

Detective or Advisor—The Attorney-Client Privilege in the Coverage Evaluation

Edward F. Donohue III

I. Introduction

Communications among insurance company personnel and outside counsel should be afforded the same protection enjoyed by any other business. Courts that have entertained challenges to the attorney-client privilege in business litigation typically refer to the seminal decisions dealing with corporate clients such as *Upjohn Co. v. United States*.¹ Under *Upjohn*, all communications in furtherance of an investigation by an attorney acting as corporate legal advisor are privileged.² The Supreme Court in *Upjohn* declined to restrict the application of the privilege to communications with a “control group” of corporate officials.³ At the same time, under *Upjohn*, routine and indiscriminate involvement of counsel in ordinary business communications will not cloak otherwise discoverable information with the privilege.⁴

Privilege disputes in insurance litigation raise additional complexities. As the dissent in a recent Connecticut supreme court case recently highlighted, the application of the covenant of good faith and fair dealing to the claims adjustment process raises special policy issues. In *Hutchinson v. Farm Family Casualty Insurance Co.*,⁵ Connecticut joined the majority of states rejecting the blanket waiver approach adopted in bad faith litigation in Ohio in *Boone v. Vanliner Insurance*

¹ 449 U.S. 383 (1981).

² *Id.* at 395-97.

³ *Id.* at 392-93.

⁴ *Id.* at 396 (underlying facts not protected from disclosure).

⁵ 867 A.2d 1 (2005).

Edward F. Donohue III is a partner with Carlson, Calladine & Peterson, LLP in San Francisco, California.

*Co.*⁶ However, the dissenting justices in *Hutchinson* were obviously troubled by the prospect of cloaking large tracts of a claims file in confidence pursuant to discovery rules formulated, without qualification, for litigation adversaries.⁷

An ordinary business is not charged with a quasi-fiduciary obligation to investigate and ferret out contractual benefits for the sake of its creditors. Yet, especially in the case of consumers, many states impose an affirmative obligation to investigate policy benefits and provide a written summary of the findings. In view of cooperation provisions in most insurance policies, in theory, the parties are equal partners in the prompt settlement of the claim before a genuine dispute develops. Policyholders argue that shielding portions of the claims file from discovery conflicts with the insured's ability to verify that all benefits of the doubt were resolved in their favor. There are good policy reasons for that result in most cases. Only Ohio has ventured so far as to change its discovery standards in bad faith cases in lieu of balancing the interests of the parties.

Additional complexities arise in insurance litigation because the privilege applies at separate levels of dispute. The insurer and the policyholder may initially share the privilege and then later part ways. As a result, a substantial body of law has developed on privilege disputes surrounding the tripartite relationship between a carrier, the insured and their shared counsel.

This article provides a critical survey of the evolving judicial criteria developed to referee privilege disputes in coverage litigation. Practical approaches are discussed on improving the often conflicting contemporary standards with three principles in mind. First, all parties should have access to counsel for confidential guidance in furtherance of the equally important objectives of fair claims adjustment and declining unsupported or inflated claims. Second, governing standards for application of the privilege must be both flexible in application to a variety of situations but also not so fact driven as to impair an insurer's confidence that the privilege will be preserved in the appropriate case.

⁶ 744 N.E.2d 154, *cert. denied*, 534 U.S. 1014 (2001).

⁷ 867 A.2d at 12-13 (Norcott dissenting).

Finally, the tactical misuse of claims of privilege to frustrate legitimate discovery requests must be discouraged. In particular, policyholders should not be any more or less subject to overbroad assertions of privilege than would be the case in any other context in which they seek redress as consumers.

II. When Is An Attorney Acting As An Attorney?

Disputes over the production of insurance claims files have been acknowledged as one of the most frequently litigated of discovery disputes.⁸ Courts have enumerated alternative four and five point criteria for determining when the attorney-client privilege applies.⁹ In sum, if an actual client can establish it sought confidential legal advice, both the communications to counsel for that purpose and the advice received from counsel are sheltered by the privilege.¹⁰ In *Upjohn*, the Supreme Court reasoned that, unless information provided by the client were given equal shelter, there would be a chilling effect on the overall relationship and the level of candor needed for the attorney to adequately represent the client.¹¹ Moreover, any other approach would interfere with the attorney's obligation to maintain a client's confidences, an obligation that encourages citizens and corporations to seek early legal assistance.¹² In such an engagement, even an attorney's independent investigation, not involving actual client communications, are entitled to protection under the work product doctrine.¹³ In insurance litigation, however, in practical fact, those portions of the claims file that consist of client communications and investigatory materials are often at peril of

⁸ *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 197 F.R.D. 620, 630 (N.D. Iowa 2000); *Goodyear Tire & Rubber Co. v. Chiles Powers Supply, Inc.*, 190 F.R.D. 532, 535 (S.D. Ind. 1999).

⁹ *See, e.g., In re: Grand Jury Investigation*, 599 F.2d 1224, 1233 (3d Cir. 1979); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 601-02 (8th Cir. 1977); *Admiral Ins. Co. v. U.S. Dist. Ct. for the Dist. of Ariz.*, 881 F.2d 1486, 1492 (9th Cir. 1989).

¹⁰ *Upjohn Co.*, 449 U.S. at 394-95.

¹¹ *Id.* at 392.

¹² *Id.*

¹³ *Id.* at 401-02.

disclosure, without the application of exceptions to the attorney-client privilege such as waiver.¹⁴

The law and policy supporting disclosure comes in part from substantive insurance law and in part from principles of discovery and privilege. First, courts have observed that the routine business of an insurance company entails claims investigation.¹⁵ Thus, some courts have perceived an unfairness and potential for abuse in the event insurance companies were permitted to delegate the entirety of their claims investigation to attorneys. In light of the policyholder's "need to know" whether its claim was investigated in a reasonable manner, courts have reasoned that there must be limitations placed on the carrier's ability to inject attorneys into the adjustment process.¹⁶

Second, the distinction recognized in *Upjohn* between disclosure of privileged communications and the disclosure of underlying facts and sources of information is frequently cited as a basis for disclosure of all but actual legal opinions.¹⁷

¹⁴ See, e.g., *St. Paul Reinsurance Co.*, 197 F.R.D. at 641-42; *Conn. Indem. Co. v. Carrier Haulers, Inc.*, 197 F.R.D. 564, 571 (W.D.N.C. 2000); *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163-65 (D. Minn. 1986); *Evans v. United Services Automobile Assoc.*, 541 S.E.2d 782, 791, *cert. denied*, 547 S.E.2d 810 (N.C. 2001).

