

# **ADVICE OF COUNSEL DISCOVERY IN BAD FAITH CASES**

by

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## I. OVERVIEW

There are two bright line tests, resting at opposite poles, which some courts use to determine the question of whether a bad faith claimant can use discovery to obtain attorney client communications between insurers and their lawyers, or disclosure of that attorney's work product. One test, exemplified by Rhone-Poulenc Rorer v. Home Indem. Co., 32 F.3d 851, 863 (3d Cir. 1994)<sup>1</sup> states that only the insurer's express invocation of the advice of counsel in a claim or defense allows such discovery. The other, exemplified in General Refractories Co. v. Fireman's Fund Insurance Co., 45 Pa. D.&C. 4th 159 (C.C.P. Phila. 2000) (Bernstein, J.), finds that if the insurer's decisionmakers considered counsel's advice when making their decision, discovery of at least work product can be had because matters affecting the decisionmaker's "state of mind" are always in play. This has recently been described as a theory of "wholesale waiver". Henriquez-Disla v. Allstate Prop. & Cas. Ins. Co., CIVIL ACTION NO. 13-284, 2014 U.S. Dist. LEXIS 108820 (E.D. Pa. August 7, 2014) (Hey, U.S.M.J.)

In addressing the case law and rules below, it is important to pause and reflect on a number of points so that they may be addressed with the greatest understanding and context. Thus, the discussion below will include reference to important case law and rules on the subjects addressed, but will also drill down into that case law and suggest different perspectives, and consideration of the potential need to revisit some of that case law and existing assumptions.

Another obvious, but significant, point to remember is that the attorney client privilege and attorney work product doctrine involve two different bodies of law. Because insurance bad faith claims are governed by state law, whether in state or federal court, Pennsylvania's law on attorney-client privilege governs.<sup>2</sup> The work product doctrine is governed by two different rules, however, depending on whether the case is in federal, Rule 26(b)(3), or state, Rule 4003.3, court.

Finally, in addressing Pennsylvania's work product doctrine, history becomes an important element to consider when interpreting Rule 4003.3, as does what is meant by "bad faith." As will be discussed below, the 1978 Explanatory Comment to Rule 4003.3 is central to Pennsylvania courts' discussion of work product and advice of counsel in bad faith cases. The Bad Faith Statute, 42 Pa.C.S. § 8371, however, only became effective in 1990; and the commentators did not have the benefit of its enormous body of derivative case law when crafting their Explanatory Comment.

## II. CASE LAW

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<sup>1</sup> That Court applied Pennsylvania's law on attorney client privilege, per Federal Rule of Evidence 501, though it observed that there were no privilege issues unique to Pennsylvania law. Id. at 861-2. As set forth below, Pennsylvania state courts, including its Supreme Court, have looked to Rhone-Poulenc.

<sup>2</sup> Under Federal Rule of Evidence 501, where state law governs the dispute at issue in a federal civil case, the attorney-client privilege is also controlled by state law. See, e.g., Montgomery County v. MicroVote Corp., 175 F.3d 296, 301 (3d Cir. 1999).

**A. THE ATTORNEY CLIENT PRIVILEGE IS A TWO WAY STREET AND APPLIES TO ATTORNEY→COMMUNICATIONS ABSENT A WAIVER**

In Gillard v. AIG Ins. Co., 609 Pa. 65, 15 A.3d 44 (2011), the Supreme Court held that Pennsylvania’s attorney client privilege equally covers attorney communications to clients, as well as client communications to attorneys. Thus, “in Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.” Id. at 59. This reversed the Superior Court’s position in Gilliard and in Nationwide Mutual Ins. Co. v. Fleming, 924 A.2d 1259 (Pa. Super. 2007). Moreover, it reversed the Superior Court’s decision on attorney-client privilege in The Birth Center v. The St. Paul Companies, Inc., 727 A.2d 1144 (Pa. Super. 1999), aff’d on other grounds, 567 Pa. 386, 787 A.2d 376 (2001), overruled in part on other grounds, Mishoe v. Erie Ins. Co., 573 Pa. 267, 824 A.2d 1153 (2003).<sup>3</sup> Both the majority and the dissent in Gilliard cited the Superior Court’s Birth Center decision as exemplifying the view that the privilege only ran from client to attorney. 15 A.3d at 47, 61. Thus, to the extent this 1999 Superior Court decision applied a now-rejected version of the attorney-client privilege to order the production of an attorney’s letters to the insurer on the issue of bad faith, as well as claim handlers’ notes embodying conversations with that counsel and counsel’s analysis, that 1999 Superior Court decision has no precedential value.

Moreover, Gilliard itself was a bad faith case involving the handling of a UIM claim. The insured sought to compel production of the attorney files from the law firm representing the insurers in the underlying litigation, which the insurers withheld or redacted based on assertion of the attorney-client privilege. The argument that the attorney communications to the insurer somehow incorporated communications from the insurer to its attorneys was not at issue. Id. at 48. Rather, the Supreme Court was dealing with the pure attorney to client communication, *sans* any incorporated client communications embedded with the attorney’s communication. The Amicus Brief in Gilliard stated that “the Superior Court affirmed an order of the Court of Common Pleas requiring the [the insurers] to produce communications containing their outside counsel’s legal advice, analysis, and opinions.”<sup>4</sup> It seems clear that the types of documents Gilliard addressed included opinions of counsel provided to an insurance company, without necessarily including any communications from the client within that advice. The Court found the communication of that advice from counsel to its insurer-client to be within the attorney-client privilege.

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<sup>3</sup> Birth Center involved Cowden type common law contractual bad faith for failure to settle. In Cowden v. Aetna, 134 A.2d 223 (Pa. 1957), the Supreme Court found that the carrier’s contractual right to control the litigation and settlement of the insured’s case creates a contract-based fiduciary duty and a good faith obligation that may require payment by an insurer for failure to settle in certain excess verdict situations. On appeal to the Supreme Court in Birth Center, the Court further found other forms of consequential damages recoverable or this common law breach of contract claim, beyond payment of the excess verdict alone. The Birth Center v. The St. Paul Companies, Inc., 787 A.2d 376 (Pa. 2001).

<sup>4</sup> Amici Curiae Brief of the Association of Corporate Counsel, Pennsylvania Bar Association, Philadelphia Bar Association, Allegheny County Bar Association, and Chamber of Commerce of the United States of America in Support of Reversal at p.1.

As will be discussed below, it is the Superior Court's Birth Center ruling on work product protection that remains at issue. That being said, if an attorney communicates with an insurer-client, e.g., in the form of a legal opinion letter on bad faith, discovery of that communication is protected by the attorney-client privilege, absent a waiver; and production of that document should still be barred even if an argument could be made that the information in that letter is not subject to work product protection. Thus, in the first instance, a party seeking such communications should have to establish the same level of waiver to break through to work product, as it would to overcome the attorney client privilege.

