DISCOVERY OF RESERVES IN INSURANCE LITIGATION

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I. INTRODUCTION

Attorneys specializing in litigation involving insurance coverage disputes routinely serve or contest discovery requests seeking information and documents regarding an insurer's reserves on a particular claim or claims. While publications like *Mealey's* demonstrate that courts are actively resolving discovery disputes over reserves, the vast majority of the court opinions on this subject go unreported in the official reporters. This article will organize and analyze the developing case law on discovery of reserves in insurance litigation. In so doing, Texas and federal procedure will be emphasized.

As commonly understood in the insurance industry, the purpose of a loss reserve is to assure the accuracy of an insurer's financial status so that insurer insolvency can be avoided. A perceptive definition of the reserve concept was stated by the United States Supreme Court early in this century:

> The term "reserve" or "reserves" has a special meaning in the law of insurance. While its scope varies under different laws, in general it means a sum of money, variously computed or estimated, which, with accretions from interest, is set aside — "reserved" — as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued, but contingent and indefinite as to amount or time of payment.[1]

When a claim is first made on the insurer, the claims department, or more accurately the adjuster assigned the claim, makes an assessment of the amount the claim will ultimately cost the insurer, including not only the dollar amount which may be paid under the policy, but the expenses involved in processing, adjusting, and, if necessary in third party claims, defending any action. Initially, this reserve amount may comprise nothing more than the adjuster's estimate of what the claim is likely to cost the insurance company. Later, the amount is subject to adjustment as more information comes to light.[2]

Counsel may also become involved in setting these reserve amounts, either by directly setting reserves or by offering a coverage or liability opinion on a particular claim. Oversimplifying the role the lawyer's opinion may play, her evaluation giving a seventy percent chance for coverage or liability on a claim at policy limits, for example, may result in the insurance adjuster resetting reserves on that claim to seventy percent of policy limits. Thus, whether known by counsel or not, this information may play a part in the mental process in which an insurance adjuster engages in setting or adjusting the reserve amount. By the attorney's involvement in setting reserves in this fashion, or by setting them directly herself, certain privileges may arise that may prevent the discovery or admissibility of reserves in derivative suits, including bad faith actions. These potential shields, in addition to the catch-all objection concerning relevance,[3] include the attorney-

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client,[4] the party communications,[5] and work product[6] privileges.

II. TEXAS RESERVE SETTING STATUTE

The Texas Insurance Code contains a typical reserve setting statute. It provides that every insurer doing business in Texas must "maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses or claims . . . for which such insurer may be liable . . . ."[7] Formulas to be used in determining the amount of the reserves are left for promulgation by the Texas Department of Insurance.[8] Noting that insurers are mandated to keep and maintain reserve information, the following discussion addresses avenues an insurer may take in its attempt to prevent discovery and evidentiary use of reserve information and those that a claimant may follow to thwart such attempts.

III. RELEVANCY

A. Evidentiary and Discovery Relevance of Reserves

Although scant case law exists that provides a meaningful discussion of avoiding reserve discovery on the grounds of irrelevancy, at least one commentator concludes that relevancy is often an effective objection to producing this information.[9] Theories advanced in support of this argument include the positions that: setting reserves is based on assumption of liability and is not probative of the insurer's evaluation of liability; the insurer does not intend this reserve information to be made available to the court and therefore it cannot be an admission under an estoppel theory; and the amount of an insurer's reserves is closely regulated and the setting of the reserve is therefore influenced by factors that do not correspond to the facts of the claim.[10] At the same time, however, insureds and bad faith plaintiffs maintain that reserve information is relevant because: the existence and timing of the establishment of reserves may show notice of the underlying claim; the existence of reserves may rebut a lost policy defense; reserves may constitute evidence of the duty to defend; reserves may constitute evidence that the insurer has concluded a claim may be covered under the policy; and reserves may provide evidence of bad faith or unfair claims settlement practices.[11]

The arguments advancing nondiscovery of reserve information based on these relevancy theories are controversial in light of the broad nature of the discovery definition of relevancy under both the Federal and Texas Rules of Civil Procedure. Discovery under these Rules is permitted as to:

> [A]ny matter which is relevant to the subject matter of the pending action . . . It is not grounds for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[12]

Texas and federal evidentiary rules, however, are more narrow with regard to admitting evidence at trial which was relevant for discovery purposes. Quoting the identical Texas and federal evidentiary rules:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[13]

From this comparison, it appears that reserve information may not be probative as to the insurer's evaluation of liability for a particular claim (and therefore this information may not constitute evidence that will be admissible at trial). Nonetheless, policyholders usually argue that it does not necessarily follow that reserve information will not lead to "the discovery of admissible evidence." Although insurers should raise a relevancy objection and argue that reserves are not probative as to the insurer's evaluation of liability,[14] a review of the case law indicates that this evidentiary relevancy position in and of itself does not present the most effective barrier to preventing a plaintiff from discovering reserve information.

An insurer's relevancy objection to discovery requests concerning reserves may be useful, if not as a tool for keeping reserve information from

discovery altogether, then as a "filler" or "make weight" argument to support the privilege arguments discussed below. In *In re Couch*,[15] the court addressed the relevance of loss reserves for discovery purposes. This case presents the classic offensive use of reserves to establish bad faith liability. Here, the bankruptcy trustee sought discovery of loss reserve information to prove that the insurer's refusal to settle was bad faith per se. The court, determining that reserve amounts were only partially in the control of the insurer due to state insurance regulation, held the information did not accurately or fairly equate itself with an admission of liability or the value of any particular claim, and therefore did not have to be produced in response to the trustee's discovery request.[16]

Critics of the *In re Couch* opinion contend the court's holding, that reserve information is irrelevant, blurs the distinction between discovery relevance and evidence admissibility. These critics, however, also espouse an evidentiary relevancy argument which goes to the probative value of the reserve amount in connection with the amount reflecting a true evaluation of liability for the claim. While the state regulation may lessen the reliability of the loss reserve as a statement of *liability*, policyholders will normally contend that reserves are still likely to "lead to the discovery of admissible evidence" under the *discovery* relevancy standard.

B. Authority Supporting Argument Reserves Are Not Relevant in Discovery

Inquiry into the relevance of reserves in insurance litigation would not be complete without considering two lines of cases completely at odds with each other concerning whether reserve information serves discovery's stated purpose of expediting litigation by narrowing the area of controversy, avoiding ambush at trial, promoting settlement and providing a lead to admissible evidence.[17] One line of cases, stemming from *Union Carbide Corp. v. Travelers Indem. Co.*,[18] holds that providing an adversary with reserve information does not meet this criteria and therefore is not discoverable in coverage disputes.[19] Advocates attempting to discover reserve information attack this decision and take the position that *Union Carbide v. Travelers* does not adequately discuss why reserves do not meet discovery objectives. These parties dispute the *Union Carbide* court's observation that reserve amounts merely provide uncertain and contingent estimates of a claim. Thus, critics of *Union Carbide* complain that the opinion does not provide any reasoned basis as to why reserves may be hypothetical and therefore inadmissible at trial.[20]

The second stop in the *Union Carbide* line of cases denying discovery of reserves based on lack of relevancy is *Independent Petrochemical Corp. v. Aetna Cas. and Sur. Co.*[21] In agreeing with the magistrate that reserves are nothing more than an estimate of the value of a claim after considering the likelihood of an adverse judgment which does not "normally entail an evaluation of coverage based upon a thorough factual and legal consideration when routinely made as claims analysis,"[22] the district court chose not to disturb the magistrate's conclusion that reserve information is "of very tenuous relevance if of any relevancy at all."[23] Parties resisting discovery will thus rely on these cases and their progeny to argue that reserve information is irrelevant in discovery despite the fact the information may be useful to a plaintiff in establishing coverage.[24]

Special attention should be drawn to *Exchange National Bank of Chicago v. United States Fidelity & Guaranty Co.*,[25] a bad faith case which holds reserve information is not discoverable. This case may have special significance to insurers in bad faith cases, as it appears to be one of the few available bad faith decisions, other than *In re Couch*[26] in which a court held reserve information was not relevant for discovery purposes. The plaintiffs sought discovery of reserves arguing that the insurer's action in merely setting reserves was "tantamount to an admission of bad faith and to an admission that USF&G vexatiously and unreasonably delayed in settling plaintiff's claim."[27] Rejecting this argument, the court held:

> Contrary to plaintiffs' suggestion, the establishment of a reserve by an insurance company is not a concession that the company acted in bad faith in denying a claim. Nor does it constitute evidence that the company has engaged in unfair claims practices. The establishment of reserves by insurance

companies may be nothing more than good business or good accounting practice, or compliance with regulatory requirements. The establishment of a reserve has no bearing upon an insurer's liability in a bad faith action or an action for unfair claims practices.[28]

