anything that is cheap and easy, unless it's a divorce.

214. *Id.* at 1033.

215. *Id.* (citing Ashmead v. Harris, 336 N.W.2d at 200).

> The minority rule, we believe, is flawed because it presumes too much. Simply because an event has occurred which may require an insurer to provide payments under its contract with an insured does not automatically transform an insurer's activities into preparation for litigation. An insurance company routinely investigates possible claims whether or not there is any possibility of litigation, and we do not believe that [the work product doctrine] was intended to insulate insurers from discovery merely because they regularly deal with potential claims. The minority rule also improperly relieves insurers and their insureds of a substantial portion of the obligations of discovery imposed on parties generally. . . . Indeed, under the minority rule, hardly any document authorized by or for an insurer is discoverable without the showing of substantial need and undue hardship. . . .[216]

3. The "Maybe" Standard

Courts rejecting the categorical approaches adopted by the *Thomas Organ* and *Ashmead* courts have chosen to employ a case-by-case approach under which the court engages in a detailed, factual analysis to determine: "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."[217]

Frustrated with the conundrum of defining claims adjustment as either an "ordinary business practice" *or* prelitigation preparation (because it is both), some courts and commentators have suggested abandoning the "ordinary course of business" analysis altogether.[218] These courts have focused on the causation element: the motivation in creating the record. Thus, while "litigation need not be imminent, the primary motivating purpose behind the creation of document or investigative report must be to aid in

216. Langdon v. Champion, 752 P.2d 999, 1006–07 (Alaska 1988).

217. State Farm Fire & Cas. Ins. Co. v. Perrigan, 102 F.R.D. 235, 238 (W.D. Va. 1984); *see also* Airheart v. Chicago & North Western Transp. Co., 128 F.R.D. 669 (D.S.D. 1989); Mission National Ins. Co. v. Lilly, 112 F.R.D. 160, 164 (D. Minn. 1986) (adopting as best approach "a case-by-case analysis, considering the unique factual context of the given problem."); Haynes v. Anderson, 597 So. 2d 615 (Miss. 1992) (citing *Carver*, adopting case-by-case approach should consider nature of documents, relationship of parties, and other facts peculiar to case); Pete Rinaldi's Fast Foods v. Great American Ins. Cos., 123 F.R.D. 198, 201–02 (M.D.N.C. 1988); Sham v. Hyannis Heritage House Hotel, Inc., 118 F.R.D. 24, 36 (D. Mass. 1987).

218. Weiss v. Muccillo, Culpepper, Inc., 1997 U.S. Dist. LEXIS 17871 (S.D.N.Y. 1997) (citing Jeff A. Anderson, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 855 and 852 (1983):

> In sum, because of the problems the ordinary course of business exception creates, courts should abandon it and instead follow the rule 26(b)(3) framework. When faced with a work product problem, a court should decide first, on the basis of the facts of the case, whether the material was prepared in anticipation of litigation, and second, whether the party seeking discovery of the material has substantial need for it. . . . A court should treat the ordinary course of business criterion as merely one factor among many when applying the anticipation of litigation test.

possible future litigation." As stated in *Janicker v. George Washington University*:[219]

> The mere contingency that litigation may result is not determinative. If in connection with an accident or an event, a business entity in the ordinary course of business conducts an investigation for its own purposes, the resulting investigative report is producible in civil pretrial discovery.
>
> . . . .
>
> A more or less routine investigation of a possibly resistible claim is not sufficient to immunize an investigative report developed in the ordinary course of business. While litigation need not be imminent, the primary motivating purpose behind the creation of a document or investigative report must be to aid in possible future litigation.

Under this analysis, the courts have focused not on the pendency of litigation, but rather on the document itself. "[T]he test should be 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."[220]

For some courts, another fact that plays into the analysis is whether the underlying claim involves first-party or third-party "litigation insurance." This factor is weighed by the Middle District Court in North Carolina in its fact-specific analysis:

> When the party seeking the work product does not have a special relationship with the insurer, different considerations may apply. For example, in investigations of an accident, because of potential claims by the third party against the insured, the possibility of litigation might arise at an earlier time. However, when the claim is made by its insured, an insurance company cannot in good faith contend that there is a reasonable possibility of litigation with respect to every claim submitted to it.[221]

The Texas Supreme Court's rejection of an "ordinary business exception" to the attorney-work product doctrine in *National Tank Co. v. Broth-*

219. 94 F.R.D. 648, 650 (D.D.C. 1982).