## **B. WHEN IS THE PRIVILEGE WAIVED AS TO ADVICE OF COUNSEL**

Because the attorney client privilege protects insurance counsel's advice to the insurer from disclosure, the issue then becomes what constitutes a waiver of the privilege sufficient to open the door to discovery of counsel's advice.

### **1. Waiver requires an affirmative act and will not be readily implied.**

In Rhone-Poulenc, the Third Circuit found that the insurer only opens the discovery door by "putting his or her attorney's advice in issue in the litigation...." 32 F.3d at 863. The Court made clear that the mere relevance of an attorney's advice does not place that advice "in issue." Id. at 864. Most importantly, such advice is not placed in issue solely "because the attorney's advice might affect the client's state of mind in a relevant manner." Id. This Court defines placing counsel's advice in issue by the insurer's taking some affirmative step to place it in issue. This includes circumstances where the client "chooses to make the advice-of-counsel an essential element of a claim or defense and '*attempts to prove that claim or defense by disclosing or describing an attorney-client communication.*'" McCrink v. Peoples Benefit Life Ins. Co., No. 2:04-cv-01068, 2004 U.S. Dist. LEXIS 23990, \*\*8-9 (E.D. Pa. Nov. 30, 2004) (Davis, J.) (quoting Rhone-Poulenc) (emphasis added).

Rhone-Poulenc has been cited favorably by the Pennsylvania Supreme Court in the attorney-client privilege context. In Commonwealth v. Harris, 32 A.3d 243, 253 (Pa. 2011), the Court cited Rhone-Poulenc to support the proposition that the attorney client communication is placed "in issue" for purposes of waiver "when the privilege-holder asserts a claim or defense, and attempts to prove that claim or defense *by reference to the otherwise privileged material.*" (Emphasis added). Rhone-Poulenc was also quoted in Gilliard: "If we intend to serve the interests of justice by encouraging consultation with counsel free from the apprehension of disclosure, then courts must work to apply the privilege in ways that are predictable and certain. "An uncertain privilege -- or one which purports to be certain, but rests in widely varying applications by the courts -- is little better than no privilege.'" Gilliard, 15 A.2d at 51 n.5 (quoting Rhone, 32 F.3d at 863). Gilliard was citing this proposition to support its finding that application of the attorney-client privilege requires clarity and certainty. Rhone-Poulenc itself was in insurance coverage case, and the "in issue" language, as applied by the Third Circuit, emphasized the express act of disclosure requirement as consistent with the idea that the privilege should be waived by an affirmative act, reflecting a conscious choice by the client to forego the privilege. 32 F.3d at 863.

In Mueller v. Nationwide Mutual Ins. Co., 31 Pa. D. & C. 4<sup>th</sup> 23 (C.C.P. Allegheny 1996), Judge Wettick cites Rhone-Poulenc, id. at 37, among other case law, to the same effect in rejecting the implied waiver doctrine in bad faith cases simply because the insurer's state of mind is at issue. Judge Wettick observes: "While plaintiffs suggest that any implied waiver doctrine can be confined to bad faith claims against insurance companies, plaintiffs' justification for this exception to the attorney-client privilege ... would justify the loss of the privilege in a wide variety of cases because of the ability of a creative party to make the state of mind of another party an issue in the case." Id. at 38. He adds: "This ruling that a party does not automatically waive the attorney-client privilege by making its state of mind an issue in the case does not create a license to lie. An attorney who claims the privilege on behalf of a client cannot do so without first reviewing the communications for which the privilege is sought." Id. at 40.

Then, to quote Judge Wettick at greater length, id. at 40-42 (citations omitted):

Finally, while existing Pennsylvania appellate case law characterizes the attorney-client privilege as an absolute privilege, I recognize that the Pennsylvania appellate courts have never addressed the claim that Pennsylvania should adopt an exception where the state of mind of a litigant is an issue in the case. However, the Pennsylvania appellate courts have consistently sought to preserve the integrity of the attorney-client privilege because of its significance to a socially important relationship. .... "[T]he roots of the attorney-client privilege are firmly entrenched in our common law, described fittingly as 'the most revered of our common-law privileges.'" The purpose of the privilege "is to create an atmosphere that will encourage confidence and dialogue between attorney and client.... The intended beneficiary of this policy is not the individual client so much as the systematic administration of justice which depends on frank and open client-attorney communication."

The justifications for the privilege are equally applicable where the state of mind of a party may be an issue in the case. In the field of insurance, for example, there is substantial legislation and case law that is intended to set the standards of behavior of insurance companies. The legal system governing insurance law is complicated, so we cannot assume that lay people working for insurance companies will, on their own, be aware of and have a proper understanding of the laws that are intended to shape their behavior.

We want insurance companies to involve attorneys in their decision-making where the claims may be complicated. We want a free flow of information between a lawyer and representatives of an insurance company. If the law encourages an honest, careful, and prompt analysis of the claims by counsel for insurance companies, claims are more likely to be resolved in a manner envisioned by the laws governing insurance companies.

These honest, open, and candid exchanges are less likely to occur if the communications between counsel and the decision-makers of the

insurance companies are discoverable in bad faith suits. The Pennsylvania appellate courts have consistently reaffirmed the underlying rationale for the attorney-client privilege that the privilege is a necessary condition for a candid exchange of information between counsel and a client and that the social good derived from the performance of attorneys acting for their clients outweighs the harm that may come from the suppression of relevant evidence in a specific case.

Of course, insurers raising the reliance on advice of counsel as a defense to a bad faith claim waive the privilege “as to any communications between the insurance company and its counsel regarding the underlying claims upon which the bad faith claim is based.” In these circumstances, insurers “cannot raise the attorney-client privilege unless they state that they will not be contending that advice of counsel was a factor that influenced the manner in which they handled the insured’s claims.” *Id.* at 32-33. See also McAndrew v. Donegal Mut. Ins. Co., 56 Pa. D. & C.4th 1, 20 (C.C.P. Lackawanna 2002). That, of course, would eviscerate the defense.

In Henriquez-Disla v. Allstate Prop. & Cas. Ins. Co., NO. 13-284, 2014 U.S. Dist. LEXIS 108820 (E.D. Pa. August 7, 2014) (Hey, U.S.M.J.), the Court recently applied Rhone-Poulenc, Fidelity & Deposit Co. v. McCulloch, 168 F.R.D. 516 (E.D. Pa. 1996) (Joyner, J.), and Magistrate Judge Hart’s decision in Saltern v. Nor-Car Fed. Credit Union, 2003 U.S. Dist. LEXIS 7679 (E.D. Pa. Apr. 16, 2003) to address an advice of counsel waiver in the bad faith context. Quoting Saltern (which relied upon Rhone-Poulenc), “advice is not placed in issue merely because it is relevant.... A waiver can be found only where a client has made the decision and taken an affirmative step in the litigation to place the advice of attorney in issue....This occurs where the client attempts to prove a claim or defense by disclosing or describing an attorney client communication....” Thus, the Third Circuit instructed that “advice of counsel ‘does not necessarily become in issue merely because the attorney’s advice might affect the client’s state of mind in a relevant manner.’” It is “[o]nly when the client ‘asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication,’ does the client waive the attorney-client privilege.”