C. Authority Supporting Argument Reserves Are Relevant in Discovery

In contrast to the cases denying discovery, a second line of cases developed around language in *Groben v. Travelers Indem. Co.*,[29] a bad faith case. The *Groben* court stated that "examination with respect to reserves may develop evidence on the issue of defendant's bad faith. Bad faith is a state of mind which must be established by circumstantial evidence. The actions of defendant in respect to the reserve are relevant."[30] Advancing a position that discovery is warranted, a litigant may argue that unlike *Union Carbide*, the *Groben* court tied the relevancy discussion to the bad faith issues before it, albeit in the simple statement that "(n)egligent investigation and uninformed evaluation of the worth of the Rosen claims go to the heart of the case since serious and recurring negligence can be indicative of bad faith."[31] A party advocating discovery may further be aided by the fact that many of the cases since *Groben* conclude that because reserve information goes to the state of mind of the insurer it is relevant for discovery purposes in bad faith cases while those resisting discovery should argue these decisions contain little analysis as to this point.[32] Additionally, it should be noted that some courts are willing to permit discovery of reserves in non bad faith actions.[33]

D. Authority Permitting Limited Discovery of Reserves

Finally, several cases taking a Solomonic view split the difference and allow limited discovery regarding reserves. For example, in the bad faith case of *Town of Nassau v. Phoenix Assurance Co.*,[34] the court permitted discovery of reserve information generally but not of the reason for setting a reserve below $50,000.[35] In *Stonewall Insurance Co. v. National Gypsum Co.*,[36] a coverage case, the court affirmed the magistrate's order allowing discovery of reserve information through the use of a deposition, rejecting the insurer's argument that producing the reserve information requested by plaintiffs imposed a burden that outweighed the benefit of such information to plaintiffs.[37]

E. Use of Relevancy in Avoiding Reserve Discovery

Although no discernible rule is established by these cases, from *Union Carbide* and its progeny[38] those resisting discovery can argue with confidence that reserve information simply *does not* "lead to the discovery of admissible evidence" in coverage disputes due to the often stated reasons that (1) reserves are not set after a thorough and meaningful evaluation of the factual and legal aspects of a claim and (2) reserves are, in part, statutorily required. While this argument has been most successful in coverage cases, it can also be made in bad faith cases as evidenced by the decision in *Exchange National Bank*.[39] Once a coverage dispute turns into a bad faith or unfair claim settlement action, however, courts appear more willing to permit discovery of reserves due to the scienter requirement that the plaintiff must establish in those claims. Thus in those cases, reserve information *does* "lead to discovery of admissible evidence" and, although reserve information is only circumstantial evidence as to state of mind, those seeking discovery will argue "[b]ad faith is a state of mind which must be established by circumstantial evidence."[40]

IV. PRIVILEGES

If a showing of discovery relevance is made, the insurer need not yet resign itself to the fact that discovery of reserve information is proper or permissible, nor should the party seeking discovery believe that it is. Several discovery exemptions may apply to keep reserves from reaching the claimant. These exemptions include the work product,[41] party communication,[42] and attorney–client[43] privileges. Because some of these exemptions vary between the Federal and Texas Rules of Civil Procedure, at least in form where necessary, the following discussion distinguishes between application of these exemptions under Texas and federal law.

A. Work Product Privilege

1. Texas Rules of Civil Procedure

Rule 166b of the Texas Rules of Civil Procedure sets forth the work product exemption from discovery:

> 3. Exemptions. The following matters are protected from disclosure by privilege:
>
> a. Work Product. The work product of an attorney, subject to the exemptions of Texas Rule of Civil Evidence 503(d) which shall govern as to work product as well as to attorney–client privilege . . .[44]

Although this rule creates an exemption for attorney work product, the rule fails to define "attorney." As used in this exemption, case law establishes that "attorney" includes the agents of the lawyer.[45] Those seeking discovery will argue that "attorney" does not include an insurance adjuster who putatively wears two hats in dealing with insurance claims — one while acting as a claims adjuster and the second while acting as agent for an attorney conducting a separate investigation — because the work product exemption was not created to protect from discovery all materials assembled in the ordinary course of business.[46] While other Texas trial preparation privileges require that the communication or other matters be made, acquired, or developed in anticipation of litigation or in preparation for trial,[47] the work product exemption does not contain similar "in anticipation of litigation" language. Nevertheless, by its very nature, a determination must be made as to whether the alleged privileged information constitutes the work product of an attorney and, in any event, Texas courts have required that litigation be anticipated prior to the privilege attaching despite the fact that the rule is silent in this regard.[48] Additionally, whether materials that comprise work product can be discovered despite their privileged nature has not been addressed by the Texas courts. One Texas commentator believes, however, that there is a bifurcated nature to the work product doctrine in Texas that would permit limited discovery in certain cases.[49] Indeed, the Texas Supreme Court has recently acknowledged this facet of the federal rule and stated that the history of the Texas rule does not indicate that it is to apply any differently than the federal rule.[50]

a. Anticipation of Litigation Requirement

A substantial body of law exists regarding what constitutes actions taken in anticipation of litigation in the context of the party communication privilege. As this requirement is common to both the party communication and work product privileges,[51] the cases discussing both these privileges should be considered in giving this requirement substance. One court stated that "only information obtained by a party after there is good cause to believe suit will be filed or after the institution of a lawsuit is privileged."[52] When work is performed by an attorney after commencement of the action, insurers will argue that such work obviously meets the "in anticipation of litigation" requirement, as litigation is not only imminent but ongoing. When work is performed after an event that gives rise to a lawsuit and prior to its filing, however, a more complicated analysis is required.

In *Flores v. Fourth Court of Appeals*,[53] a case involving the party communication privilege, the Texas Supreme Court established a two part "in anticipation of litigation" test applicable to both the work product and party communication privileges.[54] The *Flores* test contained both an objective prong (Did the outward manifestations indicate that litigation was imminent?) and a subjective prong (Did the party opposing discovery have a good faith belief that litigation would ensue?). Finding that the imminence requirement in the objective prong frustrated the goals of discovery privileges, however, the Texas Supreme Court recently revised the objective inquiry such that it is satisfied "whenever the circumstances surrounding the investigation would have indicated to a reasonable person that there was a substantial chance of litigation."[55] Additionally, those advocating discovery will argue that in restating the subjective prong as enunciated by *Flores*, the Supreme Court increased the burden on the party resisting discovery: Did the party "invoking the privilege believe in good faith that there [was] a substantial chance that litigation" would ensue?[56]

Which facts will satisfy this standard is likely to continue to be the source of considerable debate; whereas objective manifestations such as a demand letter were necessary before the objective prong of the "anticipation of litigation" test could be satisfied[57], the new formulation allows greater flexibility in determining when a privilege may attach. For example, insurers will take the position that their knowledge that a certain type of event almost always leads to litigation satisfies the reconstituted objective prong. Of course, for a matter to be undertaken in "anticipation of litigation," the subjective prong remains an obstacle, albeit a low one. In terms of the duration of this privilege, insurers seeking long-term protection from discovery should remind the court that Texas has recently aligned itself with the majority of jurisdictions in holding that the work product privilege is of a continuing duration such that work product prepared in connection with one lawsuit remains privileged in subsequent litigation.[58]

Applying these principles to discovery of reserves, the insurer may be able to establish this element of the attorney work product privilege if it can demonstrate that the reserve information was set in connection with ongoing litigation or after the circumstances indicated to a reasonable person that there was a substantial chance of litigation and it believed in good faith that there was a substantial chance litigation would ensue. Insurers will further argue that because reserve setting is a fluid process (i.e., reserves are reset as more information regarding the claim comes to light), although an initial reserve may not qualify as work product because litigation was not imminent in terms of the objective or subjective criteria, later changes in the reserve amount may satisfy these standards, thus permitting the invocation of the privilege as to the later amounts. If an insurer can successfully keep later reserve information from discovery, it should then argue to discredit a discovered initial reserve figure by demonstrating that its setting was based on only sketchy information which would have no probative value in relation to the claim now asserted. For example, the insurer may wish to take this approach to convince a trial judge the initial reserve figures have no evidentiary relevancy, or to convince the jury this information is unreliable and is not an accurate statement of its state of mind regarding the claim.

b. Materials Prepared in Ordinary Course of Business

As noted above, setting reserves is mandated by statute.[59] Thus, regardless of whether an attorney is involved in the process, reserves must be set and maintained. Those seeking discovery of reserves will argue that Texas courts do not protect work product gathered in the ordinary course of business,[60] and for many courts which have been presented with the issue, setting reserves is an activity done in the ordinary course of business.[61]

Texas decisions holding that work performed in the ordinary course of business is not protected by the work product privilege can be traced to language in *United States v. El Paso Co.*,[62] and ultimately to the advisory committee notes to Federal Rule of Civil Procedure 26(b)(3),[63] upon which Texas' general discovery rule, Rule 166b of the Texas Rules of Civil Procedure, is based. In *United States v. El Paso Co.*, the defendant claimed a certain tax pool analysis was immune from discovery based on work product privilege. While noting that work product was not "an umbrella that shades all materials prepared by a lawyer," the court recognized that "[l]itigation need not be imminent . . . as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation."[64] Thus it appears that although the work product privilege is not an umbrella from discovery, those resisting discovery will argue that when the primary motivating factor behind the creation of the document is to aid in litigation, the document may qualify for work product status notwithstanding that it was also prepared in the ordinary course of business. Insurers should therefore argue that the decision in *El Paso* supports the conclusion that Texas courts overstate the effect that preparing a document in the course of business has on its discovery.

