

PROTECTING THE PRIVILEGE MARYLAND

By: Steven E. Leder

In Maryland, the attorney-client privilege and the work-product privilege protect documents from disclosure in insurance coverage and insurance bad faith litigation; however, there are limitations on this protection. The documents must be held in confidence to prevent discovery of documents protected by either privilege. Where the insurer makes selective disclosures or relies upon advice of counsel the privilege may be waived. The mere allegation of bad faith does not permit the discovery of mental impression and opinion type attorney work product, but may permit the discovery of documents or things prepared in anticipation of litigation. Investigative activities by attorneys are protected if the investigation was not routine and involves legal appraisements.

1. **Attorney-Client Privilege**

The attorney-client privilege is codified in the Md. Code (1974, 1995 Repl. Vol.), Courts and Judicial Proceedings Art., § 9-108, and states that:

[a] person may not be compelled to testify in violation of the attorney-client privilege.

Maryland has adopted Wigmore's definition of the attorney-client privilege, as the statute does not define the privilege:

(1) Where legal advice of [any] kind is sought (2) from a professional legal advisor in his capacity as such (3) the communications relating to that purpose (4) made in confidence (5) by the client (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection [may] be waived.

Harrison v State, 276 Md. 122, 135, 345 A. 2d 830 (1975) (quoting 8 John H. Wigmore, *Wigmore On Evidence* §2292, at 554 (McNaughton rev. ed 1961).

2. **Attorney Work Product Doctrine**

The work product doctrine is codified in Maryland Rules of Civil Procedure, Rule 2-402(c). The Maryland rule and Federal Rule of Civil Procedure 26(b)(3) are nearly identical for further review, the Maryland courts look to the federal decisions for guidance. *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 407, 718 A.2d 1129, 1134 (1998). See also, *McLain, Maryland Evidence*, §503.21 n.1 (2001). In Maryland, as in the Federal system, there are two types of work-product privilege. "Mental impressions, conclusions, opinions, or legal theories of an attorney" are subject to an unqualified privilege against disclosure. Md. Rule 2-402(c). "Documents or other tangible things prepared in anticipation of litigation" are subject to a qualified privilege that protects them from disclosure unless a party shows "substantial need" and "undue hardship." Need cite here

3. **Scope of Evidentiary Privileges In Coverage Disputes**

In *Nationwide Mutual Ins. Co. v. Lafarge Corp.*, 1994 US. Dist. LEXIS 3851 (D. Md. 1994), a dispute arose among Lafarge's numerous insurers concerning coverage for allegedly defective cement used in defective concrete railroad ties sold to various railroads. There, Lafarge moved to compel the production of documents held by Hartford, who contended that the disputed

documents were protected by either the attorney-client privilege or the work product privilege. The Court reviewed four documents *in camera*: two letters; and, a facsimile note. There the court held that the two letters were absolutely immune from discovery as opinion work product as they were written after the declaratory judgment action was pending. The letters contained analysis of the legal position and advice on possible litigation strategies. The two handwritten documents were protected as attorney-client privilege. Hence, usually, the privileges will be enforced.

4. Effect of Bad Faith Claims

The United States District Court for the District of Maryland is split on the discovery of insurer's files containing work-product privilege where "bad faith" is alleged. *APL Corp v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10 (1980); *Travelers Indemnity Company v. Allied-Signal, Inc.* 124 F.R.D. 101 (1989). *APL Corp* involved an action on a fidelity policy where two of the insured's employees pled guilty to larceny after trust. The police reports valued the merchandise at approximately \$7,000. The insured's proof of loss claimed losses over \$800,000. The insured alleged bad faith denial of the claim. The court, in *dicta*, reasoned, if the facts contained in Aetna's investigative file demonstrated Aetna was aware that the loss was far greater than amount documented in the police report, a fact finder might find that it acted in bad faith.