¹⁵ *St. Paul Reinsurance Co.*, 197 F.R.D. at 637; *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 536, 541-42 (N.D. W. Va. 2000); *Mission Nat'l Ins. Co.*, 112 F.R.D. at 163; *Evans*, 541 S.E.2d at 789; *Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Ct. of Denver*, 718 P.2d 1044, 1048 (Colo. 1986).

¹⁶ *St. Paul Reinsurance Co.*, 197 F.B. at 639; *Mission Nat'l Ins. Co.*, 112 F.R.D. at 164; *Western Nat'l Bank of Denver v. Employers Ins. of Wausau*, 109 F.R.D. 55, 57 (D. Colo. 1985); *APL Corp. v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10, 14 (D. Md. 1980).

¹⁷ See, e.g., *Nat'l Farmers Union Prop. and Cas. Co.*, 718 P.2d at 1044 n.3, citing *Upjohn Co.*, 449 U.S. at 396.

Finally, in some cases the courts have found insurers failed to satisfy the threshold requirement that an attorney was actually acting as an attorney as opposed to an adjuster.¹⁸ As one court noted:

[N]ot all communications between an attorney and client during attorney-conducted investigations constitute legal work entitled to attorney-client privilege . . . no privilege attaches when an attorney performs investigative work in the capacity as an insurance claims adjuster, rather than as a lawyer . . .¹⁹

Notwithstanding the involvement of a licensed lawyer, the requisite attorney-client relationship will be found absent to the extent the engagement is predominantly investigatory.²⁰

However objectively logical the effort to differentiate ordinary claims adjustment from the practice of law as a general proposition, predictable and consistent tests have not emerged. In the wake of product, environmental and other risks never foreseen before the late twentieth century, insurance products have become increasingly specialized and complex. The original function of an adjuster as an investigator, verifying the cause and value of the loss, is an anachronism. The ever burgeoning law on policy interpretation, coupled with the overlay of law and regulations governing the adjustment process itself, has changed the claims evaluation. Consultation without outside counsel on a coverage question may have been the exception at one time. Today, to the extent companies adjust more complex claims without consulting outside counsel at all, is due in part to the prevalence of legal professionals in claims departments.

¹⁸ *E.g.*, 2,022 Ranch, L.L.C. v. Superior Court, 113 Cal. App. 4th 1377, 1391-92, 17 Cal. Rptr. 3d 197, 207 (2003); *Diversified Indus., Inc.*, 572 F.2d at 603; *St. Paul Reinsurance Co.*, 197 F.R.D. at 642; *Mission Nat'l Ins. Co.*, 112 F.R.D. at 163.

¹⁹ *In re Allen*, 106 F.3d 582, 602-03 (4th Cir. 1997), *cert. denied*, *McGraw v. Better Gov't Bureau, Inc.*, 522 U.S. 1047 (1998).

²⁰ 2,022 Ranch, L.L.C., 113 Cal. App. 4th at 1397.

By the same token, a growing body of independent adjusters are attorneys that include legal opinions as part of their overall service package.²¹ To avoid errors and the incident severity of bad faith exposure, carriers consult outside counsel earlier and more often. Companies that have not staffed their claims departments with lawyers have sometimes outsourced claims evaluation on a routine basis to outside coverage counsel.²²

This trend has been viewed with suspicion by some courts. As described, one concern is the deprivation of the policyholder of relevant information. However, a number of courts have also clearly frowned upon, in effect, prematurely treating an unrepresented policyholder owed an impartial evaluation, as an adversary.²³

In theory, the tests applied for resolving work product and attorney-client privilege disputes are distinct.²⁴ Thus, there is no requirement that litigation be anticipated for coverage advice to fall within the attorney-client privilege.²⁵ All that need be established is that the requisite confidential relationship existed.²⁶ Since the relationship is confidential, an affirmation by attorney and client that they agreed to form such a relationship should be dispositive.²⁷ Arguably, a case-by-case approach, under which a court second-guesses the existence of an otherwise agreed upon client relationship, has the chilling effect of an unpredictable standard disapproved in *Upjohn*:

[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict

²¹ See, e.g., *St. Paul Reinsurance Co.*, 197 F.R.D. at 642.

²² See, e.g., *Mission Nat'l Ins. Co.*, 112 F.R.D. at 163.

²³ See, e.g., *Kidwiler*, 192 F.R.D. at 541-42; *Mission Nat'l Ins. Co.*, 112 F.R.D. at 163; *Nat'l Farmers Union Prop. and Cas. Co.*, 718 P.2d at 1049-50.

²⁴ *Mission Nat'l Ins. Co.*, 112 F.R.D. at 162.

²⁵ *Aetna Cas. & Sur. Co. v. Super. Ct.*, 153 Cal. App. 3d 467, 474 (1984).

²⁶ *Id.*; *Mission Nat'l Ins. Co.*, 112 F.R.D. at 163; *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991).

²⁷ See, e.g., *Dunn*, 927 F.2d at 875; *Hartford Fin. Serv. Group, Inc. v. Lake County Park and Recreation Board*, 717 N.E. 2d 1232, 1235 (Ind. Ct. App. 1999); *Aetna Cas. & Sur. Co.*, 153 Cal. App. 3d at 476.

with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.²⁸

In light of this policy, the disguised adjuster exception to the privilege is difficult to justify. Ultimately, work product criteria have improperly shaped the results of attorney-client privilege disputes, a problem undoubtedly flowing from the fact that both tests are usually applied in such disputes.²⁹ In most jurisdictions, work product is not protected unless prepared in “anticipation of litigation,” a requirement that technically does not even require that litigation be threatened.³⁰ Courts that have held that attorneys involved in coverage investigations were not acting as attorneys have clearly been influenced by their concurrent view that there can be no legitimate need for legal advice or work product protection until there is a so-called “shift” from the ordinary business of adjustment to a mature coverage dispute.³¹

To the extent rulings on work product objections have influenced contemporaneous findings that no attorney-client privilege applied, the “shift” standard is problematic. In particular, the courts have not adopted a consistent approach in coverage litigation as to when the inchoate shift from routine investigation to anticipated dispute

²⁸ 449 U.S. at 393. *See also* Rhone-Poulenc Rorer, Inc. v. Home Ind. Co., 32 F.3d 851, 862-63 (3d Cir. 1994) (recognizing parties’ interest in protection of predictable standard in coverage litigation).

²⁹ *See, e.g., St. Paul Reinsurance Co.*, 197 F.R.D. at 628, 641; *Evans*, 541 S.E.2d 789-91.

³⁰ *Kidwiler*, 192 F.R.D. at 541-42.