In *Flores*,[65] the Texas Supreme Court concluded the investigation report at issue was not completed in anticipation of litigation, in part because it was completed in the ordinary course of business. The court, however, based its decision that litigation

was not anticipated, and therefore the privilege did not attach, on the fact that there was no objective evidence that a lawsuit was imminent.[66] This decision, insurers will argue, leads to the conclusion that a document may be prepared (e.g., loss reserve analysis) in anticipation of litigation, even though it is done in the ordinary course of business, if there is first an objective indication that a substantial chance of litigation is present and, second, it had the good faith belief that litigation would ensue.[67]

Although this analysis aids in overcoming the "ordinary course of business" obstacle for those resisting discovery, it should be noted that those advocating reserve discovery will contend that the advisory committee note to Federal Rule 26(b)(3) supports the conclusion that loss reserves are never work product:

> Materials assembled in the ordinary course of business, or *pursuant to public requirements unrelated to litigation*, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision.[68]

Exactly what amount of precedential value to which this note is entitled is unclear, but the litigants are sure to bring it to the court's attention and argue it sets the scope of the privilege. It should be further noted that although many courts have determined reserve information constitutes work product and therefore is free from discovery, those courts did not expressly consider that such information may actually have been completed in the ordinary course of business.[69]

c. Attorney Work Product Used in Other Documents

In raising the work product privilege in connection with reserves, if a court were to determine that *only* the information prepared by the lawyer is privileged, then it would become critical whether the attorney, acting as such, set the reserves herself, or whether she provided the carrier only with information that went into the insurer's decision regarding reserve amounts, e.g., by giving a coverage opinion. Illustrative of this point in an analogous context is *Simon v. G.D. Searle Co.*,[70] where the court was presented with the issue of whether risk management documents, prepared by nonlawyer corporate officials based on information compiled from individual case reserve figures set by lawyers, were also afforded the protection of that privilege. The court concluded that while the individual reserve information was protected by the work product doctrine, the risk management documents were not protected.[71] The court stated:

> The individual figures lose their identity when combined to create the aggregate information. Furthermore, the aggregates are not even compilations of individual figures . . . The purpose of the work product doctrine — that of preventing discovery of a lawyer's mental impressions — is not violated by allowing discovery of documents that incorporate a lawyer's thoughts in, at least, such an indirect and diluted manner.[72]

The court added in a footnote, "the individual case reserve figures are nondiscoverable opinion work product, but when gathered into aggregates, no identifiable opinion work product remains."[73]

Under similar facts, the magistrate in *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*[74] took the opposite approached and concluded that risk management documents based on reserves set by attorneys were not discoverable because they gave insights into the lawyer's opinions in preparing the specific case reserves:

> [B]y raising the work-product privilege, the defendants ask me to protect mental processes that go to the essence of the lawyer expertise -- establishing the value of a legal claim and the fees and expenses that may be incurred in its defense. The litigation's ultimate cost to the client has great significance in determining whether a lawsuit will be tried or settled and, if settled, for what amount. Establishing the value of a claim is analytically complex, requiring an assessment of the body of evidence and the particular issues involved in each case, as well as an evaluation of the case's strengths and weaknesses. It is one of the more challenging and difficult tasks a lawyer confronts . . . Thus, the aggregate reserve

figures may give some insight into the mental processes of the lawyers in setting specific case reserves . . . Notably this is not a situation where mental impressions are merely contained within and comprise a part of another document and can easily be redacted. Instead the aggregate and average figures are derived from and necessarily embody the protected material . . . Thus it is impossible to protect the mental impressions underlying the specific case reserves without also protecting the aggregate figures.[75]

These cases set forth the position of claimant and insurer as to discovery of documents in cases in which the carrier relies on an attorney's opinion in its reserve setting. While the opinion itself may be free from discovery as work product, those seeking discovery will argue that reserves set by the insurer, which rely on attorney opinion, sufficiently dilute and indirectly reflect that opinion such that the principles behind work product privilege are not violated by permitting discovery. On the other hand, insurers will certainly contend that reserves they set reflect enough of the attorney's thought processes to invoke the exemption from discovery. To the extent the Court does not have a bias favoring one of the litigants causing it to grant or prevent discovery without serious consideration of these issues, the Court may very well make an in camera inspection of the opinion and reserves, and then decide whether the work product privilege prevents discovery.

d. Ordinary and Opinion Work Product

Following the lead established by the United States Supreme Court in *Hickman v. Taylor*,[76] Texas courts recognize that the purpose of the work product exemption is to shelter the mental process, thoughts and opinions of an attorney from discovery, in order to allow the attorney room to prepare a case without fear that the opposition will obtain some unfair advantage by discovering the process of case preparation.[77] Within this privilege there are two subcategories: ordinary work product (encompassing factual matters, such as witness statements taken by the attorney or communications between the attorney and others) and opinion work product (which encompasses the attorney's mental impressions and opinions). A survey of Texas case law demonstrates that the courts are especially protective of the attorney's mental impressions and legal thoughts.[78]

The distinction between ordinary and opinion work product becomes critical in determining whether the work product privilege is absolute or only qualified, so that a party may discover otherwise privileged information if she can show a substantial need for that information and that comparable information cannot be obtained elsewhere without undue hardship. Texas courts have struggled with this issue,[79] and because the work product rule does not contain a "substantial need/undue hardship" exception as do other discovery exemptions,[80] some courts are hesitant to allow the judicially made exceptions to work product protection to apply in motions seeking to compel materials that constitute attorney work product.[81] Notwithstanding this apparent uncertainty and confusion, or perhaps because of it, at least one Texas commentator believes that ordinary work product is subject to a substantial need/undue hardship exception, while opinion work product is afforded an absolute privileged status.[82]

In the case of setting reserves, the inquiry of whether the attorney's work product constitutes ordinary or opinion work product is necessarily factual in nature and requires the court to determine which materials were prepared by the attorney in setting the loss reserve. Simplifying the inquiry, if the information prepared by the attorney consisted of her investigation into only the factual aspects of a case (i.e., the attorney acted as a mere fact gatherer), it is likely that her work constitutes only ordinary work product that may be subject to discovery, assuming the proponent of the request can meet the substantial need/undue hardship showing. As the information prepared by the attorney begins to move away from the purely factual (e.g., if the attorney gave her evaluation of a witness' demeanor while collecting facts or expressed her opinion as to the veracity of a person or fact), it is less likely that the exception will apply. At the other extreme, when the work performed by an attorney consists of an opinion as to coverage or the setting of reserves after a legal and factual investigation, it is probable that a litigant could avoid discovery by arguing this work is entitled to absolutely privileged status, assuming

the remaining requirements of the exemption from discovery are satisfied.

e. Work Product Privilege as Applied to Loss Reserves

As the above discussion indicates, determining whether loss reserves fall into the work product exemption from discovery is no simple undertaking. In this connection, however, several general statements regarding typical reserve information may be made. First, this privilege contemplates that an attorney (or her agent) must perform the protected work. This element comes into focus when one considers the situation where the attorney gives the carrier her evaluation as to coverage and that opinion is used by the carrier in setting reserves. In this context, the party seeking discovery may contend that the reserve information does not obtain work product status on the basis that an attorney (or her agent, as the employee of the insurer is not the attorney's agent) did not set the reserve. Additionally, proponents of discovery in bad faith cases will argue that case law establishes that only marginal work product protection exists when a bad faith plaintiff wishes to discover reserve amounts set by a carrier[83] and that reserve amounts set in reliance upon an attorney's opinion are sufficiently removed from the attorney's actual work product to afford the loss reserve any protection from discovery. Those resisting discovery will naturally take exception to such claims, but the strongest argument for avoiding discovery based on work product will exist when the attorney sets the herself.

Even if an attorney sets the reserve amount, and no doubt exists that her subjective thoughts and opinions are expressed, it is still necessarily a fact specific inquiry as to whether the reserves were set in anticipation of litigation. Under the new formulation of this standard under Texas law, the insurer is likely to be able to satisfy its criteria in setting at least some of its loss reserves. Assuming the anticipation of litigation requirement can be met, the insurer next must overcome the argument that reserves are set both in the ordinary course of business and as demanded by statute.

Finally, if the work product exception is found to apply to the reserves set by the attorney (or the reserves that were set were based on the attorney's work product), a claimant will argue that the reserves are subject to discovery upon a showing of substantial need for this information and that it cannot be obtained elsewhere without undue hardship, if the information sought consists of only ordinary work product. The bad faith plaintiff will argue that in bad faith actions in other jurisdictions, courts permit discovery of insurer claims files, including reserve information, reasoning that the file constitutes the only evidence that could establish the insurer's state of mind, a necessary element to the cause of action.