More recently, in *Travelers Indemnity Company*, the insured moved to compel document including internal memoranda between the insurer and its attorneys; inter-office communications seeking legal advice; notes and memoranda containing their mental impressions in anticipation of lawsuit or after the lawsuit commenced; investigative reports prepared for Traveler's counsel post suit; and photographs taken at the direction of the insurer or counsel after litigation commenced. There, the court reasoned the insured's assertion of a claim against Travelers for bad faith in refusing to provide coverage did not provide the basis to order production. "[I]f at a later stage of the litigation the Court is persuaded that Travelers has acted in bad faith, discovery of the [claims] files can then be reconsidered. *Id.* at 102.

Hence, mental impression type attorney work-product is never discoverable; however, documents prepared in anticipation of litigation may be discoverable upon a proper showing.

Investigations May Be Protected By The Attorney-Client Privilege

Investigative activities by counsel are usually within the scope of the attorney client privilege. The test for "legal advice" is whether "the communications ... relate to professional advice and to the subject-matter about which such advice is sought." *Lanasa v State*, 109 Md. 602, 617, 71 A. 1058, 1074 (1909). The courts have also looked at whether the attorney was retained for a legal activity, a business activity or some other purpose. *E.I. du Pont de Nemours & Co, supra* at Md. 416, A2d 1129.

Where attorneys are retained to investigate, is their investigation protected by the work client privilege? The Maryland Federal District Court rejected an assault on the privilege, reasoning that "[t]he relevant question is not whether [the attorney] was retained to conduct an investigation ... but rather, whether this investigation was 'related to the rendition of legal services.'" *McCafferty's, Inc. v. The Bank Of Glen Burnie*, 1998 U.S. Dist. LEXIS 12859, *citing*, *In re Allen*, 106 F.3d 582, 603 (4th Cir. [W. Va] 1997). Whether an investigation is privileged may depend upon whether the issues are routine or whether it involves "complex ... issues of law, which intrinsically, required sophisticated legal appraisements." *Id.* at 5. Hence, attorney investigations will usually be subject to the attorney client privilege.

Both Privileges Are Waived Where Documents Are Not Held In Confidence

The attorney client privilege will not attach if the matter is not intended to be confidential. Confidentiality requires the communication not be intended for disclosure to third persons. *E.I.*

du Pont de Nemours & Co, supra at 416. In Re Underwriters at Lloyd's, 666 F.2d 55, 56 (D. Md. 1981), involved an action by an insured under "master declaration computer equipment lease indemnity policies" issued by Lloyds and other companies. The insurers claimed attorney-client privilege and the attorney work product privilege to certain documents and the insureds moved to compel. The trial court granted an order compelling discovery after considering three categories of documents. The first group contained an opinion letter from counsel to underwriters and claims adjusters that counsel for the insured was given when the parties "were working in a friendly and cooperative manner." Hence, the opinion letter was not confidential and not privileged. The second category of documents consisted of inter-office communications between claims adjusters and a letter from Underwriters to the claims adjusters that included discussion of the advice of counsel. The trial court found that copies of documents were "indiscriminately distributed among the various files of defendants and their agents," thus defeating any claim that the material was confidential. Moreover, the information in the documents was obtained from non-privileged documents, not based upon a confidential communication from the client to the attorney. *Id.* at 57. The third group of documents was a memorandum by counsel reporting on a meeting held between attorneys for Underwriters and officers of the insured. The Court held that this was no more than a report on events and did not reveal any privileged communications. The Fourth Circuit rejected petitioners writ of mandamus directing the District Court to vacate its order compelling discovery. Therefore, wide distribution of documents subject to the attorney client and attorney work product privilege will waive the privileges.

Waiver by Selective Disclosure or Placing the Advice of Counsel at Issue

A party waives the attorney-client privilege when he relies upon the advice of counsel as a defense. *ST Systems Corporation v. Maryland National Bank* 112 Md. App. 20, 35; 684 A.2d 32, 39-40 (1996); *Fraidin v. Weitzman*, 93 Md. App. 168, 227, 611 A.2d 1046 (1992), cert. denied, 329 Md. 109, 617 A.2d 1055 (1993); *McCafferty's, Inc. v. The Bank Of Glen Burnie*, 1998 U.S. Dist. LEXIS 12859.

Originally Prepared And Published By The Ad Hoc Privilege Task Force DRI Insurance Law Committee September 2001