³¹ *St. Paul Reinsurance Co.*, 197 F.R.D. at 635; *U.S. Fid. & Guar. Co. v. Braspetro Oil Services Co.*, Nos. 97Civ.6124 (JGK) (THK) and 98Civ.3099 (JGK) (THK), 2000 WL 744369 (June 8, 2000); *State Farm Fire & Cas. Co. v. Perrigan*, 102 F.R.D. 235, 237 (W.D. Va. 1984); *Fine v. Bellefonte Underwriters Ins. Co.*, 91 F.R.D. 420, 422 (S.D.N.Y. 1981) (hiring outside counsel merely a factor in applying work product criteria).

actually transpires.³² Some courts have ruled that the shift from an investigatory to an adversarial mode occurs when facts showing a potential basis to decline coverage are verified.³³ Others have held that work product documenting grounds for a declination and even a decision to decline, do not necessarily equate with a determination to litigate, triggering work product protection.³⁴ Others have held that the “shift” transpires, whatever the status of the claims evaluation, when liability demands and threats are made by the insured.³⁵ Still others have held that, as a general proposition, the insurer enters a pre-litigation mode only when it both resolves to decline and actually declines the claim.³⁶ One court has picked the filing of the coverage action as the benchmark for unqualified attorney-client and work product protection.³⁷ In several cases, the courts acknowledged that the shift from the ordinary course of insurance business to that of an adversary, entitled to definite work product and attorney-client protection, must be determined on a case-by-case basis.³⁸

Again, the tests for work product and attorney-client protection are not the same. Only work product protection falls away on a showing of undue hardship to the claimant. However, the distinction is cold comfort, to insurance company client and outside counsel alike, if the courts persist in ruling that an attorney that involves himself in early

³² See *Conn. Indem. Co. v. Carrier Haulers, Inc.*, 197 F.R.D. 564, 570-71 (W.D.N.C. 2000) (surveying various thresholds for applying work product protection).

³³ *Id.*

³⁴ *St. Paul Reinsurance Co.*, 197 F.R.D. at 637-38.

³⁵ *Nat'l Indus. Transformers, Inc. v. Atlantic Mut. Ins. Co.*, 1993 WL 158373 (S.D.N.Y. 1993); *Haynes v. Anderson*, 597 So. 2d 615, 619 (Miss. 1992).

³⁶ *Bellefonte Underwriters*, 91 F.R.D. at 423; *Evans*, 541 S.E.2d at 790.

³⁷ *Mission Nat'l Ins. Co.*, 112 F.R.D. at 163. See *Kidwiler*, 192 F.R.D. at 541-42 (decision to litigate presumptive termination of ordinary investigation).

³⁸ *Braspetro Oil Services*, 2000 WL 744369 (no hard and fast rule as to when shift occurs); *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982) (work product objections to production of claims file to be determined on a case-by-case basis); *Evans, supra*, 541 S.E.2d at 790 (“... this complex question is [not] capable of a simple ‘bright-line’ answer . . .”).

stages of claims evaluation is no more than an adjuster.³⁹ That the courts cannot even agree on a consistent trigger date for “the shift” only compounds the chilling effect on the attorney-client relationship. In practical fact, cases like *Mission National Insurance Co. v. Lilly*⁴⁰ cannot be easily reconciled with the teachings of *Upjohn* and the policies underpinning the attorney-client privilege. In no other business arena have the courts so readily and frequently dismissed attorneys as mere functionaries of their clients. Only lawyers who involve themselves actively in the inner web of organized crime find themselves treated as non-lawyers by the courts as often as insurance lawyers.

The courts that created the disguised adjuster exception would be well served to examine whether it is rooted in judicial attitudes toward insurance companies, with whom the courts perpetually lock horns in dispute resolution.⁴¹ Numerous businesses have similar regulatory and common law obligations to investigate the fairness of their business relationships with customers, shareholders and the like. Yet, other businesses have not been singled out as having their attorney confidences treated as unworthy of protection for the benefit of both consumers and business clients alike. Despite the uncertainty in determining when counsel will be treated as no more than an employee, there are some practical lessons to be learned from *Mission National Insurance* and its progeny.

First, an insurance company should know the ground rules of its state. Some state courts, such as California, are more diligent in observing the letter of the relationship test.⁴² The problem in many states is that no protection is afforded to any communication with an attorney found to be acting as an adjuster.⁴³ Although it burdens the court with the additional responsibility of conducting an *in camera* review of records, the better view is that protection should remain with

³⁹ See, e.g., *Mission Nat'l Ins. Co.*, 112 F.R.D. at 163.

⁴⁰ 112 F.R.D. 160.

⁴¹ Cf. *State of West Virginia ex rel. Allstate Ins. Co. v. Madden*, 601 S.E. 2d 25, 47 (W. Va. 2004) (Albright dissenting) (observing and questioning inconsistent protection provided to insurance companies).

⁴² *Aetna Cas. & Sur. Co.*, 153 Cal. App. 3d at 475-76.

⁴³ *Mission Nat'l Ins. Co.*, 112 F.R.D. at 163.

respect to legal opinions and other communications that would be privileged had the factual investigation been conducted by an independent non-attorney.⁴⁴

Second, although the jealous protection of the privilege precludes the production of relevant evidence, the carrier ultimately has to take a position in the lawsuit and support the position with admissible evidence.⁴⁵ Thus, there are benefits and burdens of invoking any privilege. To that extent, the purported interference with the policyholder's "need to know" is not empirically supported.⁴⁶

Third, however artificial and inefficient it may seem to separate the investigative and evaluative process, on large claims, the expense of separately hiring both an independent adjuster and outside counsel can be a worthwhile investment.

A common thread running through the unfavorable decisions has been the insurer's failure, both initially and after consultation with counsel, to document an independent claims evaluation. Thus, in *Mission National Insurance Co.*, the court was troubled by the wholesale delegation of claims adjustment to outside counsel for all claims in excess of \$25,000 in the designated geographical region.⁴⁷ Counsel was routinely retained at the inception of the adjustment process, before there was any basis to conclude legal expertise was required or useful in resolving the claim.⁴⁸ The court noted "the only party responsible for performing [the] pure, ordinary business function" was the law firm.⁴⁹

Similarly, in *National Farmers Union Property & Casualty Co. v. District Court*,⁵⁰ the court was not impressed with the argument that

⁴⁴ 2,022 *Ranch L.L.C.*, 113 Cal. App. 4th at 1398-99.

⁴⁵ See 2,022 *Ranch, L.L.C.*, 113 Cal. App. 4th at 1396-97 (extent of privilege depends on evidence used to defend coverage position).

⁴⁶ See *Transamerica Title Ins. Co. v. Super. Ct.*, 188 Cal. App. 3d 1047, 1048-49 (1987) (failure to rely on opinion of counsel places limits on use of confidential aspects of investigation).