220. *APL Corp.*, 91 F.R.D. at 15 (citation omitted); *see also* Henderson v. Zurn Indus., 131 F.R.D. 560 (S.D. Ind. 1990) (same).

221. Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos., 123 F.R.D. 198, 202 (M.D.N.C. 1988). *See also* Henderson v. Zurn Industries 131 F.R.D. 560, 571 n.11 (S.D. Ind. 1990) (court acknowledged difference between third-party claims against carrier and direct first-party claims: "One would expect there to be more litigation on third-party claims than on direct first-party contract actions, with a resultant increased anticipation of such litigation in the third-party context."); Ring v. Commercial Union Ins. Co., 159 F.R.D. 653 (M.D.N.C. 1995) (with first-party claims, general rule is that entirety of claims file is not accumulated in anticipation of litigation with its insured because of duty to make decision with respect to insured's claims; however, situation in third-party insurance case, where person other than insured sues and insurer is investigating accident caused by its insured, litigation may be anticipated very early on in investigation); Baker v. CNA Ins. Co., 123 F.R.D. 322 (D. Mont. 1988).

erton[222] seems to place this jurisdiction in the "fact-specific analysis category"; however, the standard enunciated in this case puts it closer to the *Ashmead* "absolutely not" school. In deciding whether accident reports and witness statements prepared by the insured and insurer were subject to work product privilege, the court determined that such reports, even if compiled in the ordinary course of business, are privileged if they satisfy objective and subjective tests. The objective requirement is satisfied whenever the circumstances surrounding the investigation would have indicated to a reasonable person that there was a substantial chance of litigation, i.e., litigation is "more than merely an abstract possibility or unwarranted fear."[223] Thus, the objective anticipation of litigation may arise before the claimant "manifests an intent to sue" or even from the circumstances of the accident itself, such as its severity. The subjective element is satisfied if "the party invoking the privilege believes in good faith that there is a substantial chance that litigation will ensue."[224] As pointed out by the dissent, this liberal standard envelops all information in a privilege. Given this standard, it is hard to imagine any surety investigation that would not be privileged.

As implied in the *National Tank Co.* dissent, courts purporting to apply a fact-specific analysis, rather than a categorical approach that defines claims files as either privileged or ordinary business records, often simply assign a privileged status to all documents created in the wake of a claim on the assumption that the existence of the claim will give rise to litigation. Rather than performing a fact-specific analysis, these courts simply apply a priori definitions. Thus, while the court in *Janicker*[225] purported to adopt a fact-specific inquiry, the insurer's investigative file was held to be work product, immunized from pretrial discovery, as it was prepared in anticipation of claims because these claims, if denied, would have clearly led to suits. Thus, courts advocating a fact-based approach invariably slide into the "yes, of course" or the "no, absolutely not" schools, with a bias towards the latter.

4. Bad Faith Dealing (BFD)

Even if a document is privileged under the attorney-work product doctrine, fact work product has only a conditional privilege that can be overcome upon a showing of need. Allegations of bad faith may provide circumstances under which the claimant can show need.[226] To make the requisite showing

222. 851 S.W.2d 193, 197–98 (Tex. 1993).
223. *Id.* at 204.
224. *Id.*
225. 94 F.R.D. 648 (D.D.C. 1982).
226. *See, e.g.*, Western Nat'l Bank v. Employers Ins. of Wausau, 109 F.R.D. 55 (D. Colo. 1985) (insured was entitled to discovery of letters from insurer's law firm retained since test for recovery in bad faith action was whether reasonable insurer would have denied claim

of need, the insured must show that it cannot obtain the substantial equivalent from deposition or other sources.[227]

In *Logan v. Commercial Union Insurance Co.*[228] the Seventh Circuit noted that allowing the insured to overcome the privilege was particularly appropriate in insurance bad faith cases "in light of the insurer's virtual monopoly over the evidence required to support such an action."[229] However, a mere allegation of bad faith will not overcome the privilege. The insured seeking disclosure "must demonstrate some likelihood or probability that the documents sought contain evidence of bad faith"; the insured need only show the possibility, not the certainty, that the documents sought contain evidence of bad faith.[230] In *Logan*, the insured's request for the insurer's files was denied because the trial court, after conducting an in camera examination of the documents, concluded that they contained no evidence of bad faith, and thus the insured failed to show substantial need.[231]