2. Federal Rules of Civil Procedure

Federal Rule of Civil Procedure 26 protects attorney work product from discovery by providing:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under [the discovery relevance standard] of this rule and prepared in anticipation of litigation or for trial . . . only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.[84]

In considering federal work product doctrine, the landmark decision by the United States Supreme Court in *Hickman v. Taylor*[85] must be considered. There, five persons were killed when a tug boat sank. An attorney hired by the tug company took statements from witnesses of the event, and the opposing attorney sought those statements in discovery. The Supreme Court denied the discovery request, reasoning:

> Proper preparation of a client's case demands that [the attorney] assemble information, sift what she considers to be the relevant from the irrelevant facts, prepare his legal theories and

plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways — aptly though roughly termed . . . "work product of the lawyer." Were such material open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. Any attorney's thought, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.[86]

In *Upjohn Co. v. United States*,[87] the Supreme Court again recognized that mental impressions, opinions and work product of attorneys deserve special protection, and in *Shelton v. American Motors Corp.*,[88] the Eighth Circuit noted that not only does the work product privilege protect materials prepared by an attorney in anticipation of litigation, "but also the attorney's mental impressions, including thought processes, opinions, conclusions and legal theories."[89]

a. Anticipation of Litigation Requirement

Unlike the Texas rule based on judicial construction, Federal Rule 26 contains a built-in requirement of anticipation of litigation before the privilege applies. One commentator set forth the relevant test as:

> [W]hether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.[90]

Additionally, the federal work product exemption applies to materials prepared by agents of the attorney, if the other parameters of the privilege are met.[91] Like the Texas scheme, the federal work product privilege does not appear to include materials prepared solely in the ordinary course of business.[92] Thus, in these respects, the analysis of reserve discovery is substantially similar, if not identical to that under the Texas Rules of Civil Procedure:[93] information constituting attorney work product is exempt from discovery if it is made by an attorney or her agent in anticipation of litigation, not in the ordinary course of business, subject to potential disclosure if the requisite showing of need is made by the opposing side.[94]

b. Ordinary and Opinion Work Product

While *Hickman*[95] did not discuss whether the opinion work product discovery exemption was qualified or absolute, it did state that the factual information gathered by an attorney may be discovered "where production of those facts is essential in the preparation of [the opposition's] case."[96] *Upjohn*[97] considered opinion work product and noted that if a showing could ever be made to overcome opinion work product's protection, it would require a greater showing than merely demonstrating the standard Rule 26 requirement that the discovery proponent has a "substantial need and inability to obtain the equivalent without undue hardship."[98] Indeed, upon a showing of compelling need, the Ninth Circuit permitted discovery of an insurance adjuster's handwritten evaluation of a claim over the insurer's assertion of opinion work product.[99]

c. Substantial Need/Undue Hardship Exception

It should be noted that notwithstanding the protective language in *Upjohn*, a number of reported opinions, including several by federal magistrates, conclude that mental impressions of an attorney (in some cases materials in claims files, presumably including reserve information) are not protected by the work product privilege on what appears to be the standard showing of need sufficient to overcome ordinary work product

protection;[100] in other cases an elevated standard appears to have been used.[101] Litigants will thus likely argue the standard that best suits their needs.

In *Tackett v. State Farm Fire and Casualty Co.*,[102] the court determined that a request for production of the insurer's entire claims file in a bad faith action met the "substantial need" requirement of Delaware's version of Federal Rule of Civil Procedure 26(b)(3).[103] The court reached this conclusion noting that in order to prove its case, plaintiff had to establish that at the time the insurer denied liability, there existed a set of facts or circumstances known to the insurer which created a bona fide dispute to the insurer's liability.[104] The court continued:

> In order therefore to prove reasonable justification, it is certain that a plaintiff will have to establish how the defendant processed the claim, why the defendant took the action it did, and why it took the time it did to process the claim. In this context, it is clear then that "[t]he claims file is a unique, contemporaneously prepared history of the company's handling of the claim; in an action such as this the need for the information in the file is not only substantial, but overwhelming." [*Brown v. Superior Court*, 670 P.2d 725, 734 (Ariz. 1983)] "The 'substantial equivalent' of this material cannot be obtained through other means of discovery. The claims file 'diary' is not only likely to lead to evidence, but to be very important evidence on the issue of whether Continental acted reasonably." *Brown, supra* at 734.[105]

Likewise, *Fidelity & Cas. Ins. Co. v. Taylor*[106] held that the entire claims file is discoverable in bad faith actions notwithstanding the work product and attorney–client privileges.[107]

Thus, although the standard for producing attorney work product requires an elevated showing of substantial need and undue hardship, some courts, including federal magistrates, are willing to find the requisite showing in certain cases. In bad faith actions, most notably where the mental impressions of those handling the claim are directly in issue, it appears a claimant stands the greatest chance for success in finding an exception to the work product privilege.

B. Party Communication Privilege

1. Texas Rules of Civil Procedure

Unlike its federal counterpart, Rule 166b of the Texas Rules of Civil Procedure expressly protects communications between a party (i.e., communications between agents or representatives or the employees of a party to the action, or communications between a party and that party's agents, representatives, or employees) from discovery.[108] In order for the privilege to apply, the communication must have been made subsequent to the occurrence or transaction upon which the suit is based and in connection with the prosecution, investigation or defense of the suit, or in its anticipation.[109] Thus, the communication must be made between the right people, at the right time and in response to the right stimulus.

In resolving whether this discovery exemption applies to loss reserves set on a particular claim, the initial inquiry must be whether acceptable persons engaged in the communication. To the extent this exemption is claimed for matters discussed between an employee of the insurer and an attorney hired by the insurer, the insurer will argue that this first prong is satisfied as a "communication between agents . . . or the employees of a party to the action."[110] Likewise, the insurer will take the position that communications between employees of the insurer similarly satisfy this requirement.[111] Thus, for the party resisting discovery, any communication between these individuals regarding reserves will likely lead a court to conclude the first prong of this exception is met. Second, while it is conceivable a reserve could be set, or a communication regarding a reserve could be made prior to the occurrence or transaction giving rise to the communication (e.g., if the insurer is aware an occurrence took place, but no claim had yet been made),[112] in the vast majority of cases reserves will not be discussed or set until a claim is made or notice is given to the insurer. Should the question of timing arise, however, the metaphysical issue of first impression as to whether the "subsequent to the occurrence or transaction upon

which the suit is based" means the occurrence or making or filing the claim (or negligently failing to settle within policy limits, as in bad faith claims) will need to be addressed accordingly. Finally, the critical determination as to whether the communication regarding reserves was done in connection with the prosecution or defense of the relevant litigation, or its anticipation, must be made. As discussed in connection with the attorney work product discovery exemption,[113] once suit is filed the communication most likely will be characterized as "in connection with the prosecution . . . or defense" of the action. When the communication is made prior to suit being filed, however, the two-part "in anticipation of litigation" test, as set forth in *National Tank Co. v. Brotherton*,[114] must be considered.

In order to invoke the party communication privilege, an insurer must meet an additional requirement above those establishing the attorney work product privilege.[115] First, as in the case of the work product privilege, litigation must be anticipated before this privilege may successfully be invoked.[116] If the communication sought to be protected was not made at the correct time in response to both an objective belief that litigation would ensue and the insurer's subjective belief that litigation would result, then there is no protection for the party communication.[117] Second, discovery proponents will argue the course of business caveat to the anticipation of litigation doctrine also prevents a communication regarding reserves from being truly "in anticipation of litigation."[118] The arguments and observations regarding these two obstacles, as noted above in connection with the work product privilege, are equally applicable to determining whether party communications regarding reserves are privileged.

Finally, the party communication privilege includes a unique requirement, the litigation that is anticipated must be the specific litigation that the communication regarded, otherwise the *relevant* litigation was not anticipated and no discovery privilege exists.[119] In *Service Lloyds Ins. Co. v. Clark*,[120] the Austin Court of Appeals determined that the party communication privilege did not protect the insurer's claim file from discovery in a bad faith action because the file was not prepared in response to the bad faith action, but rather was compiled in response to the earlier worker's compensation claim. The court stated:

> In the present appeal, the workers' compensation claim is distinct from the suit for bad faith insurance practices. "They are founded upon different concepts of liability, different elements of proof, and different types of damage." (Citation omitted.) The investigative files generated by the compensation claim were not in any sense prepared in connection with the *prosecution, investigation, or defense* of the claim for bad faith insurance practices or the investigation of the circumstances out of which the claim arises.[121]

In considering this additional barrier to invoking the party communication privilege, a party seeking discovery of reserves will argue that even if the first two obstacles are overcome, an insurer could never prove in later litigation (e.g., bad faith litigation) that the loss reserves sought to be protected were not made in contemplation of the claim itself, but rather in expectation of a bad faith lawsuit.

Furthermore, the party communication privilege is explicitly subject to the same "substantial need/undue hardship" exception as the work product privilege,[122] which makes academic any protection under the privilege upon a demonstration of need under the proper circumstances. The analysis for application of the party communication privilege is virtually identical to the work product exemption because it shares so many of the critical elements necessary to establish its application, but the chances of successfully invoking this privilege may be lower due to the fact that the specific litigation which must be anticipated at the time reserves are set is the litigation in which the reserves are sought to be produced.