In Henriquez-Disla, the insurer pleaded as a defense that its “alleged withholding of any benefits at issue was made in good faith and was reasonable.” (Internal quotations omitted). The insurer’s decisionmaker “stated in her affidavit that counsel was hired to render legal and coverage decisions....” The insured argued that the insurer “placed counsel’s advice in issue and cannot now shield that advice by the attorney-client privilege.” The Court described this effort as piecing “together two allegations to tailor the waiver of privilege.” However, “[a]t no point has [the insurer] asserted the advice of counsel as a defense.” While the “affidavit suggests that counsel may have affected [the insurer’s] state of mind,” quoting McCulloch, “‘this simply does not amount to a waiver’ of the privilege.” The Court concluded by rejecting “Plaintiffs’ theory of wholesale waiver.”

In another recent case, Mine Safety Appliances Co. v. North River Ins. Co., 2:09cv348, 2014 U.S. Dist. LEXIS 42771 (W.D. Pa. March 31, 2014) (Cerccone, J.), Judge Cerccone addressed a wide range of topics, including waiver based on state of mind. He looked to Rhone-Poulenc and Mueller, and stated: “The privilege is not waived merely because the nature of the claims place

the state-of-mind of one of the parties at issue.” Rather, “a waiver will be recognized where a party intends to use the advice of counsel to support an asserted claim or defense in the litigation.” This requires an affirmative step by the party to place it in issue.

Other cases rejecting what amounts to a “wholesale waiver” or *per se* “state of mind” bad faith exception to the attorney client privilege include, e.g., Hoffer v. Grange Ins. Co., 2014 U.S. Dist. LEXIS 137078 (M.D. Pa. Sept. 29, 2014) (Conner, J.); Walter v. Travelers Pers. Ins. Co., No. 4:12-CV-346, 2013 U.S. Dist. LEXIS 72771 (M.D. Pa. May 22, 2013) (Carlson, J.); Craker v. State Farm Mutual Automobile Insurance Company, No. 11-0225, 2011 U.S. Dist. LEXIS 111862 (W.D. Pa. Sept. 29, 2011) (Lancaster, J.); R&N Auto., Inc. v. Travelers Cas. Ins. Co. of Am., NO. 1:09-CV-0326, 2009 U.S. Dist. LEXIS 112269 (M.D. Pa. December 3, 2009) (Conner, J.); Santer v. Teachers Ins. & Annuity Ass’n, NO. 06-CV-1863, 2008 U.S. Dist. LEXIS 23364 (E.D. Pa. Mar. 24, 2008) (applied to in-house counsel) (Golden, J.); Oak Lane Printing & Letter Service v. Atlantic Mutual Ins. Co., NO. 04-3301, 2007 U.S. Dist. LEXIS 42923 (E.D. Pa. June 13, 2007) (Tucker, J.); George v. Wausau Ins. Co., NO. 99-CV-6130, 2000 U.S. Dist. LEXIS 16813 (E.D. Pa. Nov. 21, 2000) (Padova, J.); Robertson v. Allstate Ins. Co., NO. 98-4909, 1999 U.S. Dist. LEXIS 2991 (E.D. Pa. Mar. 10, 1999) (Scuderi, M.J.); Dombach v. Allstate Ins. Co., NO. 98-1652, 1998 U.S. Dist. LEXIS 13241 (E.D. Pa. Aug. 27, 1998) (Buckwalter, J.); Provident Life & Accident Co. v. Nissenbaum, NO.: 97-5666, 1998 U.S. Dist. LEXIS 18576 (E. D. Pa. Nov. 17 1998) (Kelly, J.); and Cantor v. Equitable Life Assur. Soc’y of the United States, NO. 97-5711, 1998 U.S. Dist. LEXIS 8435 (E.D. Pa. June 9, 1998) (Rueter, M.J.).

**2. Case law sometimes referenced for waiver of attorney-client privilege in the advice of counsel context either does not stand for that proposition or does not support it.**

The most typical references to the state of mind exception in the insurance bad faith context are General Refractories and Jones v. Nationwide Insurance Co., NO. 3:98-CV-2108, 2000 U.S. Dist. LEXIS 18823 (M.D. Pa. July 20, 2000) (Munley, J.). These cases both look extensively to the Superior Court’s decision in Birth Center on the concept of a state of mind exception. However, when specifically attempting to connect these cases to a “state of mind” exception or “bad faith” exception to the attorney-client privilege, it is important to recognize that the Superior Court’s Birth Center decision does not stand for that proposition.

As set forth above, the Superior Court found the attorney-client privilege inapplicable on the basis that there was no Pennsylvania privilege covering attorney to client communications. It was only in the context of addressing the work product doctrine, after first having found no attorney-client privilege protecting the same documents at issue, that the Superior Court explored a state of mind exception. The cornerstone of its analysis was the 1978 Explanatory Comment to Rule 4003.3, the Pennsylvania rule governing work product, not the statute governing the attorney-client privilege. As discussed further below, the Superior Court concluded: “Hence, assuming without deciding that the letters, memoranda, and notes were protected work product under 4003.3, St. Paul waived its right to challenge discovery of these materials on appeal because St. Paul made them relevant to its state of mind at the time it paid the excess verdict.” 727 A.2d at 1166.



In General Refractories, the Court was clearly disturbed by the defendant's conduct during the discovery process, labeling it "slash and burn" and describing the defendant's *pro hac vice* counsel as adopting a "dysfunctional approach." 45 Pa.D.&C. 4<sup>th</sup> at 161-2.<sup>5</sup> The court further stated of the defense tactics: "The sad history of defendant's discovery responses in this case reveals a clear pattern of delay, stonewalling, deception, obfuscation and pretense." Id. at 165. As another example of the Court's concern of defendant's conduct in discovery, the Court observed as to a document placed in an attorney's files, "[t]his is a blatant and transparent attempt to bury a discoverable document in an attorney's file." Id. at 168.

On whether there was an attorney-client privilege, the Court stated: "A complete picture of the defendant's dealings with its insured in this case including what is revealed in the hidden documents, reveals a carrier *which used captive counsel as an integral part of its claims department, engaging in a common strategy of claims handling* which kept its own financial interests paramount, to the detriment of the insured. Concerned with protecting its own funds, to the detriment of its insured, in a conscious effort to avoid this very claim of bad faith, defendant *attempted to use counsel* to construct a 'privilege' wall against discovery of the true nature of their decision-making. *This was no client-attorney relationship. Mr. West is an employee of the defendant acting not as counsel but as an adjuster with a law degree. There is no privileged relationship.*" Id. at 167 (emphasis added).