Some courts faced with a bad faith claim coupled with an underlying contract claim bifurcate the bad faith claim from the contract action, allowing the underlying insurance claim to be resolved first.[232]

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under similar facts and circumstances, and insured was also allowed to obtain discovery of law firm's file because file was investigative, prepared in the ordinary course of business, rather than work product); Kujawa v. Manhattan Nat'l Life Ins. Co., 541 So. 2d 1168 (Fla. 1989) (stating cause of action for bad faith processing of claims did not abolish privileges accorded to investigation files; attorney work product can be overcome upon satisfying rule); Loftis v. Amica Mut. Ins. Co., 175 F.R.D. 5 (D. Conn. 1997) (in bad faith action, plaintiff failed to show need for opinion work product of attorney engaged to advise insurer of bad faith exposure; insurer already produced evidence of its handling of claim).

227. *See, e.g.*, Lett v. State Farm Fire and Cas. Co., 115 F.R.D. 501, 504 (N.D. Ga. 1987); Carver v. Allstate Ins. Co., 94 F.R.D. 131, 136 (S.D. Ga. 1982); *cf.* Joyner v. Continental Ins. Cos., 101 F.R.D. 414, 416 (S.D. Ga. 1983) (insurer's investigative reports were "prime candidates" for discovery in bad faith action because of exclusive knowledge of party); Hodges v. Southern Farm Bureau Cas. Ins. Co., 433 So. 2d 125 (La. 1983) (plaintiff in insurance bad faith case could not obtain substantial equivalent of insurer's documents by other means; accuracy of documents could not be duplicated by deposing insurer's officers who would have to rely on memory).

228. 96 F.3d 971 (7th Cir. 1996).

229. *Id.* at 977; *see also* Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 576–78 (9th Cir. 1992) ("In a bad faith insurance claim settlement case, the 'strategy, mental impressions and opinion of [the insurer's] agents considering the handling of the claim are directly at issue,'" and thus it is clear that "unless the information is available elsewhere, a plaintiff may be able to establish a compelling need for evidence in the insurer's claim file regarding the insurer's opinion of the viability and value of the claim."); Reavis v. Metropolitan Property & Liability Ins. Co., 117 F.R.D. 160, 164 (S.D. Cal. 1987).

230. *Id.*

231. *Id. See also* Rosa Lee Ring v. Commercial Union Ins. Co., 159 F.R.D. 653 (M.D.N.C. 1995) (plaintiff who failed to make prima facie case of bad faith failed to make sufficient showing to obtain insurer's work product).

232. *In re* Bergeson, 112 F.R.D. 692 (D. Mont. 1986); Corrente v. Fitchburg Mut. Fire Ins. Co., 557 A.2d 859 (R.I. 1989).

C. *The (In)Applicability of Insurance Precedent*[233] *to Surety Claims*

Unfortunately, the application of attorney-work product privilege to the surety's investigative file is not as clear as in the insurance setting, where the definitive answer is yes, no, or maybe.

For many purposes, suretyship has been deemed the same as insurance. Many insurance statutes include surety contracts within their coverage.[234] Just like insurers, sureties have a duty to investigate and decide whether a claim is valid or there is any defense. Insofar as the surety is defined as an "insurer" or deemed to have similar duties to investigate claims of the obligee, the case law pertaining to the discoverability of work product in a bad faith insurance setting would be equally applicable in an obligee's bad faith action against the surety. Thus, the surety's business practice is analogous in many respects to the insurer's ordinary business practice of adjusting claims. Accordingly, the precedent in the insurance context (the yes/no/maybe paradigm) is valid in some respects for resolving work product privilege claims as to surety claims files. However, suretyship differs from insurance in certain salient respects that make the application of the work product privilege to surety files more, and less, likely than to an insurer's investigative files.