2. Federal Privilege

While the Texas Rules of Civil Procedure provide explicit protection for "party communications," the party communication privilege in the federal scheme is encompassed under the work product doctrine.[123] Thus, to the extent a communication is sought to be privileged

in the federal courts, the parameters of the federal work product privilege must be established.[124]

C. Attorney–Client Privilege

1. Texas and Federal Rules of Civil Procedure

Rule 501 of the Federal Rules of Civil Procedure states that evidentiary privileges are to be determined in accordance with state law in diversity actions.[125] Because most, if not all, insurance related actions brought in federal court will be based on diversity of citizenship subject matter jurisdiction, and because of the limited case law regarding the attorney–client privilege in disputes involving loss reserves, the following discussion encompasses the attorney–client privilege under both the Federal and Texas Rules of Civil Procedure.

Texas Rule of Civil Procedure 166b(3)(e) incorporates, for purposes of exemption from discovery, "[a]ny matter protected from disclosure by any other privilege."[126] In turn, the Texas Rules of Civil Evidence provide the criteria for invoking, and the limitations of, the attorney–client privilege.[127] Generally speaking, the client holds this privilege and has the right to refuse to disclose and prevent others from disclosing confidential communications that were made to facilitate the rendition of professional legal services to the client: (1) between herself (or her representative) and her lawyer (or her lawyer's representative); (2) between the lawyer and the lawyer's representative; (3) between the client (or the client's representative, lawyer or representative of her lawyer) to a lawyer (or a representative of that lawyer) representing another party in a pending action, concerning a matter of common interest in that pending action; (4) between representatives of the client or between the client and her representatives; or (5) among lawyers and their representatives representing the same client.[128]

a. Purpose of Attorney–Client Privilege

The attorney–client privilege is well accepted in Texas and its purpose is the protection of communications between the lawyer and client in matters where professional advice is sought, so that those communications may be undertaken without fear that they will somehow later be used against the client.[129] This privilege lasts beyond the termination of the attorney–client relationship and resolution of the controversy that spawned the matter.[130] Moreover, and most importantly to an insurer who retains an attorney to set reserves, not only are the statements from the client to the attorney privileged, but the statements by the attorney to the client are entitled to privileged status as well.[131]

b. Defined Terms in Texas Scheme

Included in the evidentiary rule establishing the attorney–client privilege are a number of definitions relating to this privilege. For example, "client" includes persons, corporations, associations, and entities who are rendered professional legal services by a lawyer, or who consult with a lawyer with the view toward obtaining professional legal services.[132] "Lawyer" is defined broadly to include a person authorized, or reasonably believed to be authorized by the client, to engage in the practice of law in any state or nation.[133] A communication is "confidential" if it is not intended to be disclosed to third persons, other than to those agents or representatives of the lawyer or client who act in furtherance of legal services or to people necessary to transmit the communication.[134] A "representative of the client" is one who has authority to obtain professional legal services or authority to act on legal advice, on behalf of the client.[135] The Texas Supreme Court has recently concluded that this "representative of the client" definition is the "control group" such that only those persons in the upper echelon of the corporate hierarchy and those individuals who are authorized to seek legal counsel on behalf of the corporation constitute the client's representatives for purpose of this privilege.[136] While this recent decision defines the scope of those with the authority to obtain legal services, insurers will likely continue to argue that the issue as to those persons having the ability to *act* on legal advice remains open and, as one commentator believes, this definition includes not only the "control group" of an entity (those able to obtain professional legal advice on the client's behalf), but also a much broader group of functionaries (those with authorization to act on the legal advice).[137] Finally, as those seeking

discovery are sure to remind the court, the attorney–client privilege is subject to a number of exceptions including a "crime/fraud" exception which states that there is no privilege "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud."[138]

c. Specific Situations Involving Attorney–Client Privilege and Reserves

In the two situations an attorney may become involved in setting loss reserves, the likelihood of the attorney–client privilege attaching varies greatly depending on whether the attorney or the carrier actually sets reserves. Additionally, plaintiffs in bad faith cases may present special concerns to insurers regarding the potential application of the crime/fraud exception to the privilege regardless of which player ultimately set the reserve amount.

(1) Reserves Set by Attorney

Where an attorney is contacted by a client to prepare or suggest a loss reserve on a particular claim, the carrier will likely seek protection from discovery of reserves because all the elements necessary to invoke the privilege appear to be met. First, assuming the communication between the lawyer and the client is made with discretion, such that it is not intended for dissemination to third persons, it will most likely be a confidential communication. Naturally, this is a fact specific inquiry and common sense indicates there are situations in which it cannot be said that the communication was not "intended to be disclosed to third persons." Second, whether the communication is made for purposes of facilitating the rendition of professional legal services will be a fact specific inquiry as well. It is an axiomatic principle of the law surrounding the attorney–client privilege, however, that a document or communication does not become privileged merely because it is given to a lawyer.[139] Furthermore, a claimant should argue that other jurisdictions have determined that the attorney–client privilege does not protect communications that relate only to business or technical data.[140] Thus, if the Court determines that an insurer used an attorney to set reserves for purposes of avoiding their discovery if litigation resulted (e.g., having the attorney set the reserves based on factual data which would normally be done by an adjuster) the party seeking discovery may be successful in avoiding this privilege.[141] On the other hand, if the attorney set reserves not only on the basis of facts surrounding the claim, but also on her opinion regarding legal aspects of the claim (e.g., based on a determination of probability of coverage), it is likely that the carrier will prevail by arguing that the communication occurred for purposes of facilitating the rendition of professional legal advice.

(2) Reserves Set by Carrier

Where the attorney does not engage in setting the loss reserve amount but rather gives her assessment of a claim (as in rendering a legal opinion as to coverage under a policy which is in turn used to formulate the amount of reserves), it is questionable whether those resisting discovery could successfully argue that the actual reserve amount should be protected from discovery based on the attorney–client privilege. Assuming the privilege applies to the coverage opinion itself, the question becomes whether the protected nature of the communication survives the insurer's using that information to set reserve amounts. In this regard, when the confidential communication is used by a nonlawyer to reach a decision regarding reserves unrelated to the protected communication (e.g., the opinion), proponents of discovery will claim the reserve amount cannot logically be considered an attorney–to–client or client–to–attorney confidential communication as no "communication" has taken place.

While no case addresses this particular issue, *Simon v. G.D. Searle & Co.*[142] is somewhat instructive. In *Simon*, attorneys set individual reserve amounts. Those reserves were then used to prepare certain risk management documents the plaintiffs wished to discover. The court stated that simply because the underlying documents (the reserves) were prepared by attorneys,[143] the aggregate documents (the risk management reports) were not automatically protected from discovery based on the attorney–client privilege.[144] Those resisting discovery may point to the analogous

discussion regarding similar aggregate information compiled by the insurer with regard to the work product privilege[145] in which other courts conclude that "where reserves have been established based on legal input, the results and supporting papers most likely will be work product and may also reflect attorney–client privilege communications."[146]

d. Crime/Fraud Exclusion to Attorney–Client Privilege

By engaging in reasoning related to the "crime/fraud" exception provided for in the Texas Rules of Evidence,[147] a litigant may be successful in discovering reserve information in bad faith actions despite the applicability (or potential applicability) of the attorney–client privilege, by arguing that the insurer should not be permitted to use the privilege "where an insurer through its attorney engages in a bad faith attempt to defeat, or at least reduce, the rightful claim of its insured . . ."[148] Thus, in some instances, even if the attorney–client privilege were found to exist, under the proper circumstances, a Texas court may be willing to allow production of reserve information if it determines the "crime/fraud" exception to the attorney–client privilege is applicable.

e. The In–House Counsel

While Texas courts have not addressed the issue, federal courts have consistently held that the attorney–client privilege can exist between a corporate entity and its in–house attorneys.[149] Texas law allowing in–house counsel to collect attorney's fees as damages[150] supports the argument that in–house attorneys are to be treated the same as outside attorneys in most if not all areas. In order for the privilege to apply to communication between in–house attorneys and clients, however, the attorneys must act *as attorneys* by rendering legal advice in their professional capacity;[151] courts are wary of giving effect to the privilege when it is not genuine, but rather is manipulated only to give confidentiality to clients.[152]

The case of *In re LTV Securities Litigation*[153] presents an insurer with useful arguments in establishing attorney–client privilege between itself and its in–house counsel. In this regard, inside attorneys are well advised to tie their reserve setting to lawyer functions "from which `[they] evaluate and draw conclusions as to the propriety of past actions and to make recommendations for possible future courses of action.'"[154] For example, the in–house lawyer could expressly compute reserve figures based on the likelihood of coverage in a particular action after reviewing policy language, allegations regarding a claim and facts which may be available. When this approach to reserve setting is taken, the attorney brings special "training, skill and background . . . necessary to make the professional independent analysis and legal recommendations sought by" the carrier, which other lay employees do not possess.[155] Moreover, in any correspondence or communication between the attorney and carrier, it would be useful for the attorney to refer to the insurer as "the client," thus further underscoring her perceived relationship to the carrier.[156] In this fashion, the insurer will have the best chance of successfully asserting the attorney–client privilege to prevent disclosure of reserve figures.