⁴⁷ 112 F.R.D. 162.

⁴⁸ *Id.* at 163.

⁴⁹ *Id.*

⁵⁰ 718 P.2d 1044 (Colo. 1986).

counsel needed to conduct the entire coverage investigation because the policy had never been interpreted before, making future litigation probable in the event of a declination.⁵¹ As in *Mission National Insurance*, the court disapproved the knee-jerk referral of the entire adjustment process to counsel.⁵² It found “the dominant purpose” of the engagement was investigatory and that the insurer failed to show it had approached the law firm seeking any specific confidential legal advice as required by the *Upjohn* decision.⁵³ The dissent criticized the majority for injecting a “dominant purpose” factor into an otherwise ordinary engagement that, as in *Upjohn*, involved both a factual investigation and a legal evaluation.⁵⁴ As Justice Rovira pointed out, *Upjohn* clearly held that both the client communications, as summarized in the investigatory section of counsel’s letter, and the ultimate legal opinion, were protected by the privilege.⁵⁵ Yet the majority only allowed for redaction of the opinion portion of counsel’s report.

Rescission cases are very sensitive. Given the complexity of the legal issues and the often inflammatory nature of claims of policyholder misrepresentation, early retention of counsel is common. In many states, efforts to purchase coverage for a known risk under false pretenses is punishable as a crime.⁵⁶

Yet in *St. Paul Reinsurance Co., Ltd. v. Commercial Financial Corp.*,⁵⁷ the court clearly believed the carrier jumped the gun by retaining an attorney adjuster to evaluate coverage when grounds to rescind were only suspected.⁵⁸ Attorney-client privilege protection was not afforded until after a decision was made to decline and sue for declaratory relief.⁵⁹

⁵¹ 718 P.2d at 1048.

⁵² *Id.* at 1049.

⁵³ *Id.*

⁵⁴ *Id.* at 1050.

⁵⁵ *Id.*

⁵⁶ See Ins. Fraud Prevention Model Act § 2. C. (1) (a) (Nat. Assoc. of Ins. Commissioners Model Reg. Service, July 2001).

⁵⁷ 197 F.R.D. 620.

⁵⁸ *Id.* at 642.

⁵⁹ *Id.*

Insurance companies should continue to resist rulings which, in effect, penalize them for involving attorneys in a claims investigation as they see fit, in their best business judgment. At the same time, judicial expectations that a self-contained, non-privileged investigatory file should universally be available to policyholders are a fact of life.⁶⁰ To the extent the decisionmaking and investigatory components of the adjustment process can be segregated in the organization of a claims file, the risks of intrusion into the legal side of the file should be lower.

III. Multiple Clients And Levels Of Litigation

Another area that is frequently the subject of dispute in coverage litigation is the joint client exception to the privilege. Under duty to defend policies, the policyholder and the insurer enjoy a so-called "tripartite relationship" with outside counsel.⁶¹ Under the so-called mutual benefit rule, in third party litigation, legal advice communicated to the insured defendant and the insurance company is protected from disclosure.⁶² The mutual interest rule applies not only to jointly retained defense counsel but as between plaintiff and a subrogated insurer in a subrogation case.⁶³ There is, however, an important limitation on the privilege in this context. When the interests of insurer and insured ultimately diverge, for example, in subsequent bad faith litigation, the privilege evaporates.⁶⁴

The rule creates difficulties in cases where the interests of policyholder and insurer diverge, even if they do not conflict to a degree

⁶⁰ See *2,022 Ranch, L.L.C.*, 113 Cal. App. 4th at 1396-97 n.5 (noting regulatory requirement that insurer maintain a claims file).

⁶¹ *Gafcon, Inc. v. Ponsor & Associates*, 98 Cal. App. 4th 1388, 1419-20, 120 Cal. Rptr. 2d 392 (2002).

⁶² *Palmer v. Fire Ins. Exch.*, 861 P.2d 895, 905-06 (Mont. 1993); *Glacier General Assur. Co. v. Superior Court*, 95 Cal. App. 3d 836, 842, 157 Cal. Rptr. 435 (1979).

⁶³ *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 965 (3d Cir. 1988).

⁶⁴ *Blaylock & Brown Constr. v. AIU Ins. Co.*, 796 S.W.2d 146, 155 (Tenn. 1990) (attorney communications during period of joint representation not privileged); *Nationwide Mutual Ins. Co. v. Smith*, 194 So. 2d 505, 508-09 (Ala. 1967); *Henke v. Iowa Home Mut. Cas. Co.*, 87 N.W.2d 920, 925 (Iowa 1958).

warranting separate representation of the insured. Claims that present material excess or uninsured exposure to the insured are the most common example. In many states, under the *Cumis* doctrine,⁶⁵ only when there is both uninsured exposure and the potential that decisions on defense strategy increase that exposure, is a client entitled to independent counsel.⁶⁶ Though the carrier and insured defendant may be equally interested in the best possible outcome, counsel may still be haunted by the prospect that a liability evaluation given to both clients may be turned by one on the other in subsequent coverage litigation. In many cases, that advice may fall into the hands of the very adversary whose claim was the subject of the legal evaluation. Thus, when an insured client assigns rights to a third party claimant, that claimant stands in the shoes of the insured and is entitled to the entire claim file, inclusive of attorney reports.⁶⁷

The solution to this dilemma is not obvious. As the *Cumis* rule was originally formulated, the appointment of independent counsel was more liberally afforded.⁶⁸ However, in light of the extra cost of providing independent counsel in the case of potential conflicts, and the incident cost to policyholders in increased premiums, the California legislature later curtailed the right to independent counsel.⁶⁹ Thus, in many states, this cloud over the attorney-client relationship remains.

Finally, there are certain limitations on the mutual interest exception. Merely funding an insured's defense, as when a carrier appoints *Cumis* counsel, is not sufficient to establish a mutual interest.⁷⁰ A liability insurer that has no attorney-client relationship with the attorney defending the insured cannot assert the attorney-client

⁶⁵ The *Cumis* doctrine originated in *San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc.*, 162 Cal. App. 3d 358, 208 Cal. Rptr. 3d 494 (1984).

⁶⁶ CAL. CIV. CODE § 2860.

⁶⁷ *United Services Auto Ass'n v. Jennings*, 731 So. 2d 1258, 1259-60 (Fla. 1999).

⁶⁸ *Cumis*, 162 Cal. App. 3d at 364.

⁶⁹ *See Gafcon, Inc.*, 98 Cal. App. 4th at 1420.