1. Applying the Insurance Paradigm

Insofar as the work product analyses involving insurer's investigative files are simply a specific application of the ordinary business doctrine, these cases provide a framework for analyzing the work product doctrine to the surety's investigative files. The respective rationales of the courts deeming investigative files to be not protected at all *(Thomas Organ* and *Langdon)*, absolutely protected *(Ashmead)*, or protected depending on the circumstances *(Dunn* and *Perrigan)* could likewise apply to the surety. Just as in insurance cases, the point of demarcation when the privilege arises could be designated as when an obligee's claim is denied or when the surety manifests an intent to litigate. However, this same framework "ordinary business doctrine" may shape a different outcome because the ordinary

233. AMBROSE BIERCE, THE DEVIL'S DICTIONARY, offers the best definition of "precedent" for the purposes of this analysis:

> Precedent, n. In Law, a previous decision, rule or practice which, in the absence of a definite statute, has whatever force and authority a Judge may choose to give it, thereby greatly simplifying his task of doing as he pleases. As there are precedents for everything, he has only to ignore those that make against his interest and accentuate those in the line of his desire. Invention of the precedent elevates the trial-at-law from the low estate of a fortuitous ordeal to the noble attitude of a dirigible arbitrament.

Id.

234. *See, e.g.*, FLA. STAT. §§ 624.155(1)(b)(1), 626.9541(I)(3)(d), and 624.03, defining surety as "insurer" for the purposes of the statute, and thus imposing statutory obligation to investigate claims made against bond and to settle those claims in good faith. *See also* ARIZ. STAT. § 20–257(2), which defines a surety as an insurer.

business function and the expectation of litigation in the surety setting are different than in the insurance setting.

The surety has different fiduciary and contractual obligations, including an obligation to investigate independently of the obligee's claims. Thus, the surety's investigations on a payment or performance bond claim serve a different business function than an insurer's investigation of a first-party or third-party claim. The wider the array of "ordinary business functions" performed by a surety, the wider the application of the ordinary business doctrine, and consequently the more confined the work product privilege.

Although an insurer does not necessarily anticipate litigation when investigating every first-party claim, the probability of a bond claim ending in litigation with either the obligee in a dispute over the claim or with the principal in a subsequent indemnity action is substantially higher. An insurance contract is an agreement to indemnify the *insured.* The insurance premium is the insured's proportionate share of the risk for the entire class of *insureds.* When a claim is paid, the insured does not indemnify the insurer. In contrast, the contract of suretyship is one to answer for the debt, default, or miscarriage of another,[235] and when the surety is called on to perform, it accrues the right of subrogation and indemnification from the principal. Suretyship could even be described as being inherently more litigious than insurance in that surety claims automatically raise the specter of litigation from either opposing the claim on the one hand or, upon satisfying the claim, litigating the indemnification claim against the principal.

As discussed above, some courts that apply an all-circumstances test in the insurance setting consider whether the insurance claim under investigation is a first-party or third-party claim.[236] For other courts, the distinction between first- and third-party claims is controlling, with the foreseeability of litigation being imminent only as to third-party claims.[237] Using the first-third party insurance scheme, a bond claim would be more analogous to a third-party claim, for which some courts assign a higher foreseeability of litigation.

Thus, applying the insurance paradigm, a surety's investigative files

235. Meyer v. Building & Realty Serv. Co., 196 N.E. 250 (Ind. 1935).

236. Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos., 123 F.R.D. 198, 202 (M.D.N.C. 1988); Ring v. Commercial Union Ins. Co., 159 F.R.D. 653 (M.D. N.C. 1995) (in third-party insurance case litigation may be anticipated very early on in investigation); Henderson v. Zurn Industries, 131 F.R.D. 560, 571 n.11 (S.D. Ind. 1990) (more litigation would be expected on third-party claims than on direct first-party contract actions, resulting in increased anticipation of litigation in third-party context); Baker v. CNA Ins. Co., 123 F.R.D. 322 (D. Mont. 1988).

237. McCullough v. Standard Pressing Machines Co., 39 Va. Cir. 191; 1996 Va. Cir. LEXIS 131 (1996).

would be accorded the same work product protection as insurance files, more protection or less protection.

2. A Paradigm for the Surety

Using the ordinary business record doctrine as the organizing scheme, with due consideration for the purpose underlying the creation of various records, the work product doctrine can be deemed to apply to records created after the surety decides whether to honor or deny the obligee's claim. Applying this scheme requires an understanding of what the surety's ordinary business functions are.