V. CONCLUSION

Of the potential defenses to producing loss reserve information in discovery, none are particularly strong in all cases in which a claimant may wish to discover this information. For example, in a coverage dispute, the carrier has an excellent chance of avoiding production based on relevancy grounds,[157] whereas in a bad faith action, its chance of avoiding production of reserve information on relevancy grounds is diminished somewhat. Thus, a relevancy objection is perhaps the most realistic and reliable approach in many cases where the carrier fails to engage in any advance posturing with regard to protecting reserves. In asserting the work product privilege, the basic elements required to be satisfied present serious, but not insurmountable, obstacles which may be overcome upon demonstrating the proper factual circumstances.[158] Also, insurers will likely be further aided by the fact that some jurisdictions summarily conclude that reserve information constitutes material protected by this privilege.[159] In asserting the party communications privilege, the insurer must not

only establish many of the elements necessary to invoke the work product privilege,[160] but it also has the additional burden of demonstrating that the communication was made in connection with the present action — a requirement that may be difficult to meet in protecting the communication from disclosure, especially in resulting bad faith litigation.[161] Finally, reserve information may be protected by the attorney–client privilege, depending most likely on whether the attorney set the reserve information herself or whether the insurer set reserves relying on information provided by the attorney.[162]

ENDNOTES

1. *Maryland Casualty Co. v. United States*, 251 U.S. 342, 350 (1920).

2. *See* Stephen S. Ashley, *The Discovery and Admission of Reserves in Bad Faith Cases*, VI Bad Faith Law Report 163.

3. *See infra* notes 9–40 and accompanying text.

4. *See infra* notes 126–148 and accompanying text.

5. *See infra* notes 108–125 and accompanying text.

6. *See infra* notes 44–107 and accompanying text.

7. Tex. Ins. Code Ann. art. 21.39 (Vernon 1981).

8. *Id.*

9. *See*, Scott O. Reed, *Discovery of Reserve and Reinsurance Information*, 40 FICC Quarterly 372 (Summer 1990).

10. *Id.* at 373–74; *see also In re Couch*, 80 B.R. 512, 517 (S.D. Cal. 1987).

11. *See, e.g., Stonewall Insurance Co. v. National Gypsum Co.*, No. 86–9671, 1988. WL 96159 (S.D.N.Y. Sept. 6, 1988).

12. Tex. R. Civ. P. 166b(2)(a), Fed. R. Civ. Proc. 26(b)(1).

13. Tex. R. Civ. Evid. 401, Fed. R. Evid. 401.

14. Indeed, this theory has been successfully invoked in a bad faith action on first party insurance. *See American Protection Insurance Company v. Helm Concentrates, Inc.*, 140 F.R.D. 448 (E.D. Ca. 1991).

15. 80 B.R. 512 (S.D. Cal. 1987).

16. *Id.* at 517.

17. *See Union Carbide Corp. v. Travelers Indem. Co.*, 61 F.R.D. 411, 413 (W.D. Pa. 1973).

18. *Id.*

19. Those cases that deny discovery of reserves on relevancy grounds appear to be largely made up of pure coverage cases, as opposed to pure bad faith cases or coverage/bad faith hybrid cases. In fact, our research has uncovered only two bad faith cases, in addition to *In Re Couch*, *supra* note 15, where discovery of reserves has been disallowed on relevancy grounds; in many cases, however, it cannot be determined whether the claims are based on coverage, bad faith or both. *See Exchange National Bank of Chicago v. United States Fidelity & Guaranty Co.*, *infra* note 27 and *American Protection Insurance Co. v. Helm Concentrates, Inc.*, *supra* note 14.

20. *Union Carbide*, 61 F.R.D. at 411.

21. 117 F.R.D. 283 (D.D.C. 1986), *aff'd*, No. 83–3347, 1987 WL 8512 (D.D.C. March 9, 1987).

22. *Independent Petrochemical*, 117 F.R.D. at 288.

23. *Independent Petrochemical*, No. 83–3347, WL 8512.

24. *See, e.g.*, *Leski Inc. v. Federal Ins. Co.*, 129 F.R.D. 99, 106 (D.N.J. 1989) (coverage dispute where court concluded reserve information was of very tenuous relevancy and was nondiscoverable except insofar as that information concerned "lost" policies); *National Union Fire Ins. Co. v. Stauffer Chemical Co.*, 558 A.2d 1091, 1097–98 (Del.Super. 1989) (duty to defend suit in which court determined reserves have little probability of leading to admissible facts, and the mere fact that reserves were established did not necessarily mean the insurer believed the claim would be covered under the policy); *Schierenberg v. Howell–Baldwin*, 571 N.E.2d 335, 337–38 (Ind. App. 1991) (reserve information sought in negligence action was inadmissible at trial because it dealt with liability insurance and was nondiscoverable because it did not lead to the discovery of admissible facts); *Richey v. Chappell*, 572 N.E. 2d 1338 (Ind. App. 1991) (reserve information in personal injury case was inadmissible at trial and did not lead to discovery of admissible facts); *Rhone–Poulenc Rorer Inc. v. Home Indem. Co.*, 139 F.R.D. 609 (E.D. Pa. 1991) (in this case of an unstated nature, court determined that because setting reserve amounts does not normally involve an evaluation of coverage based on a thorough factual and legal evaluation, it is of very tenuous relevance, if any at all, and also constitutes attorney work product); *Fireman's Fund Ins. Co. v. ACC Chemical Co.*, No. CL 14219 (Iowa App. June 4, 1993) (reserve information inadmissible at trial in case involving insured's claims that insurer wrongfully refused to tender defense because reserves do not constitute evidence insurer believed claim was legitimate and danger of prejudice outweighed probative value).

25. No. 81C–7119, 1985 WL 1773 (N.D. Ill. June 6, 1985). It should be noted that this appears to involve a first–party bad faith action. Also worth noting is *American Protection Insurance Co. v. Helm Concentrates, Inc.*, 140 F.R.D. 448 (E.D. Cal. 1991) in which the magistrate denied discovery of reserves stating that in first party bad faith actions, unlike third party suits:

> The insurer's good faith is determined by the manner and depth of its investigation and the determination of whether there was a good faith factual and/or legal question as to whether the loss was covered. Potential liability or the insured's estimation as to its potential liability is marginally relevant at best.

26. 80 B.R. 512 (S.D. Cal. 1987); *see supra* notes 15–16 and accompanying text.

27. *Exchange National Bank*, No. 81C–7119, 1985 WL 1773.

28. *Id.*

29. 266 N.Y.S.2d 616, 619 (N.Y. Sup.Ct. 1965).

30. *Id.* at 619.

31. *Id.*

32. *See, e.g., Miller v. Elite Ins. Co.*, 100 Cal.App.3d 739, 753, 161 Cal. Rptr. 322 (1980) (mere fact insurer established reserve fund is an indication that insurer was aware of its obligation to defend the insured); *Samson v. Transamerica Ins. Co.*, 636 P.2d 32, 44 (Ca. 1981) (by establishing reserves, insurer recognizes its duty to defend the insured); *In re Berason*, 112 F.R.D. 692, 697 (D. Mont. 1986) (claims file is discoverable, subject to attorney–client and work product privileges, because it is the only source of information that can establish the insurer's good faith or bad faith basis for denying the claim); *Fidelity & Cas. Ins. Co. v. Taylor*, 525 So.2d 908, 909–910 (Fla. App. 1987) (entire claims file discoverable in bad faith action); *Ehrlander v. State Dept. of Transp.*, 797 P.2d 629, n.14 (Alaska 1990) (in bad faith action loss reserves were discoverable because they lead to discovery of admissible evidence, and attorney–client and work product privileges were not applicable); *First Nat'l Bank of Louisville v. Lustia*, 1991 WL 236839 (E.D. La. 1991) (reserve information was relevant and discoverable in unfair claims settlement action because it works to establish the state of mind of the insurer).

33. *See, e.g., Champion Int'l Corp. v. Liberty Mut. Ins. Co.*, 128 F.R.D. 608, 612 (S.D. N.Y. 1989) (in action for indemnity and defense costs brought by insured, court upheld magistrate's order allowing production of reserve information as not clearly erroneous).

34. 394 N.Y.S.2d 319, 320 (N.Y.Sup.Ct. 1977).

35. *Id.*

36. No. 86–9671, 1988 WL 96159 (S.D.N.Y. Sept. 6, 1988).

37. *Id.*

38. *See supra* notes 17–28 and accompanying text.

39. *See supra* note 25–28 and accompanying text.

40. *Groben*, 266 N.Y.S.2d at 619.

41. *See infra* notes 44–107 and accompanying text.

42. *See infra* notes 108–125 and accompanying text.

43. *See infra* notes 126–148 and accompanying text.

44. Tex. R. Civ. P. 166b(3). Rule 503(d) of the Texas Rules of Civil Evidence provides exceptions to the attorney–client privilege in cases of communications made in furtherance of a crime or fraud, where claimants make claims through the same deceased client of the lawyer, in matters involving a claimed breach of duty between the lawyer and client, where the lawyer attested to a document, and where a lawyer represents joint clients.

