American Casualty v. Hotel and Restaurant Employees and Bartenders International Union Welfare Fund, et al., Discovery Commissioner Opinion #7, (July, 1990)

I. PROCEDURAL HISTORY OF LITIGATION

Beginning in 1977, the Hotel and Restaurant Employees and Bartenders International Union Welfare Fund (the International Fund) and its Administrator, William L. Myers, Inc. (Meyers, Inc.), were covered by a succession of claims made fiduciary liability policies issued by American Casualty Company. Policy number TLI006 88 8907 is at issue in this case. It was a three year, claims made policy issued in October of 1981, and was in effect when the relevant claims at issue were first asserted.

In October of 1980, the Southern Nevada Culinary Worker and Bartenders Health and Welfare Trust Fund (the local Fund) merged into the International Fund. The merger was implemented by means of a written contract between the Trustees of the Local and International Funds. Among the merger agreement's provisions was one by which the International Trustees agreed to defend and indemnify the Local Trustees arising from the Local Trustees' pre-merger acts on behalf of the Local Fund.

In August of 1981, the International Fund filed suit against the Local Fund's pre-merger Administrator and Accountants, alleging that their pre-merger advice to the Local Trustees had led to the adoption of an unaffordable benefit schedule for Local Fund beneficiaries. In December of 1981, the Local Fund's Administrator, Earl Liever, countered by

filing a Third-Party Complaint against the former Local Trustees and Meyers, Inc., the International Fund's Administrator, alleging that the former Local Trustees and the International Fund's Administrator shared the responsibility for any losses that might befall the International Fund.

American Casualty's involvement in the litigation began in December of 1981, following the filing of the Third-Party Complaint against the Local Trustees and Meyers, Inc., as Meyers, Inc., was a named insured under the policy and asked that American Casualty defend it against the Third-Party mismanagement Complaint. The Local Trustees also claimed in December of 1981, that they too were insured under the policy by virtue of the merger agreement and therefore should be defended and indemnified by American Casualty.

In response to the claims of Meyers, Inc., and the Local Trustees, American Casualty in January of 1982, retained the firm of Hogan & Hartson, more specifically attorneys Stuart Ross and Harold Masback of that firm, to serve as "monitoring counsel" in connection with the litigation ["monitoring counsel" is American Casualty's designation]. American Casualty alleges that the monitoring counsel represented American Casualty's interests in communications with insureds and other claimants under the policy and provided legal advice to American Casualty concerning its obligations, if any, under the policy. American Casualty has alleged that it never delegated

to its counsel the responsibility for making decisions concerning coverage or the handling of the litigation claims under the policy.

In February of 1982, Ross and Masback wrote counsel for the Local Trustees and advised there appeared to be no coverage for the Local Trustees under the policy. They also wrote to counsel for Meyers, Inc., and advised that, subject to a reservation of rights, a defense would be provided to Meyers, Inc., as an insured under the policy.

Subsequent to the December 1981, Third-Party Complaint, the Local Trustees, demanded, in addition to their demands on American Casualty, that the International Trustees defend and indemnify them pursuant to paragraph 3(c)(ii) of the merger agreement. The International Trustees rejected the demand, thereby leading to the Counter-claim by the three management side Local Trustees against the International Trustees. The Counter-claim alleged that the International Trustees had committed a tortious breach of the covenant of good faith and fair dealing, and sought indemnification under the merger agreement for all costs of defense, judgments and settlement for which the three Local Trustees might become liable in the Third-Party action.

On March 25, 1983, the International Fund's counsel, John Reynolds, sent American Casualty a letter demanding a defense

to the Counter-claim. On July 27, 1983, American Casualty advised the International Fund that it had retained a Las Vegas law firm and specifically attorney, James Olson, to begin representing the International Trustees. No reservation of rights was claimed. Mr. Olson filed a reply to the Counter-claim on the International Trustee's behalf on August 31, 1983, and continued representing the International Trustees at American Casualty's expense for the next four and one-half years.

On or about September 28, 1983, the International Fund's attorney, John Reynolds, met with attorney Kevin Lanigan of the Hogan & Hartson firm. On September 30, 1983, Lanigan sent a letter to Reynolds with the following language:

> As you and I discussed during our conversation Wednesday, the defense being provided to your client by the American Casualty Company of Reading, Pennsylvania (hereinafter "American") continues to be provided pursuant to a full reservation of American's rights. [September 30, 1983, letter, Lanigan to Reynolds]

On December 21, 1983, a further letter was sent by Ross and Masback to Reynolds which included a reservation of rights along with explanations for those reservations. [It should be noted that Ross and Masback left the Hogan & Hartson firm in November of 1983, forming Ross, Dixon and Masback. This ended the

participation of the Hogan & Hartson firm in this case.]