When given notice of a claim under either a performance or payment bond, the surety will undertake an investigation of the claim in the ordinary course of its business for two reasons: (1) to discharge any statutory duty owed to bond claimants to process claims in good faith; and (2) to preserve its right of indemnification against the principal and any indemnitors. Documents created to discharge these business functions would not be subject to any work product protection, even if these documents have a secondary use in litigation.

a. Surety's Duty to Obligee to Investigate Once a claim is made upon the surety, the surety's right to protect itself from loss is coupled with an "implied covenant of good faith and fair dealing" owed to the obligee, which the surety satisfies by acting reasonably in response to a claim by its obligee.[238] Thus, once a claim arises, the surety has a duty to independently investigate the claim.[239] The recipient of a notice of claim may also trigger specific statutory duties to respond or an obligation to investigate.[240]

Documents created to discharge a statutory duty are recognized as ordinary business records. Thus, where the surety has a statutory duty to investigate a claim, as in Florida, Arizona, and California, all documents generated in connection with the surety's investigation of the bond claims represent the surety's ordinary business records that are generated to show compliance with statutory obligations to investigate, rather than for the purposes of litigation. The failure to discharge the duty to investigate, whether statutory or imposed by the courts, gives rise to the specter of a bad faith claim. For example, in *Loyal Order of Moose v. International Fidelity*

238. Loyal Order of Moose, Lodge 1392 v. Int'l Fidelity Ins. Co., 797 P.2d 622 (Alaska 1990).

239. Dodge v. Fidelity & Deposit Co., 778 P.2d 1240 (Ariz. 1989).

240. *See, e.g.*, section 2695.10(b) of the California Regulations for Standards for Prompt, Fair and Equitable Settlements Applicable to Surety Insurance that provides that following receipt of a notice of claim and a proof of claim, the surety has sixty days in which to accept or deny the claim, in whole or in part, and affirm or deny liability. If the surety cannot decide within sixty days whether to accept or deny the claim, the surety must advise the claimant and keep the claimant apprised of the status, among other things.

Insurance Co.,[241] the Alaska Supreme Court allowed a bad faith claim against a surety for failure to adequately investigate an obligee's claim by analogizing the relationship between a surety and obligee to that between the insurer and insured.[242]

Consistent with the distinction drawn between ordinary business and litigation records, that deems an insurer's claims investigation in its early stages to be an ordinary business function, the surety's investigations would likewise not be protected as attorney work product.[243] Thus, when "the object is to determine whether to honor the claim or resist it, and whether to seek subrogation against a third party," as stated in *Carver*, these investigations are performed in the ordinary course of business, and documents related to these preliminary investigations are not subject to any work product protection.

b. Conducting Investigation to Preserve Indemnification: Duty to Indemnitors While proceeding with its initial claims investigation, a surety must also consider the duties owed to its principal. As stated by the Arizona Supreme Court, the duty of good faith owed to the obligee does not require the surety to act in bad faith toward its principal.[244] Although the general agreement of indemnity may provide that the surety has an absolute right of indemnification, courts have imposed limitations on the seemingly unfettered discretion of sureties to pay or settle claims and then seek indemnification. The surety protects its right of indemnity by investigating claims in good faith and attempting to resolve the claim (or mitigate its loss) without prejudicing the rights the principal may have to seek recourse from the obligee or claimant.[245]

A surety cannot obtain indemnification if it is shown to be a volunteer or if the payments were made unreasonably or without due investigation.[246] Thus, performing an investigation of bond claims is conducted in the ordinary course of a surety's business in order to preserve its rights of in-

241. 797 P.2d 622 (Alaska 1990).

242. *Id.* ("A surety may satisfy its duty of good faith to its obligee by acting reasonably in response to a claim by its obligee, and by acting promptly to remedy or perform the principal's duties where default is clear."). *See also* Cates Constr., Inc. v. Talbot Partners, 62 Cal. Rptr. 2d 548 (Cal. Ct. App. 1997); Dodge v. Fidelity & Deposit Co. of Maryland, 778 P.2d 1240 (Ariz. 1989) (owners brought bad faith claim against the surety for refusal to investigate and remedy their claim).

243. Cotton States Mut. Ins. Co. v. Turtle Assoc., Inc., 444 So. 2d 595 (Fla. Dist. Ct. App. 1984) (noting that Florida rule closely resembles federal rule, and thus relying on federal law and citing *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131 (S.D. Ga. 1982)).