45. *Bearden v. Boone*, 693 S.W.2d 25, 28 (Tex. App.––Amarillo 1985, orig. proceeding).

46. *Brown & Root U.S.A., Inc. v. Moore*, 731 S.W.2d 137, 140 (Tex. App.––Houston [14th Dist.] 1987, orig. proceeding). *See also Evans v. State Farm Hut. Auto. Ins. Co.*, 685 S.W.2d 765, 767 (Tex. App.––Houston (1st Dist.] 1985, writ ref'd n.r.e.); *Wiley v. Williams*, 769 S.W.2d 715, 717 (Tex. App.––Austin 1989, orig. proceeding)

47. *See* Tex. R. Civ. P. 166b(3)(b), (c) and (d) — consulting expert statement privilege, witness statement privilege and party communication privilege, respectively.

48. *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 202 (Tex. 1993); *Star-Telegram, Inc. v. Schattman*, 784 S.W.2d 109, 111 (Tex. App.--Fort Worth 1990, orig. proceeding); *Department of Mental Health v. Davis*, 775 S.W.2d 467, 471 (Tex. App.--Austin 1989, orig. proceeding).

49. William V. Dorsaneo, 3A Texas Litigation Guide §89A.03[2][b][i] (1990). *See also infra* note 82 and accompanying text.

50. *National Tank Co.*, *supra* note 48 at 202.

51. *National Tank Co.*, *supra* note 48; *See Boring & Tunneling Co. v. Salazar*, 782 S.W.2d 284, 286 (Tex. App.--Houston [14th Dist.] 1989, orig. proc.); *Department of Mental Health*, *supra* note 48; *Star-Telegram*, *supra* note 48.

52. *Stringer v. Eleventh Court of Appeals*, 720 S.W.2d 801, 802 (Tex. 1987).

53. 777 S.W.2d 38, 40 (Tex. 1989).

54. *See infra* notes 114-116 and accompanying text.

55. *National Tank Co.*, *supra* note 48 at 204.

56. *Id.* at 10.

57. *See Child Work v. Solito*, 780 S.W.2d 954, 956 (Tex. App.—Houston [14th Dist.] 1989, orig. proc.) (demand made) and *Lone Star Dodge, Inc. v. Marshall*, 736 S.W.2d 184, 188-89 (Tex. App.—Dallas 1987, orig. proc.) (plaintiff's counsel hired).

58. *Owens-Corning Fiberglas Corp. v. Caldwell*, 818 S.W.2d 749, 751-52 (Tex. 1991).

59. *See supra* notes 7-8 and accompanying text.

60. *See, e.g., Evans v. State Farm Mutual Automobile Ins. Co.*, 685 S.W.2d 765, 767 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.).

61. *See, e.g., Loyal Order of Moose Lodge 1392 v. International Fidelity Ins. Co.*, 797 P.2d 622, 629 n.14 (Alaska 1990); *J.R. Stevenson Corp. v. Dormitory Authority*, 492 N.Y.S.2d 385 (N.Y. Sup.Ct. 1985); *Groben v. Travelers Indem. Co.*, 266 N.Y.S.2d 616, 619 (N.Y. Sup.Ct. 1965).

62. 682 F.2d 530 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984).

63. Fed. R. Civ. P. 26(b)(3) advisory committee note.

64. *Id.* at 542 (quoting in part *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981)).

65. *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38 (Tex. 1988).

66. *Id.* at 41.

67. *See National Tank Co., supra* note 48 at 204.

68. Fed. R. Civ. P. 26(b)(3) advisory committee note (emphasis added).

69. *See, e.g., Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, No. 83–3347, 1987 WL 8512 (D.D.C. March 9, 1987); *Richey v. Chappell*, 572 N.E.2d 1338, 1340 (Ind. App.––1991); *Rhone–Poulenc Rorer, Inc. v. Home Indem. Co.*, 139 F.R.D. 609 (E.D. Pa. 1991); and *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 402 (8th Cir. 1987).

70. 81 F.2d 397 (8th Cir. 1987).

71. *Id.* at 401–402.

72. *Id.* at 402.

73. *Id.* at n.3.

74. 139 F.R.D. 609 (E.D. Pa. 1991).

75. *Id. See also Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, No. 83–3347, 1987 WL 8512 (D.D.C. March 9, 1987) ("where reserves have been established based on legal input, the results and supporting papers most likely will be work product and may also reflect attorney–client privilege communications").

76. 329 U.S. 495, 511–12 (1946).

77. *Owens–Corning Fiberglass Corp. v. Caldwell*, 818 S.W.2d 749, 750 (Tex. 1991). *See also Axelson, Inc. v. McIlhany*, 755 S.W.2d 170, 173 (Tex. App.––Amarillo 1988, orig. proc.).

78. *Compare, e.g., Axelson, supra* note 77 (attorney's indexes, notes, and memoranda were "work product" in every sense of the terms) with *Garcia v. Peeples*, 734 S.W.2d 343, 348 (Tex. 1987) (photographs taken by attorney were not work product because they did not disclose his mental impressions or legal opinions).

79. *See Garcia v. Peeples, supra* note 78 and *Department of Mental Health, supra* note 48 (holding work product is not subject to trial court's control in ruling on discovery controversies).

80. *See* Tex. R. Civ. P. 166b(3) (last paragraph).

81. *Menton v. Lattimore*, 667 S.W.2d 335, 341 (Tex. App.––Fort Worth 1984, orig. proc.).

82. William V. Dorsaneo, 3A Texas Litigation Guide § 89A.03[2][b][i] (1990).

83. *See, e.g., Loyal Order of Moose v. Intern. Fidelity*, 797 P.2d 622, 628–29 n. 14 (Alaska 1990) (work product privilege provided no protection because loss reserves are not prepared in anticipation of litigation); *Tackett v. State Farm Fire and Cas.*, 558 A.2d 1098, 1102–03 (Del. Super. 1988) (court held plaintiffs demonstrated sufficient substantial need to overcome the work product privilege); *Fidelity & Cas. Ins. Co. of N.Y. v. Taylor*, 525 So.2d 908, 910 (holding claims file is subject to production where claimant demonstrates substantial need notwithstanding the work product privilege); *North Georgia Lumber & Hardware v. Home Ins. Co.*, 82 F.R.D. 678, 680 (N.D. Ga. 1979) (work product privilege overcome upon showing of substantial need).

84. Fed. R. Civ. P. 26(b)(3).

85. 329 U.S. 495 (1946).

86. *Id.* at 511.

87. 449 U.S. 383 (1981).

88. 805 F.2d 1323 (8th Cir. 1986).

89. *Id.* at 1328.

90. 8 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2024 (1970), cited with approval in *Simon v. G.D. Searle & Co.*, *supra*, note 70 at 401.

91. *United States v. Nobles*, 422 U.S. 225, 238–89 (1975).

92. *United States v. City of El Paso*, 682 F.2d 530, 542 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984). *See supra* notes 60–69 and accompanying text.

93. For purposes of the "anticipation of litigation" standard in the relevant federal decisions, it appears that the work product produced by the attorney need not be in anticipation of this specific pending litigation. *In Re LTV Securities Litigation*, 89 F.R.D. 595, 612 (N.D.Tex. 1981) ("The weight of modern authority supports the conclusion that the work product privilege extends to documents prepared in anticipation of prior, terminated litigation, regardless of the interconnectedness of the issues or facts." *Id.* (quoting *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 724 (N.D. Ill. 1978)). *See also In Re Murphy*, 560 F.2d 326, 334–35 (8th Cir. 1977). *But see, United States v. International Business Machine Corp.*, 66 F.R.D. 154, 178 (S.D. N.Y. 1974) and *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D. Pa. 1970) (materials qualifying as work product in some cases are discoverable in subsequent litigation).

94. *See supra* notes 51–82 and accompanying text.

95. *Hickman v. Taylor*, 329 U.S. 495 (1946).

96. *Id.* at 511.

97. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

98. *Id.* at 401, *see also In re Grand Jury Subpoena*, 784 F.2d 857, 862 (8th Cir. 1986), *cert. dism'd sub nom*, 479 U.S. 1048 (1987) (court found impressions, conclusions, opinions, and legal theories were entitled to absolute protection even if Rule 26 hardship test is met). *But see Reavis v. Metropolitan Property and Liab. Ins. Co.*, 117 F.R.D. 160, 164 (S.D. Cal. 1987) ("The strategy, mental impressions and opinions of [the insurer's] agents concerning the handling of the claim are directly at issue. When mental impressions and opinions are directly at issue in a case, courts have permitted an exception to the strict protection of Rule 26(b) (3) and allowed discovery"); *Donovan v. Fitzsimmons*, 90 F.R.D. 583 (N.D. Ohio 1981) (recognizing exceptions to opinion work product privilege) and *Bird v. Penn Cent. Co.*, 61 F.R.D. 43 (E.D. Pa. 1973) (where material contained in opinion work product constitutes evidence that is directly at issue, a compelling need may overcome the privilege).

99. *Holmgren v. State Farm Mut. Auto Ins. Co.*, 976 F.2d 573, 576–78 (9th Cir. 1992).