⁷⁰ *Koster v. June's Trucking, Inc.*, 625 N.W.2d 82, 84-85 (Mich. Ct. App. 2001).

privilege.⁷¹ Moreover, when an attorney retained solely to represent the interests of the insurer does not share attorney-client communications with the insured, such information may not be discovered in a subsequent bad faith case.⁷²

Similarly, the rights of an assignee or a subrogated party may be cut off when adverse positions crystallize before the underlying litigation is terminated. In *Yurick v. Liberty Mutual Insurance Co.*,⁷³ an excess carrier sued a primary carrier for bad faith in the settlement of an underlying claim. The excess carrier attempted to rely on the general principle that a subrogated excess carrier steps into the shoes of the insured for the purposes of the attorney-client privilege.⁷⁴ However, because the third party claimant and the excess carrier made demands and threats of coverage litigation from the inception of the litigation, much of the underlying attorney-client file was deemed protected.⁷⁵ Thus, a subrogated party cannot enjoy the protection of the joint privilege until it establishes a joint retention with the insured.⁷⁶ If it makes threats and demands in its own right before the underlying claim is resolved, it cannot pierce the privilege as to advice rendered regarding such threatened claims.

⁷¹ *Id.*, see also *Rockwell Int'l Corp. v. Super. Ct.*, 26 Cal. App. 4th 1255, 1267, 32 Cal Rptr. 2d 153 (1994).

⁷² *Bartlett v. State Farm Mut. Auto. Ins. Co.*, 206 F.R.D. 623, 627 (S.D. Ind. 2002); *Squealer Feeds v. Pickering*, 536 N.W.2d 678, 684 (Iowa 1995), *overruled on other grounds*, *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38 (Iowa 2004).

⁷³ 201 F.R.D. 465 (D. Ariz. 2001).

⁷⁴ *Id.* at 474. See *Central Nat'l Inc. Co. of Omaha v. Med. Protective Co. of Fort Wayne*, 107 F.R.D. 393, 395 (E.D. Mo. 1985).

⁷⁵ 201 F.R.D. at 474.

⁷⁶ *But see Dome Petroleum Ltd. v. Employers Mut. Liab. Ins. Co.*, 131 F.R.D. 63, 70 (D.N.J. 1990) (subrogator's control of claim and absence of joint communication to subrogee does not preclude finding of joint engagement).

Of final note, the mutual interest doctrine is not strictly limited in application to joint clients.⁷⁷ Co-parties with a sufficient identity of interest may enjoy attorney-client and work product protection.⁷⁸

Relying on this principle, co-parties have attempted to document and formalize such protection through so-called joint prosecution and joint defense agreements.⁷⁹ However, as various defendants in coverage litigation arising out of the World Trade Center attacks experienced, there are substantial limitations on the efficacy of such agreements.⁸⁰

First, the legal posture and interests of the parties must be identical, not merely based on an alignment of commercial interests.⁸¹ Further, as illustrated by the World Trade Center case, as a practical matter, the information often exchanged under the guise of such agreements is not independently protected by either privilege.⁸² Since sharing communications with non-clients results in an automatic waiver of the privilege, parties to such agreements must carefully assess whether their mutuality of interest rises to the requisite level of identity protected by the courts.

IV. Implied Waiver And Advice Of Counsel

Disputes respecting implied waiver of the attorney-client privilege almost universally arise in instances in which an attorney's investigation becomes relevant in the litigation. Thus, the subject of implied waiver logically begins with a discussion of the defensive use of opinions of counsel.

⁷⁷ *In re the Regents of California*, 101 F.3d 1386, 1390 (Fed. Cir. 1996), *cert. denied*, *Genetech, Inc. v. Regents of the Univ. of Cal.*, 520 U.S. 1193 (1997); *Katz v. AT&T Corp.*, 191 F.R.D. 433, 437 (E.D. Pa. 2000).

⁷⁸ *Id.*

⁷⁹ *See, e.g., Katz*, 191 F.R.D. at 437; *SR Int'l Bus. Ins. Co. Ltd. v. World Trade Prop. LLC*, No. 01 Civ 9291 (JSM), 2003 WL 193071 (Jan. 29, 2003).

⁸⁰ *SR Int'l Bus. Ins. Co. Ltd.*, 2003 WL 193071 at *1.

⁸¹ *In re Regents of the Univ. of Cal.*, 101 F.3d at 1390.

⁸² *SR Int'l Bus. Ins. Co. Ltd.*, 2003 WL 193071 at *1-3.

Good faith reliance on counsel may be overtly used as a defense to allegations of breach of the covenant of good faith and fair dealing.⁸³ In some cases, reliance on counsel has supported a complete defense to bad faith liability.⁸⁴ However, many courts treat reliance on counsel as only a factor in determining the carrier's good faith.⁸⁵

Two distinct types of opinions may be used defensively in coverage litigation. First, a carrier may rely upon defense counsel's assessment of the value of a claim or the chances of prevailing in underlying litigation.⁸⁶ Alternatively, the opinion may be isolated to coverage advice.⁸⁷

This distinction is often overlooked in decisions dealing with the question of whether attorney-client communications should be divulged under the implied waiver doctrine. In many cases it is advisable for defense counsel evaluations to be produced. For example, carriers accused of bad faith for failing to accept a reasonable settlement offer often fall back on liability assessments to defend their positions.

However, in the case of coverage advice, the various components of evidence showing that the decision was objectively reasonable, in most cases, can be established without disclosing the attorney-client communications themselves. For example, most courts now recognize that coverage decisions involving uninterpreted policy provisions, conflicting law, and matters of first impression ought not be the subject of bad faith liability.⁸⁸ Other courts go further and bar bad

⁸³ See, e.g., *Allen v. Allstate Co.*, 656 F.2d 487, 489 (9th Cir. 1981).

⁸⁴ See, e.g., *Beck v. State Farm Mut. Auto. Ins. Co.*, 54 Cal. App. 3d 347, 356, 126 Cal. Rptr. 602 (1976); *Fetter Livestock Co. v. Nat'l Farmers Union Prop. & Cas. Co.*, 257 F. Supp. 4, 13 (D. Mont. 1966).

⁸⁵ See, e.g., *Allen*, 656 F.2d at 489; *Cotton States Mutual Ins. Co. v. Trevethan*, 390 So. 2d 724, 728, (Fla. App. 1980), *cert. denied*, 392 So. 2d 1373 (Fla. 1980).

⁸⁶ See, e.g., *Allen*, 656 F.2d at 489; *Thompson v. State Farm Mut. Auto. Ins. Co.*, 505 P.2d 423, 429 (Mont. 1973), *overruled on other grounds*, *Waters v. Guar. Nat'l Bank*, 3 P.3d 626 (Mont. 2000).

⁸⁷ *Transamerica Title Ins. Co.*, 188 Cal. App. 3d at 1050-51.