In a related action both the union-side and the management-side Local Trustees filed actions for declaratory relief against American Casualty in the United States District Court for Nevada in October of 1983. The International Fund attempted to intervene in the coverage action in July of 1987, but the motion was denied. In September of 1987, Summary Judgment was entered in favor of American Casualty against the Local Trustees on the coverage issue.

The Liever Defendants paid the International Fund approximately 1.8 million dollars in settlement for their negligence and, additionally, dismissed the Third-Party claim it had against the Local Trustees. However, in June of 1987, Summary Judgment was entered in U.S. District Court in favor of the Local Trustees on their Counter-claim against the International Trustees for attorney's fees and costs in defense of the Liever Third-Party Complaint. It was not until May of 1988, that a final judgment assessing money damages in the approximate sum of $850,000.00 was entered. A demand for payment of the judgment was made by the International Fund to American Casualty in May of 1988. American Casualty responded through Ross, Dixon & Masback (Peter Thompson), detailing the reasons it would not pay. The International Trustees then filed suit against American Casualty in Federal Court, but the suit was dismissed based upon a lack of diversity. American Casualty

then commenced the instant state court action in July of 1988, and the International Fund Counter-claimed, asserting bad faith on the part of American Casualty. The International Fund alleges that American Casualty failed to both defend and reserve its rights in a timely fashion under the policy, and American Casualty is now estopped from ever claiming a lack of duty to indemnify pursuant to Illinois law, which the parties agree would control that question in this case.

In addition to the coverage question the International alleges in this case that American Casualty acted in bad faith by seeking to avoid responsibility under the policy with a belated reservation of rights. It is alleged American Casualty simply hired the attorneys named above to "create" a defense to coverage, even after agreeing to defend without a timely reservation of rights. Because of the bad faith allegations, counsel for the International Fund now seeks to discover all documents generated in the Lanigan, Ross, Masback and Thompson files, dealing with the coverage of the International Fund by American Casualty. The International Fund alleges it is entitled to all documents generated prior to the rendition of the judgment against the International Fund in May of 1988. American Casualty asserts that various documents should not be produced because they are either irrelevant, are protected by work product immunity or by an attorney/client privilege.

American Casualty agreed to produce the complete file

maintained by James Olson in connection with his defense of the International Trustees, including all of his correspondence with American Casualty. Additionally, documentation from American Casualty's claim file, covering six years of claims related documents and correspondence, was produced. Finally, American Casualty produced portions of the files from Ross, Dixon & Masback and Hogan & Hartson, as well as documents which were discovered by American Casualty in its litigation with the Local Trustees. The log of documents claimed by American Casualty to be protected from production is attached hereto as Exhibit "A".

A separate discovery issue, raised by the International Fund and briefed by the parties, relates to the inadvertent production of documents which were claimed to be privileged during discovery in the Federal District Court coverage litigation between American Casualty and the Local Trustees. Documents were inadvertently produced by American Casualty in February of 1984. By order of February, 1985, the Federal Court denied a motion by American Casualty to recover the inadvertently produced documents and protect them. American Casualty now argues the protection lost for those documents was only lost in the Federal Court action and the documents may now be protected once again in this case. The list of inadvertently produced documents is attached hereto as Exhibit "B".

II. PROTECTION OF DOCUMENTS UNDER THE ATTORNEY/CLIENT PRIVILEGE

A. Civil Fraud Exception

American Casualty has raised the attorney/client privilege as a reason for not producing certain documents in response to the request of the International Fund. The attorney/client privilege allows a client to refuse to disclose and prevent others from disclosing confidential communications between the client or his representative and his attorney or his attorney's representative, which communications were made for the purpose of facilitating the rendition of legal services to the client. N.R.S. 49.095. It is the oldest of the privileges for confidential communications known to the common law. The attorney/client privilege rests on the theory that encouraging the clients to make full disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously, a benefit outweighing the risks posed to truth finding. Haynes v. State, 103 Nev. 309, 739 P.2d 497 (1987). While it must always be kept in mind that the attorney/client privilege works to suppress otherwise relevant evidence and forestall the search for truth, DiCenzo v. Izawa, 723 P.2d 171 (Ha.1986), clients must be encouraged to make full disclosure to their attorneys and thereby promote broader public interests in the observance of law and administration of justice. Upjohn Company v. U.S., 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