100. *See infra* notes 102–106 and accompanying text.

101. *See infra* note 107.

102. 558 A.2d 1098, 1102–03 (Del.Super. 1988).

103. *Id.* at 1103.

104. *Id.*

105. *Id.*

106. 525 So.2d 908 (Fla. App. 1987).

107. *See also Reavis v. Metropolitan Property & Liab. Ins. Co.*, 117 F.R.D. 160, 164 (S.D. Cal. 1987) ("There is no dispute that mental impressions are afforded greater protection . . . [b]ut the strategy, mental impressions and opinions of Metropolitan's agents concerning the handling of the claim are directly at issue. When mental impressions and opinions are directly at issue in a case, courts have permitted an exception of mental impressions"); *Royers v. Burleson*, 100 F.R.D. 436, 440 (D. D.C. 1983); *Donovan v. Fitzsimmons*, 90 F.R.D. 583 (N.D. Ill. 1981); *Bird v. Penn Central Co.*, 61 F.R.D. 43 (E.D. Pa. 1973) ("Rule 26(b)(3) on its face protects against the discovery of these aspects of the work product. However, exceptions have been made where such information is directly at issue, and the need for its production is compelling, as here").

108. Tex. R. Civ. P. 166b(3)(d).

109. *Id. See also Eddington v. Touchy*, 793 S.W.2d 335, 336 (Tex. App.––Houston [1st Dist] 1990, orig. proc.; mand. overr.).

110. Tex. R. Civ. P. 166b(3)(d).

111. *Id.*

112. *See* Tex. Ins. Code art. 21.39 (Vernon 1981), "Every insurer shall maintain reserves . . . for the payment of all losses or claims . . . whether reported or unreported . . ."

113. *See supra* notes 51–58 and accompanying text.

114. *See supra* notes 53–57 and accompanying text.

115. *See supra* notes 51–52, 60–70 and accompanying text.

116. *See supra* notes 51–58 and accompanying text.

117. *See supra* note 51–58 and accompanying text.

118. See supra notes 60–69 and accompanying text.

119. *Republic Insurance Co. v. Davis*, No. D–2369, 1993 WL 186086 (Tex. June 3, 1993).

120. 714 S.W.2d 437 (Tex. App.––Austin 1986, orig. proc.); *see also Eddington v. Touchy*, 793 S.W.2d 335 (Tex. App.––Houston [1st Dist.] 1990, orig. proc.; mand. overr.)

121. *Id.* at 439 (emphasis in original).

122. *See* Tex. R. Civ. P. 166b(3) (last paragraph); *see supra* note 82 and accompanying text.

123. *See Hickman v. Taylor*, 329 U.S. 495 (1946).

124. *See supra* notes 84–107 and accompanying text.

125. Fed. R. Civ. Evid. 501; *See also Simon v. G. D. Searle & Co.*, 816 F.2d 397 (8th Cir. 1987).

126. Tex. R. Civ. P. 166(3)(e).

127. Tex. R. Civ. Evid. 503.

128. *Id.*

129. *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978).

130. *Bearden v. Boone*, 693 S.W.2d 25, 27–28 (Tex. App.––Amarillo 1985, orig. proc.).

131. *See Dewitt and Rearick v. Ferguson*, 699 S.W.2d 692, 693 (Tex. App.––El Paso 1985, orig. proc.) (communications from lawyer to client are entitled to attorney–client privilege.)

132. Tex. R. Civ. Evid. 503(a)(1).

133. Tex. R. Civ. Evid. 503(a)(3).

134. Tex. R. Civ. Evid. 503(a)(5). *See also Boring & Tunneling Co. v. Salazar*, 782 S.W.2d 284, 289–90 (Tex. App.––Houston [14th Dist.] 1989, orig. proc.) (letter to insurance adjusters from attorney was clearly written with the purpose of facilitating rendition of professional legal services.)

135. Tex. R. Civ. Evid. 503(a)(2).

136. *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 198–99 (Tex. 1993).

137. William V. Dorsaneo, 3A *Texas Litigation Guide* § 89A.04[3][a][iii] (1990). In *Upjohn v. United States*, 449 U.S. 383 (1981), the Supreme Court rejected the narrow "control group" test in determining whether a communication between an entity's low level employees and attorney was protected by the attorney–client privilege. The test set forth by the *Upjohn* court is as follows: (1) the communication must involve information necessary for the attorney to provide the entity with adequate legal representation; (2) the communication must relate to matters within the scope of the employee's employment; and, (3) the employee must be aware that the communication is in furtherance of the attorney providing the entity with legal advice. *Id.* at 394–95. Thus, while this test differs from that under Texas law, its scope appears to be roughly equivalent.

138. Tex. R. Civ. Evid. 503(d)(1). *See supra* note 44.

139. *Brown v. St. Paul City Ry.*, 62 N.W.2d 688 (Minn. 1954); *see also National Tank Co.*, *supra* note 136 at 199.

140. *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403 (8th Cir. 1987). It must be recognized that while some courts very strongly state the rule that business and technical data is not protected by the attorney–client privilege, the true nature of the rule is probably best illustrated by the courts giving this apparent limitation its genesis. *See, e.g., Burlington Industries v. Exxon*, 65 F.R.D. 26, 39 (D.Md. 1974) ("[n]o privilege will attach

for documents designed merely to communicate nonprivileged business or technical data"); *First Wisconsin Mortgage Trust Co. v. First Wisconsin Corp.*, 86 F.R.D. 160, 174 (E.D. Wis. 1980) ("attorney–client privilege does not extend to business advice given by an attorney to a client, or to inter–client communications designed to communicate only business or technical data"). *Cf. SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508 (D.Conn. 1976) (portions of documents in question were discoverable because although they were prepared by an attorney, they contained business information that was of a public nature).

141. *See National Farmers Union Property & Cas. Co. v. Denver District Court*, 718 P.2d 1044 (Colo. 1986) (lawyers were not acting as attorneys, but rather as claims investigators involved only with fact investigations, therefore the attorney–client privilege did not apply).

142. 816 F.2d 397 (8th Cir. 1987).

143. The reserves were assumed by the court to be privileged under the attorney–client privilege, although the court apparently had doubts as to their status. *Id.* at 402–03 and n.5.

144. *See also Loyal Order of Moose*, *supra* note 61 (court found attorney–client privilege did not apply to loss reserves, stating only that "the existence and amount of any loss reserve is not a protected 'confidential communication' made for the purpose of facilitating the rendition of professional legal services").

145. *See supra* notes 70–75 and accompanying text.

146. *Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, No. 83–3347, 1987 WL 8512 (D.D.C. March 9, 1987). *See also Rhone–Poulenc Rorer, Inc. v. Home Indem. Co.*, 139 F.R.D. 609 (E.D. Pa. 1991) (aggregate reserve information based on reserves set by lawyers was protected by work product privilege).

147. Tex. R. Civ. Evid. 503(d)(i).

148. *United Services Auto. Ass'n v. Werely*, 526 P.2d 28, 33 (Alaska 1974). *See also Escalante v. Sentry Ins. Co.*, 49 Wash. App. 375 (1987) (allowing in camera inspection of materials putatively protected by the attorney–client privilege when the discovery proponent makes a factual showing adequate to support good faith belief that the insurer's wrongful conduct is sufficient to invoke the fraud exception to the privilege).

149. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981); *United States v. Shyres*, 898 F.2d 647, 655 (8th Cir. 1990); *In re LTV Securities Litigation*, 89 F.R.D. 595, 601 (N.D. Tex. 1981); and, *Barr Marine Products Co., Inc. v. Borg–Warner Corp.*, 84 F.R.D. 631, 635 (E.D. Pa. 1979).

150. *See Tesoro Petroleum Corp. v. Costal Refining & Marketing, Inc.*, 754 S.W.2d 764, 766–67 (Tex. App.–– Houston [1st Dist.] 1988, writ denied) and *Campbell, Athey & Zukowski v. Thomasson*, 863 F.2d 398, 400 (5th Cir. 1989).

151. *In re LTV Securities Litigation*, *supra* note 149 at 600–01.

152. *In re Grand Jury Subpoena*, 803 F.2d 493, 499 (9th Cir. 1986), *corrected*, 817 F.2d 64 (9th Cir. 1986).

153. 89 F.R.D. 595 (N.D. Tex. 1981).

154. *Id.* at 601 (citing *Diversified Indus. Inc. v. Meridith*, 572 F.2d 596, 610 (8th Cir. 1978)).

155. *Id.* at 601.

156. Because privileged communications can only exist between the attorney and the client, the attorney must exercise special care to communicate reserve information only to the "client" so as not to inadvertently waive the privilege by discussing the matter with carrier employees who do not constitute the "client." *See supra* notes 132–136 and accompanying text.

157. *See supra* notes 9–40 and accompanying text.

158. *See supra* notes 51–69, 90–94 and accompanying text.

159. *See supra* note 69 and accompanying text.

160. *See supra* notes 108–119, and accompanying text.

161. *See supra* notes 120–121 and accompanying text.

162. *See supra* notes 139–146 and accompanying text.