Thus, as to the attorney-client privilege, the Court was relying upon the argument that the lawyer was not serving as a lawyer, and therefore the privilege did not even exist; rather than a state of mind exception to the attorney-client privilege. The Court then proceeds to its Rule 4003.3 work product analysis. Later, in summing up its analysis, the Court states: "The court has determined that no privileged attorney-client relationship existed and accordingly there is no privilege." Id. at 171.

In Jones v. Nationwide Insurance Co., the Court was reviewing the recommendations of a special master on the issues of attorney-client privilege and work product in an insurance bad faith case. The master relied heavily on the Superior Court's Birth Center opinion, as did the federal district Judge, in finding the privilege inapplicable.<sup>6</sup> As set forth above, to the extent that this included the theory that the privilege does not apply where the communication runs from attorney to client, Pennsylvania's Supreme Court rejected that theory in Gilliard, and neither the Superior Court's Birth Center decision, nor Jones, are good law on that issue. Id. at \*\*5-6.

The Jones Court, however, went beyond what the Superior Court actually said, and applied a state of mind exception to the attorney-client privilege, and not only the work product doctrine. Id. at \*6 Thus, in rejecting the insurer's argument that it had not affirmatively raised an advice of counsel defense, the Court stated, among other things, "this matter involves bad faith litigation, in which the advice of counsel is inextricably interwoven into the fabric of the facts that occurred." Id. at \*7. It analogized the insurer's affirmative defense in Jones ("acted reasonably and in accordance with the insurance contract and the applicable laws of the Commonwealth of

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<sup>5</sup> The counsel's *pro hac vice* admission was ultimately stripped in the Court's Order.

<sup>6</sup> Work product in Birth Center, however, was governed by Pa.R.C.P. 4003.3, whereas in federal cases the analysis should be conducted under F.R.C.P. 26(b)(3).

Pennsylvania when issuing the policy of insurance, and when handling, investigating and evaluating plaintiff's claim") to the defense in Birth Center that the excess verdict demonstrated good faith. Id. The District Court found that this affirmative defense "language clearly makes the advice of counsel relevant for purposes of discovery." Id.

Again, this argument was not included in the Superior Court's attorney-client privilege analysis, but only in its work product analysis; and the District Court here is conflating the two. Moreover, the Jones analysis on attorney-client privilege is contrary to the Third Circuit's Rhone decision, which was binding on the District Court, where the Third Circuit states that relevance was not the standard to apply in determining waiver of the attorney-client privilege; rather, there had to be by an affirmative act of waiver. It may be that the Jones Court was asserting that the express affirmative act of waiver was to be found in the above-quoted affirmative defense, but again, (i) that would not likely meet Rhone's standards and (ii) that type of argument was only used in the context of work product, not attorney-client privilege, by the Superior Court in Birth Center.

The Court in Walter v. Travelers Pers. Ins. Co., No. 4:12-CV-346, 2013 U.S. Dist. LEXIS 72771 (M.D. Pa. May 22, 2013) (Carlson, J.) chose not to follow Jones, citing George v. Wausau Ins. Co., 2000 U.S. Dist. LEXIS 16813 (E.D. Pa. Nov. 21, 2000) (Padova, J.), among other cases. In George, 2000 U.S. Dist. LEXIS 16813, \*\*7-8, the Jones Court's approach to this language as a waiver of attorney-client privilege was specifically rejected, with citation to Rhone to establish a contrary conclusion. The Jones approach on attorney-client privilege was also specifically rejected in McCrink v. Peoples Benefit Life Ins. Co., 2004 U.S. Dist. LEXIS 23990, \*\*8-9 (E.D. Pa. Nov. 30, 2004) (quoting Rhone-Poulenc) and Saltern v. Nor-Car Fed. Credit Union, 2003 U.S. Dist. LEXIS 7679 at \*4 (E.D. Pa. Apr. 16, 2003) (waiver of the attorney-client privilege in bad faith case as to advice of counsel "occurs where the client attempts to prove a claim or defense by *disclosing* or *describing* an attorney client communication.") (emphasis in original).

Finally, the Superior Court's decision in Berg v. Nationwide Mutual Insurance Co., Inc., 44 A.3d 1164 (Pa. Super. 2012), appeal denied, 65 A.3d 412 (2013) includes some discussion of the attorney-client privilege in an insurance bad faith case. In that case, the plaintiffs alleged that the carrier was trying to conceal relevant evidence "through the false assertions of attorney-client privilege." Id. at 1178. They wanted the trial court to conduct an *in camera* review of 30 redactions from the claims log that they claimed "may bear directly on the issue of Nationwide's 'state of mind' ...." Id.

In remanding for an *in camera* inspection, the Court spoke generally about a fact-finder's need to consider all evidence available to determine whether the insurer's conduct was objective and intelligent under the circumstances, citing its decisions in Birth Center and Rhodes v. USAA Casualty Insurance Co., 21 A.3d 1253, 1263-4 (Pa. Super. 2011) (a case involving the defendant insurer seeking discovery from plaintiff's counsel).<sup>7</sup> It then cited Rule 4003.3 and a litany of work

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<sup>7</sup> Rhodes was a UIM bad faith case, where the insurer sought discovery of the insured's counsel's files in the underlying UIM case, other than material protected by the attorney-client privilege. It pursued the theory that the insurer was entitled to see if the insured brought the UIM case in bad faith. Thus, the carrier purported to be seeking only work product. Rhodes was decided a few

product cases for the proposition that *in camera* review is appropriate to weed out protected material and to determine privilege issues. 44 A.3d at 1179. It is not clear from this general discussion what attorney communications, advice or opinions were at issue, if any, and whether this discussion was addressing a putative waiver of the attorney-client privilege on a right to consider all evidence available basis. This opinion lacks the detail and clarity needed to do something as serious as establishing the legal basis for finding a waiver of the attorney-client privilege; especially where the issue is not raised and the only authority cited relates to the work product doctrine. (This case will be further discussed in the work product section below.)

In sum, there is no basis, even in the minority body of case law on advice of counsel, that would support waiver of the attorney-client privilege in the absence of an insurer affirmatively and expressly injecting the opinion or advice of its lawyers into the case.

### **C. THE APPLICATION OF THE WORK PRODUCT DOCTRINE**

The work product doctrine is subject to Pa.R.C.P. 4003.3 in state court and Federal Rule of Civil Procedure 26(b)(3) in federal cases. These two rules are of significantly different scope. Under Rule 4003.3, work product protections are narrower than those in federal court. For example, unlike Rule 4003.3, Rule 26(b)(3) work product can be discovered only upon a showing of substantial need.

#### **1. The federal work product doctrine applied to advice of counsel cases.**

Rule 26(b)(3)(A) provides that “[o]rordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” Rule 26(b)(3)(B) provides that “[i]f the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.”