⁸⁸ See, e.g., *Am. Cas. Co. v. Krieger*, 181 F.3d 1113, 1123 (9th Cir. 1999); *Empire Fire and Marine v. Simpsonville Wrecker*, 880 S.W.2d 886, 889-

faith claims when the factual information bearing on coverage is highly conflicting.⁸⁹

Even if the bad faith claim is dismissed before trial, the information, policy language and legal authority relied upon by counsel in advising the carrier can readily be presented to the trier of fact without the use of the actual legal opinion. The governing legal authority, along with commentary on uncertainties and disputed interpretations of the law, can be introduced through a bad faith expert, including an attorney not affiliated with the defendant insurer.

Yet, some of the decisions on the implied waiver doctrine border on punishing insurers for claiming that their decisions were reasonable, even if wrong, by opening up their entire claims files. Unquestionably, to the extent a carrier overtly injects advice of counsel into the case, such materials should be produced.⁹⁰

From that non-controversial starting point, the approach to the implied waiver doctrine diverges greatly among state courts. Many courts require the insurer to expressly raise advice of counsel as a defense to the claim of bad faith.⁹¹ Under this line of authority, claims personnel may testify that, in conducting their investigation, they consulted with counsel. The fact of such consultation does not suffice to place the legal advice “at issue” so as to require production of privileged materials.⁹² Nor does the carrier’s disclosure to the policyholder that it consulted with counsel in reaching its determination suffice to waive the

90 (Ky. Ct. App. 1994); *Squire v. Exch. Ins. Co.*, 775 P.2d 143, 145 (Idaho Ct. App. 1989).

⁸⁹ See, e.g., *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 994 (9th Cir. 2001); *Pecarovich v. Allstate Ins. Co.*, 272 F. Supp. 2d 981, 994-95 (C.D. Cal. 2003), *rev’d on other grounds*, 135 Fed. Appx. 23 (9th Cir. 2005).

⁹⁰ See, e.g., *Transamerica Title Ins. Co.*, 188 Cal. App. 3d at 1050-53.

⁹¹ See, e.g., *Rhone-Poulenc Rorer, Inc.*, 32 F.3d at 863-64; *Public Service Co. of New Mexico v. Lyons*, 10 P.3d 166, 173 (N.M. Ct. App. 2000); *Robertson v. Allstate Ins. Co.*, No. CIV. A. 98-4909, 1999 WL 179754, *5 (Mar. 10, 1999).

⁹² *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 730 A.2d 51, 60 (Conn. 1999).

privilege.⁹³ However, other courts have found an implied waiver even when an insurer expressly declares that it will not rely on advice of counsel as a defense.

In *Tackett v. State Farm Fire and Casualty Insurance Co.*,⁹⁴ the insurer was accused of bad faith in the form of delay and in making unreasonably low offers to compromise an uninsured motorist claim. The plaintiff sought discovery of the complete claims file on the grounds that State Farm had defended its handling of the claim, including its consultation with counsel, as “routine.”⁹⁵ The court noted that plaintiff could not unilaterally pierce the privilege by alleging the claim had been adjusted in bad faith.⁹⁶ However, the court found that it was unfair to allow the carrier to defend its investigation as reasonable and ordinary, while at the same time withholding portions of the claims file that might impeach that assertion.⁹⁷ The carrier implicitly waived the privilege by mentioning consultation with counsel in a context where it contended it had done nothing wrong.⁹⁸

Similarly, in *State Farm Mutual Automobile Insurance Co. v. Lee*,⁹⁹ the Arizona Supreme Court ruled that the carrier waived the attorney-client privilege by contending it was in compliance with the law in a period prior to the time its anti-stacking provisions were ruled ineffective in Arizona.¹⁰⁰ In defending itself, the company did not rely on advice of counsel. Rather, it cited a series of state court decisions showing the state of the law on the subject was unsettled. Nevertheless, relying upon a claims employee’s deposition testimony, the majority inferred that State Farm personnel were too unsophisticated to make independent judgments on the legal issues before them.¹⁰¹ The court

⁹³ *Ex parte* Great Am. Surplus Lines Ins. Co. v. St. Paul Fire & Marine Ins. Co., 540 So. 2d 1357, 1359 (Ala. 1989).

⁹⁴ 653 A.2d 254 (Del. 1995).

⁹⁵ *Id.* at 258.

⁹⁶ *Id.* at 259.

⁹⁷ *Id.*

⁹⁸ *Id.* at 260.

⁹⁹ 13 P.3d 1169 (Ariz. 2000).

¹⁰⁰ *Id.* at 1171-73.

¹⁰¹ *Id.* at 1179.

ruled State Farm had waived the privilege by contending it acted in good faith.¹⁰²

Two years after *Tackett* was decided, another Delaware court had occasion to determine whether the privilege had been waived in a context in which, as in *Tackett*, the carrier both claimed its conduct was reasonable and consulted with counsel on how to handle the claim.¹⁰³ The court characterized the *Tackett* court as “careful” to limit its holding to situations where the carrier’s defense of the claim incorporated advice of counsel.¹⁰⁴ Thus, it was held insufficient that the carrier formulated its coverage position, after consulting with counsel.¹⁰⁵

Neither the *Tackett* nor *Lee* courts can be accused of “careful” legal analysis. In both cases, a waiver was found, not because a coverage opinion was used as a sword to support a legal defense. The disclosure of the mere existence of the communication in discovery supported a finding of waiver in *Tackett*.¹⁰⁶ The *Lee* court found a waiver from the fact that counsel was consulted before the company took a position on a legal issue.¹⁰⁷ Clearly, if the mere process of consulting with counsel potentially supports a waiver, the exceptions will easily overtake the rule.¹⁰⁸ The implied waiver criteria described in these cases was not carefully crafted to preserve the privilege. Rather, the test for implied waiver is unintelligible and untenable in light of its ambiguity.

Thus, a Montana court identified the reason no test short of one tied to an explicit reliance on legal opinions is workable.

The fundamental purpose of the attorney-client privilege is to enable the attorney to provide the best possible legal advice and encourage clients to act within the law.

¹⁰² *Id.* at 1180-81. *See also* *Birth Center v. St. Paul Cos.*, 727 A.2d 1144 (Pa. Super. Ct. 1999) (where consultation with counsel part of deliberative process, insurer waived privilege by contending it acted in good faith).

¹⁰³ *Clausen v. Nat’l Grange Mut. Ins. Co.*, 730 A.2d 133 (Del. 1997).

¹⁰⁴ *Id.* at 141.

¹⁰⁵ *Id.* at 143.

¹⁰⁶ 653 A.2d at 259.

¹⁰⁷ 13 P.3d at 1180-81.