244. Dodge v. Fidelity & Deposit Co., 778 P.2d 1240 (Ariz. 1989).

245. Fidelity & Deposit Co. v. Bristol Steel & Iron Works, Inc., 722 F.2d 1160 (4th Cir. 1983).

246. *See, e.g.*, The Hartford v. Tanner, 22 Kan. App. 2d 64, 910 P. 2d 872, 880–81 (Kan. App. 1996) (as surety's investigation is "standard practice" in industry, failure to conduct investigation was unreasonable and barred indemnification).

demnification. Records reflecting the ordinary business function of the securing of the right to indemnification would not be subject to any attorney-client product protection.

V. THE PRIVILEGE AND THE EXPERT

A. *Litigation Consultant versus Project Management Consultant*

As discussed at length in section II, consultants who perform the ordinary business functions of a surety, such as underwriting and perhaps initial claims adjusting and investigation, are not litigation consultants working for or on behalf of counsel, and thus their analyses would not be protected by any attorney-work product privilege.

This ordinary business doctrine was applied to a surety consultant's files in *Levingston v. Allis-Chalmers Corp.*[247] Documents that the surety withheld on the basis of attorney-client and/or attorney-work product privilege included documents generated during the surety's completion of projects that were authored or received by its attorneys, surety representatives, surety consultants and other attorneys involved in disputed claims against the surety arising from the bonded jobs. The court concluded that the surety consultants engaged to assist with completing the bonded projects and the investigations of payment bond claims were not hired by the surety "in anticipation of litigation"—particularly not the instant litigation. Rather, they were engaged to ascertain the status of the work to determine what had to be completed and project completion costs. Furthermore, because the consultants were not listed as trial experts, the court concluded that they were merely "actors" or "viewers to be treated as ordinary witnesses from whom all facts known and opinions held are freely discoverable."[248] Moreover, the surety had failed to demonstrate that the consultant documents were created "to aid in possible future litigation," as required to invoke a work product privilege. Rather, the documents were created primarily in connection with completing the bonded projects and the analysis of claims against the surety's bonds on the bonded projects.

Levingston adds to the list of the surety's ordinary business functions the task of completing work on bonded projects and the business analyses of estimating costs of completion. In litigation against the obligee on a performance bond, these analyses would undoubtedly have a secondary litigation purpose; however, as the primary purpose of the analyses is for the business purpose of completing a bonded project, the documents would not be shielded from production by courts adhering to the ordinary business record doctrine.

247. 109 F.R.D. 546 (S.D. Miss. 1985).

248. C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE, §§ 2029, 2033, pp. 250–51, 258.

B. *Getting the Goods Through the Back Door*

A recurring issue under Federal Rule of Civil Procedure 26(a)(2)(B) is whether expert witnesses must disclose everything they considered in developing opinions related to litigation. Not surprisingly, courts are in disagreement. Some courts have held that the rule requires experts to disclose only factual information, and not evaluative information protected by the work product doctrine or some other privilege.[249] For these courts, deposing the expert should not open the back door to obtaining the counsel's work product.

Other recent cases offer a broader view of Rule 26(a)(2)(B), emphasizing the comments to the rule that "litigants should no longer be able to argue that materials furnished to their experts to be used in forming opinions, whether or not they are used by the expert, are privileged or otherwise protected from disclosure when such experts are testifying."[250] This countervailing school of thought provides that a party putting an expert on before the jury had better be ready to produce everything.

C. *Can They Talk to Your X?*

When is the surety consultant, who is hired for litigation purposes, subject to deposition? The general rule is that those designated as testifying trial experts are subject to deposition and their work product subject to discovery;[251] those not designated as witnesses, but rather to assist counsel, are generally not subject to disclosure.[252]

A surety will consult with counsel in conjunction with hiring an expert consultant and investigators, and counsel will consult[253] with the consultant and the surety agent before designating the consultant as a trial expert,

249. *See, e.g.*, Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289 (W.D. Mich. 1995); All West Pet Supply Co. v. Hill's Pet Prods Div. , 152 F.R.D. 634 (D. Kan. 1993).