In Hoffer v. Grange Ins. Co., 2014 U.S. Dist. LEXIS 137078 (M.D. Pa. Sept. 29, 2014) (Conner, J.), the Court rejected the concept that litigating insurers automatically waive work product protection by defending against bad faith claims. In McCrink v. Peoples Benefit Life Ins. Co., 2004 U.S. Dist. LEXIS 23990, \*\*8-9 (E.D. Pa. Nov. 30, 2004) (Davis, J.), the Court addresses Rule 26(b)(3) in the bad faith/advice of counsel context. As that court stated: “Plaintiffs’ ‘mere claim of bad faith is not enough to shatter this work-product privilege.’” Id. at \*12 (citing Robertson v. Allstate Ins. Co., 1999 U.S. Dist. LEXIS 2991 (E.D. Pa. Mar. 10, 1999); Provident

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months after Gilliard, but no issues from Gilliard are addressed in Rhodes. The Court observed that the work product doctrine was broader than the attorney-client privilege in the sense that it could product materials that would otherwise not be confidential, and cited to its opinion in Birth Center and the Explanatory Note. However, because the insured’s state of mind is irrelevant to whether the insurer acted in bad faith, the insurer’s arguments and citations were inapposite.

Life & Accident Ins. Co. v. Nissenbaum, 1998 U.S. Dist. LEXIS 18576 (E.D. Pa. Nov. 17, 1998); Garvey v. National Grange Mut. Ins. Co., 167 F.R.D. 391 (E.D. Pa. 1996)). “Indeed, to waive the work-product privilege, the client must assert that ‘the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the clients’ conduct.’” Id. (citing Capitol Sign Co. v. Alliance Metals, 1996 U.S. Dist. LEXIS 9911 (E.D. Pa. 1996)). The Court observed that this waiver standard was same as that for waiving the attorney-client privilege, *i.e.*, such a waiver “requires an affirmative step by the client, as opposed to an opposing litigant’s bald assertion that such advice is relevant.” Id. (citing Fidelity & Deposit Co v. McCullough, 168 F.R.D. 516 (E.D. Pa. 1996)). See also Closterman v. Liberty Mut., 1995 U.S. Dist. LEXIS 11356 (E.D. Pa. Aug. 9, 1995).

One federal case to the contrary is Jones v. Nationwide Ins. Co., 2000 U.S. Dist. LEXIS 18823 (M.D. Pa. July 20, 2000). As set forth above, it is not clear if this case was applying Rule 26(b)(3), or following the Superior Court’s Birth Center application of Pa.R.C.P. 4003.3. Moreover, as set forth above, its analysis is not typical of other federal decisions.

## **2. The Pennsylvania work product doctrine in advice of counsel cases.**

The only real consideration for a possible *per se* “state of mind” exception in bad faith cases is Pennsylvania’s work product doctrine. Under Gilliard, this is limited to work product that is not communicated from counsel to the insurer/client, because such communications of advice from the attorney to the client would be subject to protection by the attorney-client privilege. In footnote 16 of its opinion, the Gilliard Court addressed some aspects of the work product doctrine in light of its decision on the privilege. The Court found that its decision did not obviate the work product doctrine, because “while the two privileges overlap, they are not coterminous.” Thus, *e.g.*, the work product doctrine may not involve communications between lawyer and client, unlike the attorney client privilege; and the work product doctrine’s emphasis on anticipation of litigation differs from a privilege analysis. 15 A.3d at 59 n.16.

Thus, even if some courts are willing to uphold the “state of mind” or “bad faith” exception in the work product context, this cannot eviscerate the protective effect of the attorney-client privilege on attorney to client communications in the absence of an express waiver by the insurer. Moreover, if what is in dispute is the advice of counsel, the act of advising, by definition, inherently includes a communication from counsel to the insurer/client. Thus, advice would be barred from discovery by the attorney-client privilege without having to wrestle with a work product analysis.<sup>8</sup>

Acknowledging the seemingly diminished role of work product issues in advice of counsel situations, work product history and case law will be discussed below.

The Explanatory Comment to Rule 4003.3 is the cornerstone of the bad faith exception for advice of counsel. The Comment states: “As to representatives of a party, and sometimes an

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<sup>8</sup> If an attorney has work product in that attorney’s files that was not communicated to the client (the insurer), then that work product could not constitute advice and could not be part of the insurer’s state of mind since it could not have been considered by the insurer which never received it.

attorney, there may be situations where his conclusions or opinion as to the value or merit of a claim, not discoverable in the original litigation, should be discoverable in subsequent litigation. For example, suit is brought against an insurance carrier for unreasonable refusal to settle, resulting in a judgment against the insured in an amount in excess of the insurance coverage. Here discovery and inspection should be permitted in camera where required to weed out protected material.” This Comment is denoted as “EXPLANATORY COMMENT--1978.”<sup>9</sup> The quoted language has become an important interpretative tool for some courts in the advice of counsel/bad faith context.

In analyzing this Comment’s possible meaning and application, it is important to remember that there was no statutory bad faith claim in 1978, 42 Pa.C.S. § 8731 having become effective twelve years later, in 1990. In 1978, the clearest common law claim for insurance bad faith was reflected in Cowden v. Aetna, 389 Pa. 459, 134 A.2d 223 (1957), where the Supreme Court found that the carrier’s contractual right to control the litigation and settlement of the insured’s case creates a contract-based fiduciary duty and a good faith obligation that may require settlement in certain excess verdict situations, and payment of the excess verdict for failure to settle.<sup>10</sup>

In 1981, the Supreme Court found no common law tort (trespass) based bad faith cause of action. D’Ambrosio v. Pennsylvania National Mutual Casualty Insurance Company, 494 Pa. 501, 431 A.2d 966 (1981).<sup>11</sup> Although this was three years after the Comment, it was not as if there was a body of Pennsylvania law on the tort of common law bad faith. In his dissent to the Superior Court’s 1978 opinion in D’Ambrosio,<sup>12</sup> Judge Spaeth observed that this tort originated in California in the early 1970s; thus, it remains unclear to what extent this cause of action was contemplated in framing the 1978 Comment, either as a new tort or under existing Pennsylvania case law on due care in claims handling.<sup>13</sup> In the specific example used by the commentators, one

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<sup>9</sup> The Rule became effective in April of 1979.

<sup>10</sup> There was also some case law prior to 1978 that the mishandling of claims resulting in a failure to pay or an adverse judgment would violate the contractual duty of good faith and due care -- mixing contract and tort language in a fiduciary context -- with these duties arising out of the insurance contract. In Gedeon v. State Farm Mut. Auto. Ins. Co., 188 A.2d 320, 322 (Pa. 1963), the Supreme Court stated that where an insurer asserted its right to handle claims and settle cases, the insurer became a fiduciary, with obligations of good faith and due care. Thus, if the negligent investigation or handling of a claim resulted in a breach of such duty, the insurer could be liable for the full amount of a judgment. In Diamon v. Penn Mut. Fire Ins. Co., 372 A.2d 1218 (Pa. Super. 1977), the Superior Court found an implied contractual duty of good faith and due care in investigating a first party claim. That Court cited the California Supreme Court’s Gruenberg decision, discussed below, to prevent the insurer from invoking a contractual one year action requirement to bring a breach of the duty of good faith and fair dealing because the insurer has an independent duty to act with good faith that should not be dependent on the insured’s conduct.