¹⁰⁸ *See Vanliner Ins. Co.*, 744 N.E.2d at 160-62 (Cook dissenting).

The privilege furthers this purpose by freeing clients from the consequences or the apprehension of disclosing confidential information, thus encouraging them to be open and forthright with their attorneys.

Another important policy behind the attorney-client privilege is to foster the attorney client relationship by ensuring that attorneys are free to give accurate and candid advice without fear that the advice will later be used against the client.¹⁰⁹

Moreover, when an insurer places the cards of its legal position on the table, there is no genuine unfairness to the insured. The insurance policy and the applicable published insurance law is no less available to read and interpret. Rather, fishing expeditions for actual opinions of counsel, usually protected even under the disguised adjuster exception, belie bad faith litigation tactics on the part of attorneys for policyholders. They appreciate that a well written coverage opinion usually treats, in a balanced fashion, the relative strength of a close question. An even-handed opinion, acknowledging some potential for coverage, can easily be the subject of manipulation and abuse in a bad faith action.

The privilege is designed to encourage candor in a company's evaluation of its legal rights. The uncertain lines of the implied waiver doctrine, as *Upjohn* notes, are qualitatively no different than no privilege at all. The chilling effect of cases like *Lee* and *Tackett* will ultimately encourage the preparation of one-sided, canned position pieces, tailored for use at trial, to the mutual detriment of policyholders and insurers alike.

V. *The Vanliner Decision*

Each of the various exceptions and limitations described above provide courts with varying amounts of discretion and ultimately, leeway in resolving discovery disputes. As discussed, ground rules on privacy

¹⁰⁹ *Palmer by Diacon v. Farmers Ins. Exch.*, 861 P.2d 895, 904-05 (Mont. 1993) (citations omitted).

that are unpredictable and judgmental are problematic. When the client asks for assurances that its confidences and concerns, related to the legal problem at hand or not, will remain inviolate, the answer should be “yes” or “no,” not “maybe.”

The crime-fraud exception to the attorney-client privilege, wholly independent of its application in insurance litigation, stands out as one of the most poorly defined and explained exceptions to any recognized privilege. The exception exists to ensure that attorney-client confidentiality will not encompass communications “‘made for the purpose of getting advice for the commission of a fraud’ or crime.”¹¹⁰ The attorney-client privilege does not extend to communications “‘in furtherance of intended, or present, continuing illegality.’”¹¹¹ Consequently, courts apply a two-part test to assess whether an otherwise privileged communication must be disclosed:

First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel’s advice. Second, there must be a showing that the attorney’s assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.¹¹²

One way to interpret the foregoing principles is to conclude that an attorney may be cut off from assisting a crime in progress.¹¹³ That is,

¹¹⁰ United States v. Zolin, 491 U.S. 554, 563 (1989), citing O’Rourke v. Darbishire [1920] A.C. 581, 604 (P.C.).

¹¹¹ *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir.), cert. denied, Corp. v. U.S., 519 U.S. 945 (1996) (citing United States v. Hodge and Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977) *disavowed on other grounds*, *In re Grand Jury Subpoenas*, 803 F.2d 493 (9th Cir. 1986)).

¹¹² *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987).

¹¹³ See *In re Grand Jury Subpoenas*, 798 F.2d 32, 33-34 (2d Cir. 1986).

his records may be seized to prevent future harm or conceal past wrongdoing.¹¹⁴

However, the crime-fraud rule has not been consistently applied in that fashion. Rather, federal courts have interpreted the requirement that a violation be “about to be committed” or “ongoing” to include, without limitation, legal services involving matters which are not in fact ongoing and that merely “relate” to the wrongdoing of which the client is accused.¹¹⁵ Thus, if the Eleventh Circuit’s interpretation of the *Zolin* case is correct, it is the worst possible standard imaginable for preservation of a privilege. The court conducts *in camera* proceedings to determine the defendant’s potential culpability for wrongful conduct of which he is merely accused.¹¹⁶

If there is a *prima facie* case of criminal wrongdoing or fraud and the confidential advice “relates” to the wrongdoing, the privilege is lost.¹¹⁷ It is not surprising that the most intrusive inroads into the attorney-client privilege in insurance litigation have been rationalized based on the least clear exception to the privilege.

Thus, in *United Services Automobile Association v. Werley*,¹¹⁸ the Alaska supreme court held that the civil fraud exception to the attorney-client privilege applied in an insurance coverage action.¹¹⁹ The insured cross-claimed for bad faith in the interpleader case.¹²⁰ After prevailing on summary judgment in the interpleader case, the claimant sought production of the insurer’s entire claims file, including all written communications with defense counsel. In light of the bad faith claim, the court affirmed the production of adverse counsel’s files on the

¹¹⁴ *United States v. Skeddle*, 989 F. Supp. 890, 903-04 (N.D. Ohio 1997).

¹¹⁵ *See, e.g., In re Grand Jury Investigation*, 842 F.2d at 1226-27.

¹¹⁶ *See Skeddle*, 989 F. Supp. at 900.

¹¹⁷ *In re Grand Jury Investigation*, 842 F.2d at 1227 (“any legal assistance [the defendant] received in generating income he did not intend to report must be treated as related to his tax evasion”).

¹¹⁸ 526 P.2d 28 (Alaska 1974).

¹¹⁹ *Id.* at 32-33.

¹²⁰ *Id.* at 30.

grounds that USAA had raised two baseless “bad faith defenses” that had never been withdrawn.¹²¹

Other courts have recognized such an exception, but have refused to allow production of privileged documents where they could find at least some “foundation in fact” for the carrier’s coverage position.¹²² Even courts in these jurisdictions recognize that a mere assertion of bad faith does not suffice to pierce the privilege.

In *Boone v. Vanliner Insurance Co.*,¹²³ the Ohio Supreme Court abandoned the application of ordinary crime-fraud criteria and ruled that pre-litigation coverage advice was “unworthy of protection” in bad faith litigation. Reasoning that there was no other way the insured could obtain the full record as to whether Vanliner had exercised good faith in refusing to settle, the court dismissed contentions that the ruling would discourage insurers from seeking legal advice. Simplistically, the court suggested that, since consultation with counsel was required to satisfy the insurer’s investigatory obligations, this was not a legitimate concern:

This argument is not well taken because it assumes that insurers will violate their duty to conduct a thorough investigation by failing, when necessary, to seek legal counsel regarding whether an insured’s claim is covered under the policy of insurance, in order to avoid the insured later having access to such communications, through discovery.¹²⁴

In the more recent decision of *State of West Virginia ex rel. Allstate Insurance Co. v. Madden*,¹²⁵ the West Virginia supreme court did not go so far as to adopt the blanket pre-litigation waiver approach of

¹²¹ *Id.* at 36.