250. Karn v. Ingersoll Rand, 168 F.R.D. 633 (N.D. Ind. 1996) (adopting "bright line" interpretation requiring disclosure of all materials reviewed by expert, reasoning that such disclosures promote effective cross-examination of experts and provide certainty in discovery, thus eliminating counsel's uncertainty as to what is discoverable); Furniture World v. D.A.V. Thrift Stores, 168 F.R.D. 61 (D.N.M. 1996) (following *Karn*); B.C.F. Oil Refining, Inc. v. Consolidated Edison Co., 171 F.R.D. 57 (S.D.N.Y. 1997) (suggesting that attorneys may be deposed concerning their conversations with expert witnesses).

251. International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 186 (M.D. Fla. 1973) (party that fails to allow pretrial discovery of confidential matter will be precluded from introducing that evidence).

252. Ruiz v. Brea, 489 So. 2d 1136 (Fla. Dist. Ct. App. 1986) (documents created by or exchanged with expert are not discoverable unless expert has been designated as testifying trial expert).

253. Ambrose Bierce again provides the working definition for the operable term in *The Devil's Dictionary*: "Consult, v.t. To seek another's approval of a course already decided on." Thus, a consultant might be deemed to be one who seeks to make another (like the jury) approve what is already done.

resulting in the mutually agreeable arrangement whereby the three have a commonality of opinion, at least publicly, on the matter at issue.

A recurring (and uncertain) issue involving experts arises when an opponent seeks to depose an expert who had been designated as a witness, but later withdrawn as a testifying expert. Stated in other terms, can an ex-expert be deposed? The court in *House v. Combined Ins. Co. of America*[254] described three approaches adopted by courts: (1) the "exceptional circumstances" test that limits such discovery;[255] (2) a balancing or "discretionary standard";[256] and (3) once the expert is designated, that expert is fair game, no holds barred.[257]

In choosing the balancing or discretionary standard, the *House* court reasoned that designation of an expert waives the "free consultation privilege" a party has to a nontestifying witness; however, the court has the discretion to limit discovery pursuant to a balancing of probative value and prejudicial effects under Rule 403 of the Federal Rules of Evidence.[258] The court reasoned that such an approach would promote the salutary policy requiring parties to give some thought and care to their expert witness designations, because once those designations are made, the party will have to live with the consequence that the opposing party will likely be given the opportunity to depose the expert or even call the expert to trial on its own behalf. However, the court would not allow into evidence the fact that the witness had been previously designated as an expert; no party would be allowed to refer to how the de-designated expert came to be involved in the case.

VI. CONCLUSION

Courts embroiled in battles over privileges are faced with two irreconcilable principles: (1) the imperative to allow full and complete disclosure, premised on the notion that the jury system is a fact-finding process; and (2) the right to retain a zone of confidentiality, based on the fact that ours is an adversarial system of, for, and by advocates. Questioning the first principle undermines public confidence in and support for the system; undermining the second principle calls into question the functioning of the

254. 168 F.R.D. 236 (N.D. Iowa 1996).

255. *See, e.g.*, Durflinger v. Artiles, 727 F.2d 888 (10th Cir. 1984) (applying exceptional circumstances test).

256. *See, e.g.*, Peterson v. Willie, 81 F.3d 1033 (11th Cir. 1996) (lower court erred in allowing party to show that expert had previously been retained and designated by opponent, but no error in allowing former expert to be called).

257. *See, e.g.*, Crowe v. Nivison, 145 F.R.D. 657 (D. Md. 1993).

258. Invariably, when a court enumerates three options, one of which involves a weighing of the facts or balancing of the equities and purports to integrate the virtues of both alternatives at the margins, the court is taking the middle road.

system itself. The dilemma posed for courts is compounded in cases where the proponent of the privilege is in the business of litigation. Courts cannot agree on the discoverability of insurance files or insurer/insured communications because they have adopted different definitions of what the claims adjustment process entails and notions of what is or should be in the public domain.

The attorney advocating for or against a privilege in a surety setting has different concepts to draw from, and thus has the latitude to analogize to a favorable rationale or differentiate unfavorable rulings. If opinions expressly addressing surety cases are few or the rationales seem inconsistent with or ignore salient elements of the surety-principal relationship, then advocates can offer the courts the proper conceptual framework to interweave the relevant facts that lead to the desired outcome. Focusing on the unique elements of the suretyship relationship and differentiating it from insurance would be a long overdue innovation.