<sup>11</sup> D’Ambrosio was a first party case.

<sup>12</sup> 262 Pa. Super. 331, 396 A.2d 780, 783-785 (1978)(the relevant part of the dissent was joined by one other judge in an otherwise split per curiam affirmance).

<sup>13</sup> Judge Spaeth had advocated adopting the California Supreme Court’s reasoning in Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973), without citation to any Pennsylvania appellate authority that had done so. At least one state trial court had followed Gruenberg in 1978, prior to the Superior Court’s decision. Weigle v. Motors Ins. Corp., 19 Pa. D.

must ask to which attorney the commentators are referring in considering that lawyer's opinions on value or merit; what is meant by the original litigation; and what kind of bad faith claims against insurers are being considered. Thus, is this comment limited to Cowden type bad faith, which is the sole specific scenario given; or, did they intend it to encompass counsel in contexts other than failure to settle, *i.e.* to what extent, if any, were the commentators thinking of any case law on claims handling outside that context.

One oft-cited case citing the Comment's specific insurance example is Nedrow v. Pennsylvania National Mutual Casualty Insurance Co., 31 D.&C.3d 456 (C.C.P. Somerset 1981). Nedrow was a failure to settle case against the insurer. The insurer wanted to prevent disclosure of work product from the attorney it had engaged to represent the insured in the first action. Id. at 458. There was thus no attorney-client privilege. On the work product doctrine, the Court stated: "The commentators [to Rule 4003.3] go on to cite as an example of a case wherein discovery of this type of material is permitted, a suit brought against an insurance carrier for unreasonable refusal to settle, resulting in a judgment against the insured in an amount in excess of the insurance coverage. That is the instant case." Id. at 460. In Nedrow, "[t]he basis of the bad faith claim lies in the reasons for defendant's refusal to settle within the policy limits. Those reasons may very well be found in defendant's files." Id.

The Court observed that even under the older, more restrictive, work product rule "which expressly prohibited discovery of material prepared in anticipation of litigation or trial, the courts were willing, in bad faith representation cases, to permit discovery of material prepared for another trial and an attorney's opinions and conclusions with respect thereto." Id. The Court cited three cases, Pile v. Nationwide Mutual Ins. Co., 11 Pa. D. & C.3d 499 (1978), Schultz v. Mt. Vernon Fire Ins. Co., 2 D. & C. 3d 627 (1976), and Trzesniowski v. Erie Ins. Exchange, 59 D.&C. 2d 44 (1973). These cases involved the same Cowden type scenario, and the last two, at least, had the same common counsel scenario, *i.e.*, the counsel whose records were sought was defense counsel to the insured.

The current leading case on the Comment's application to insurance bad faith cases is the Superior Court's Birth Center decision, another Cowden type bad faith case. The difference in Birth Center, however, is that the lawyer whose advice is at issue is the insurer's lawyer providing advice of bad faith issues directly to the insurer, not defense counsel provided to the insured by the insurer as in the Nedrow type cases. That attorney's letters to the carrier, and the communications memorialized by insurer's employees, involve the insurer's counsel giving advice on bad faith to the insurer; rather than the insured's defense counsel in the underlying action giving advice on the merits and value of the underlying case. The Superior Court's Birth Center decision

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& C.3d 449, 455-6 (C.C.P. Somerset 1980) (citing Vallino v. Columbia Acci. & Health Ins. Co., 6 Pa. D. & C.3d 434 (C.C.P. Allegheny 1978); and as stated above, it was cited in Diamon, in support of the idea that the insurer's own misconduct or misjudgment could preclude application of a strict one year time period for an insured to bring a claim for claims mishandling. It was not followed in at least two federal cases applying Pennsylvania law in 1978, Myers & Watters Co. v. E. I. Dupont de Nemours & Co., 1978 U.S. Dist. Lexis 18168 (E.D. Pa. April 25, 1978); Iron Mountain Sec. Storage Corp. v. American Specialty Foods, 457 F. Supp. 1158 (E.D. Pa. 1978).

quotes from the above-cited section of the Explanatory Comment on the unreasonable refusal to settle scenario, as expressly referring to the scenario in the case before it. 727 A.2d at 1164.<sup>14</sup>

In supporting its conclusion that the case fell within the penumbra of the Explanatory Comment, the Superior Court observed that the carrier defended the bad faith case by arguing that in paying the excess verdict in the underlying case, it *per se* defeated the bad faith claim. Defense counsel in the bad faith case is quoted to this effect: “The fact is that [the carrier] stepped in and took responsibility for [the plaintiff’s verdict] and paid an enormous verdict, way beyond the limits of their policy. We submit that is entirely enough. We submit there is absolutely no bad faith here and we ask you to return such a verdict.” *Id.* at 1166. In using payment of the verdict as evidence that purported to exonerate the carrier from the bad faith claim, the carrier was found to have “placed the reasons behind its payment of the excess verdict directly in issue.” *Id.*

In doing this, the Court next reasons, the carrier “made its state of mind, at the time it satisfied the excess verdict ... relevant to the issue of whether its payment of the excess verdict was conclusive evidence of its good faith.” Thus, even assuming arguendo that there was otherwise work product protection for counsel’s letters, and the memoranda and notes of conversations with counsel, the carrier “waived its right to challenge discovery of these materials on appeal because [the carrier] made them relevant to its state of mind at the time it paid the excess verdict.” *Id.* It appears that the Court’s reasoning is that if the carrier asserts that some conduct on its part precluded bad faith, and an attorney may have advised it in connection with that conduct, then that advice is discoverable. This is so whether or not the insurer affirmatively states that its counsel gave it advice upon which it relied that should exonerate the carrier from bad faith; so long as it states a position that may relate to counsel’s advice. Under this reasoning, the issue is whether the attorney’s work product has become relevant to the insurer’s defense, whatever the nature of that defense.

In Birth Center, the advice at issue was the advice to pay an excess verdict to avoid a bad faith finding under Cowden, after a verdict had been rendered. This attorney’s advice did not necessarily address the merits of the injured party’s case against the insured; nor provide an opinion on the potential damages (value) of the underlying plaintiff’s case, prior to the verdict. Even if it did, such an analysis would not have been for the purpose of giving advice to the carrier on settling the original litigation at or within policy limits, because the plaintiff had a weak or strong case or there were potentially high damage claims. Rather, the verdict had been rendered, the horse was out of the barn, and this counsel was apparently called in to give advice about the risk of a bad faith claim post-verdict.