¹²² *Escalante v. Sentry Ins. A Mut. Co.*, 743 P.2d 832, 842 (Wash. Ct. App. 1987) (disapproved by *Ellwein v. Hartford Acc. Indem. Co.*, 15 P.3d 640 (2001)).

¹²³ 744 N.E.2d 154, 158 (Ohio), *cert. denied*, *Vanliner Ins. Co. v. Boone*, 534 U.S. 1014 (2001).

¹²⁴ *Id.* at 157.

¹²⁵ 601 S.E.2d 25 (W. Va. 2004).

Boone. The court held that the ordinary crime-fraud test applied as a condition to obtaining actual discovery of privileged portions of the claims file. However, unlike *Werley*, which required a *prima facie* showing of bad faith tactics before such a motion can be made, the court in *Madden* appeared to rule that a bad faith claimant was virtually universally entitled to an *in camera* review.¹²⁶ The court noted the requirement that a claimant make a *prima facie* showing of fraud to obtain otherwise privileged documents. Yet, without explaining the inconsistency, the court held that a court entertaining a challenge to the privilege in bad faith litigation “must hold” an *in camera* hearing.¹²⁷

Courts in most states have not followed the blanket approach to production of pre-litigation communications of *Vanliner*.¹²⁸ However, decisions, like *Werley*, that hold a *prima facie* showing of bad faith suffices to avoid the privilege, are equally questionable.¹²⁹ Bad faith may be established by mere unreasonable conduct, a showing not equivalent to “civil fraud.”¹³⁰ Thus, the better rule is that even a *prima facie* showing of bad faith alone should not qualify to establish civil fraud so as to trigger the crime-fraud exception.¹³¹

Finally, there are serious flaws in the case law that has developed around the crime-fraud exception not unique to coverage litigation. First, the meaning of “furtherance” as used in the *Zolin* case needs clarification.¹³² The better rule is that the advice or services be significant enough to satisfy a “but for” or “substantial factor” test of

¹²⁶ *Id.* at 39-40.

¹²⁷ *Id.* at 40.

¹²⁸ See, e.g., *Hutchinson*, 867 A.2d at 7-8 n.5.

¹²⁹ See also *Hutchinson*, 867 A.2d at 11.

¹³⁰ *Freedom Trust v. Chubb Group of Ins. Cos.*, 38 F. Supp. 2d 1170, 1173 (C.D. Cal. 1999).

¹³¹ *Ferrara & DiMercurio Ins. v. St. Paul Mercury Ins. Co.*, 173 F.R.D. 7, 11 (D. Mass 1997); *Freedom Trust*, 38 F. Supp. 2d at 1173; *State ex rel. U.S. Fid. and Guar. Co. v. Mont. Second Jud. Dist. Ct.*, 783 P.2d 911, 916 (Mont. 1989); see *Werley*, 526 P.2d at 33 (leaving open question of whether bad faith short of civil fraud qualifies for exception); *Madden*, 601 S.E.2d at 47 (Albright dissenting) (noting civil fraud and bad faith are not synonymous).

¹³² 491 U.S. at 563.

causation with respect to planned or executed wrongdoing.¹³³ Where legal advice is involved, the advice ought to relate directly to how the client might better put himself in a position to perpetrate or conceal a crime or fraud.¹³⁴ Otherwise, the exception should be limited to the classic crime-fraud exceptions, such as where counsel takes affirmative steps to help a client conceal or destroy evidence or otherwise succeed in the wrongdoing.¹³⁵ The meaning of “in furtherance” is patently ambiguous. In some circuits, a mere relationship between the wrongdoing and legal services provided to the client suffice to trigger the exception.¹³⁶ Such a standard is so judgmental as to constitute the functional non-existent standard disapproved in *Upjohn*.

The baseless defense exception applied in *Werley* is also recognized by federal courts.¹³⁷ It serves no useful purpose other than to provide prosecutors and private litigants alike with opportunities for abusive tactics. It should be abolished as an exception. There are ample judicial remedies for bad faith litigation tactics short of the insult and intrusion of being deprived of confidential legal advice as a price for defending a difficult case. The question of whether a claim is baseless is highly subjective. Such an unlegislated penalty for failing to concede defeat, in all but close cases, not only creates uncertainty undermining the privilege. It undermines fair access to judicial redress. A carrier advised by its attorneys that it has only a twenty-five percent chance of prevailing on its contractual defenses has a right to obtain a judicial determination of its obligations without forfeiting its confidences. If its chances of prevailing are slight, its conduct may in fact be found objectively unreasonable, supporting bad faith.

¹³³ See, e.g., *In re Grand Jury Subpoenas*, 798 F.2d 32, 34 (2d Cir. 1986).

¹³⁴ See *Wessel v. City of Albuquerque*, 2000 WL 1803818.

¹³⁵ See, e.g., *In re Sealed Case*, 754 F.2d 395, 402 (D.C. Cir. 1985) (furthering destruction of records); *United States v. Skeddle*, 989 F. Supp. at 902-04 (W.D. Ohio 1997) (concealment of crimes).

¹³⁶ See, e.g., *In re Grand Jury Investigation*, 842 F.2d at 1227-28.

¹³⁷ *Roe, Inc. v. Roe, Inc.*, 168 F.3d 69, 72 (2d Cir. 1999); *Vardon Golf Co. v. Karsten Mfg. Corp.*, 213 F.R.D. 528, 535 (N.D. Ill. 2003).

However, the use of the opinion of one's own counsel to prove a client's purported wrongdoing is fundamentally unfair. Notwithstanding the *Boone* court's inability to recognize the problem, the very prospect that an attorney's opinion will be used offensively against the client places counsel in an untenable position of conflict. Advice the attorney deems in the best interests of the client at the time it is initially requested could be the cornerstone of claims for extra-contractual exposure and punitive damages in the future.

VI. Conclusion

Courts have warned that exceptions to the privilege that interfere with an attorney's ability to provide a balanced assessment of alternative possible outcomes would have a mere chilling effect on the attorney-client relationship.¹³⁸ That is a substantial understatement of the problem posed by the relaxed standards applied in some jurisdictions. When the identical legal advice is in the best interests of the client at the time it is rendered and because unprotected from adversaries, destructive of the client's interests thereafter, "frost" is not an apt description. Quite simply, an attorney faced with such conflicts cannot meet his obligation to protect the client's interests at all. The relationship is not merely chilled but destroyed.

¹³⁸ *U.S. Fid. and Guar. Co.*, 783 P.2d at 916; *Aetna Cas. & Sur. Co.*, 153 Cal. App. 3d at 474.