Thus, it is not clear that the scenario in Birth Center was the scenario contemplated by the Explanatory Comment, contrary to the Superior Court’s statement that it was the precise scenario contemplated. Rather, the scenario described in the Explanatory Comment, which addresses the opinions of counsel on the merits and value of the underlying case prior to verdict, had already

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<sup>14</sup> The Court also distinguishes F.R.C.P. 26: “Moreover, where the legal opinions, conclusions, memoranda, notes or summaries, legal research or legal theories become a relevant issue in a case, the law in Pennsylvania is that the party seeking discovery need not show substantial need and undue hardship to obtain discovery of such materials.”

passed; and the carrier was using different counsel to evaluate its bad faith exposure and what to do next after the excess verdict. The question arises as to whether this advice from the carrier's bad faith counsel could be deemed advice in the original litigation as contemplated by the Explanatory Comment, or advice in anticipation of a possible second litigation between the insured and the insurer based on the Cowden bad faith scenario that immediately arose with the excess verdict.<sup>15</sup>

In General Refractories, *supra*, the bad faith at issue involved a denial of coverage and refusal to pay defense costs, and was unrelated to the Cowden bad faith scenario. The attorney at the focus of the Court's analysis was "captive counsel" who was "an integral part of [the carrier's] claims department," who, along with other employees, "engag[ed] in a common strategy of claims handling which kept [the carrier's] own financial interests paramount, to the detriment of the insured." 45 Pa. D.&C. 4th at 167. The Court stated that the work product rule, Rule 4003.3, could not be used to place un-protected documents in an attorney's file and then claim they were protected. *Id.* at 169. The Court states generally that there is no work product protection in bad faith cases "where the legal opinion of an attorney is directly relevant to a cause of action." *Id.* It cites Nedrow and the Superior Court's St. Paul opinion. *Id.*

The Court states that: "An insurance company may not ignore the advice of counsel concerning its obligations to an insured, cannot seek advice concerning bad faith and thereafter hide their knowledge and the documentation of intent behind a claim of privilege when sued for bad faith." *Id.* As set forth above, there is nothing clear in the Opinion to show any advice was given by the putative attorney; rather, his attorney title was being used to hide documents. "An insurance company may not hide knowledge that a claim must be paid or strategies for delay by hiding documents in an attorney's file." *Id.* In so saying, the Court is basically concluding that there is no attorney work product, but rather a failed attempt to transform non-attorney materials into work product. Thus, there is no finding by the Court that there is attorney work product going to the insurer's state of mind that must be disclosed.

The Court concludes that: "Where the actions of counsel are placed directly in question by the substantive claim there is no privilege. Where, as here, counsel is integrally involved in claims handling, the facts of the insurance company's dealing with its insured cannot be insulated from discovery." *Id.* at 170. As the Court had previously found the attorney was actually only a claims handler with a law degree, and did not really identify any legal advice being in play, it is difficult to see how the facts in this case related to any actual attorney work product. It is fair to question whether this borderline set of facts can form a foundation upon which to argue the existence of a

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<sup>15</sup> By contrast, defense counsel for the insured did report to the carrier on that counsel's opinion as to the merits and value of the case. *Id.* at 1144. In fact, defense counsel is on record as stating to the Judge: "They must be crazy. They're not offering a dime. They won't give me authority to offer any money in this case, you know, I can't believe it." *Id.* at 1151. That is not the counsel whose advice was at issue in the Superior Court's work product analysis.

This sort of record, along with the case's notoriety as being the case where the insurance adjuster refused to settle on the principle that the carrier did not settle "bad baby" cases, made for a particularly egregious set of facts; as was the background in General Refractories, though for different reasons.



broad principle that there is no work product protection for advice of counsel in insurance bad faith cases, if that principle is meant to be rooted in the Explanatory Comment. This case goes beyond the Cowden bad faith context of Nedrow and Birth Center, and into coverage questions; it is clearly removed from the specific scenario defined in the Explanatory Comment; and it may not involve attorney work product at all.

In Berg v. Nationwide Mutual Insurance Co., Inc., 44 A.3d 1164 (Pa. Super. 2012), it is likewise unclear what documents or advice are at issue. The Court states that plaintiffs are claiming that the insurer was attempting to conceal relevant evidence through false assertions of the attorney client privilege. Id. at 1178. They wanted the trial court to conduct an *in camera* review of 30 redactions from the claims log that they claimed “may bear directly on the issue of Nationwide’s ‘state of mind’ . . . .” Id. In remanding for an *in camera* inspection, the Court spoke generally about a fact-finder’s need to consider all evidence available to determine whether the insurer’s conduct was objective and intelligent under the circumstances, citing its decisions in Birth Center and Rhodes v. USAA Casualty Insurance Co., 21 A.3d 1253, 1263-4 (Pa. Super. 2011) (a case involving the defendant insurer seeking discovery from plaintiff’s counsel, as noted above).

The Court then cited Rule 4003.3 and a litany of work product cases for the proposition that *in camera* review is appropriate to weed out protected material and to determine privilege issues. 44 A.3d at 1179. It is not clear from this general discussion whether the claim is that there is discoverable advice of counsel, or whether non-attorney documents are being improperly hidden in attorney files. The information sought involved 30 redactions detailing “pertinent events and correspondence relating to” the failed automobile repairs at issue, that may go to the carrier’s “state of mind”. Id. It ordered a remand and *in camera* inspection to weed out protected materials, per Rule 4003.3

Berg cites Barrick v. Holy Spirit Hospital, 32 A.3d 800 (Pa. Super. 2011) (*en banc*) as one of the cases supporting remand. In Barrick, the Court addressed a subpoena that sought correspondence between counsel and an expert witness, and the application of Rules 4003.3 and 4003.5. In its analysis finding violation of the work product doctrine, the Court emphasized its application rather than its exceptions. In that context, it stated that “documents ordinarily protected by the attorney work-product doctrine may be discoverable if the work product itself is relevant to the underlying action.” That Court went on to start further, however, that the “work-product privilege contained within Pa.R.C.P. 4003.3 cannot be overcome, however, by merely asserting that the protected documents reference relevant subject matter.” Id. at 812.

Thus, “to overcome the work-product privilege, either an attorney’s mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research or legal theories must be directly relevant to the action.” Id. The Court provides examples of such direct relevance from the 1978 Explanatory Comment where a defense of good faith reliance on counsel is asserted to defend a malicious prosecution claim, or an attorney’s opinion on the merits of value of a claim, which may not be discoverable in the original action, could be discoverable in a subsequent suit for the unreasonable refusal to settle.

The Court found that the attorney-expert correspondence was only relevant because of the subject matter discussed; and that the correspondence in itself was not relevant. Id. at 813. Thus, it was protected work product. In this context, it stated that the party is relying on its expert’s

opinion, not that of its attorney. The Court specifically cited the Explanatory Comment as “providing examples illustrating that the attorney work product ‘is not protected against discovery’ where a party’s claim or defense relies upon the opinion of its attorney[.]” which was not occurring in that case. Id. Interestingly, this holding supports the notion that where a party is not relying on the advice of counsel in presenting its case, discovery should not be had.

In determining the scope of the Explanatory Comment and its extrapolation, the line of cases reflected in Reusswig v. Erie Ins., 49 Pa. D. & C.4th 338, 349-50 (C.C.P. Monroe 2000) may also be helpful. In that UIM bad faith case, the Court found that the work product doctrine did not apply to the attorneys’ files in the underlying case because at that time there was no anticipation of bad faith litigation; rather, the case was being prepared to defend the distinct UIM claim. It stated “that the materials sought could not have been prepared in anticipation of the subsequent action because at the time the information and/or documents were prepared for the original litigation, the defendant insurance carriers could not have foreseen the subsequent bad faith action.” Id. “In other words, such [work product] protection does not extend to subsequent litigation that follows upon the resolution of a prior claim.” Id.

In this scenario, the insurer’s attorney is defending a claim as to the amount of recovery/benefits due the insured, if any, in excess of the tortfeasor’s insurance policy. The issues at hand go to liability of the tortfeasor and/or the scope of damages. The attorney is defending in that context and developing opinions related to those issues, much like insurance defense counsel in a tort case must evaluate that case as to liability and damages, which it reports to the insurer during the tort litigation. The impressions of defense counsel in such a case would never be disclosed to the plaintiff/victim through discovery in that underlying case, as such discovery would reveal the defense strategy.

However, per the Explanatory Comment, the insurance carrier which controls the defense and typically appoints the defense counsel who reports to that carrier is informed via those reports about the attorney’s opinions on the merits of the plaintiff’s liability case and the scope of potential damages. The carrier has that information before it in deciding whether to defend or settle. That counsel is not providing the carrier with advice on whether the failure to settle is bad faith, as it is not the carrier’s coverage counsel but rather is the insured’s counsel for defense purposes. The Explanatory Comment posits the situation where the “original” case ends in an excess verdict and the insured then sues the insurer for bad faith in not settling. The same attorney reports which would never have been discoverable by the plaintiff/victim’s counsel, are now arguably discoverable in the second case to evaluate what the insurer should have done with that information.

This is distinct from advice of the insurer’s own coverage/bad faith counsel, as to what action the insurer should take to avoid bad faith. The advice of counsel in the original action goes to merits or value of the case, and may even go to whether or not a settlement is sensible. The advice of counsel retained to address whether the failure to settle may be bad faith is something separate. That is not an opinion about the merits of the plaintiff/victim’s case or the value of the plaintiff/victim’s case as such; but rather an evaluation of the merits of a bad faith case if there is no settlement. While both may go to the “state of mind” of the decision maker, the Explanatory Comment does not expressly contemplate the second example in the insurance illustration. However, the Comment arguably does contemplate this second attorney-client relationship in the

malicious prosecution example, where the party has access to the advice of counsel on whether to pursue a claim but that advice only becomes discoverable if that party expressly invokes it as a defense to the malicious prosecution claim.

Parsed another way, the theory would be that the reports of counsel on the underlying merits and value are treated as facts, rather than opinions, that go into the insurer's decision. Those reports evaluating the underlying action constitute work product in the tort case, but are not work product in the bad faith case as they are not offering any opinions or mental impressions as counsel to the insurer about the insurer's risk of exposure to a bad faith claim. By contrast, an attorney who is engaged by the carrier to evaluate facts and give an opinion on the risk of a bad faith claim is rendering an opinion to a client. This obviously goes to the client's state of mind, but there are a myriad of situations where an attorney's advice goes to the client's state of mind in deciding how to proceed and those opinions are not discoverable simply because they affect a client's thinking.<sup>16</sup> Again, as stated above, this is an analysis under Pennsylvania's work product rule, not its attorney-client privilege law.

Although governed by the Federal Rules, Coregis Ins. Co. v. Law Offices of Carole F. Kafrisen, P.C., No. 01-4517, 57 Fed. Appx. 58, 2003 U.S. App. LEXIS 1806 (3d Cir. January 27, 2003), is worth considering on these points. There, the Court stated that “[t]he only question is whether [the insured’s] bad faith claim relates to the documents, in other words, if the documents sought represent mental impressions, etc. relevant to the accusations of bad faith in the underlying malpractice claim. [The insurer] urges that there is a distinction between the release of documents related to settlement of the underlying claim and documents related to the instant coverage action. We agree. The documents before us were prepared in anticipation of litigation involving coverage and should be distinguished from [the insurer’s] handling of the underlying malpractice claim. ... Here, disclosure is inappropriate because the documents anticipate coverage litigation and relate primarily to the mental impressions and legal opinions on how to proceed with the coverage litigation. Because these documents relate to the current litigation and not the underlying claim, [the insured] cannot demonstrate substantial need and the documents should be protected.”<sup>17</sup>

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<sup>16</sup> Though not directly on point, it may be useful to think of the situation where a party's oral confirmation of a verbal contract is a verbal act, and thus is not hearsay. It may sound like hearsay, but because of words' purpose and use the statements made are not reporting on some act that occurred, but the words are themselves the act that occurred. In the present context, the opinion of counsel on the underlying merits or value is part of the pool of facts that go into weighing whether an insurer's decision not to settle was made in bad faith. The opinion of coverage counsel that weighs those facts is work product; whereas, the earlier opinion in the "original" case, which does not itself directly opine on the issue of bad faith but only to the issue of the merits or value of the underlying case, is not work product in the bad faith case though it is work product in the tort case.

<sup>17</sup> In McAndrew v. Donegal Mut. Ins. Co., 56 Pa. D. & C.4th 1, 20 (C.C.P. Lackawanna 2002), the Court, addressing a number of discovery issues in a bad faith case, concluded: "The final genre of documents consists of internal memoranda, attorney-client correspondence and other records concerning discovery issues, deposition summaries, settlement discussions, court rulings and conferences, legal research, and pre-trial and trial strategy *distinctly related to the merits of the bad faith claim*. Unlike the fourth category of records which exclusively address McAndrew's

Finally, in following the examples in the Explanatory Comment, the exceptions are not based on a broad state of mind theory, pulling every thought the insurer may hold into the black hole of an exception to the work product doctrine; rather, they are based on either the situation where the attorney's advice goes to the limited areas of the merits and value of an underlying tort case, prior to verdict and after a settlement is rejected; and the circumstances where advice of counsel is invoked expressly as a defense, such as in malicious prosecution.

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medical expense claim and Donegal's denial of the same, the final group of documents contains confidential information and mental impressions regarding the viability of the bad faith allegations under 42 Pa.C.S. § 8371." (Emphasis added). Thus, discovery of these documents was not permitted.