The Fund claims it is appropriate to permit a first party insured to discover the otherwise privileged communications of attorneys who are hired for the express purpose of rendering

advice to the insurer on the legitimacy of a claim. The Fund cites the case of U.S.A.A. v. Werley, 526 P.2d 28 (Alaska, 1974), for the proposition that when an insurer through its attorney engages in a bad faith attempt to defeat or reduce the rightful claim of its insured, invocation of the attorney/client privilege for communications pertaining to such bad faith dealing is inappropriate. Such tortious activity, the Fund asserts, satisfies the "civil fraud" requirement for an exception to the attorney/client privilege. Also see Caldwell v. District Court, 644 P.2d 26 (Colo. 1982). As the Fund has pointed out, there is no privilege if the services of the lawyer were sought to aid the client in pursuing a plan to commit fraud. N.R.S. 49.115(1).

Unfortunately, the Fund provides absolutely no support for its claim of intended fraud in this case and, quite to the contrary, the underlying facts point in the opposite direction. The "civil fraud" exception is usually invoked only upon a prima facie showing of bad faith which is tantamount to civil fraud. Escalante v. Sentry Insurance, 743 P.2d 832 (Wash.App. 1987). As is noted in the Caldwell case cited by the Fund, the Court could use an in camera inspection to establish a "foundation in fact" for a charge of civil fraud, but the in camera inspection itself is a matter of discretion with the Court, requiring a factual showing adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the

fraud exception has occurred. Caldwell v. District Court, supra. A mere allegation of bad faith is clearly insufficient under the case law to prompt a waiver of the attorney/client privilege, and the Fund only has an allegation.

It should also be pointed out there is a substantial split in authority regarding the Fund's basic assumption that a bad faith claim can even rise to the level of the "civil fraud" exception to the attorney/client privilege, and other authorities reject the reasoning of U.S.A.A. v. Werley and Escalante v. Sentry Insurance. The Fund's theory was rejected in State v. Second Judicial District Court, 783 P.2d 911 (Mont. 1989) and in Kujawa v. Manhattan National Life Insurance, 522 So.2d 1078 (Fla.App. 1988), affd. 541 So.26 1168 (Fla. 1989), wherein the Court stated that the "legislature in creating the bad faith cause of action did not evince an intent to abolish the attorney/client privilege." (Kujawa, 541 So.2d at 1169).

Unlike the factual circumstances of other cases, the insurance company in the instant action kept no secret of its intentions in regard to coverage questions arising under the International Fund policy. At the outset of American Casualty's involvement in the post merger litigation in December of 1981, the company hired Ross and Masback to advise the company regarding coverage and, in fact, to handle any coverage question litigation, such as the case at bar. American Casualty characterized counsel, such as Ross and Masback, as "monitoring

counsel." [See excerpt from deposition of Peter Hegarty, Senior Claims Analyst for the insurance company, attached as Exhibit "C" to the memorandum of American Casualty, filed June 16, 1989.] As all counsel are aware, many of the claims propounded by the Local Trustees in their claim for coverage by American Casualty, had the same basis as the coverage claims now put forward by the International Fund under the same policy. American Casualty refused to cover the Local Trustees and refused to guarantee coverage to William Meyers, Inc., a named insured under the policy, even though a defense was provided with a reservation of rights. This stated position of American Casualty in regard to coverage under the International Fund policy was enunciated as early as February of 1982. [See letter of Ross and Masback to William Singleton, dated February 17, 1982, re: coverage of Local Fund]. I see no evidence of fraud.

B. Joint Client Argument/Fiduciary Relationship

A second argument put forward by the International Fund to overcome the attorney/client privilege asserted by American Casualty finds it origins in the "joint client" exception to the attorney/client privilege. N.R.S. 49.115(5) states as follows:

> There is no privilege under N.R.S. 49.095 or 49.105:
>
> . . . 5. As to a communication relevant to a matter of common interest between two or more clients if the

> communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

It is accepted law that an attorney hired by an insurer to represent its insured is actually representing both the insurer and the insured. e.g. Rogers v. Robson, Masters, etc., 392 N.E.2d 1365 (Ill.App. 1979). However, it is equally clear that in order to establish the common client concept, the insured must show the attorney was hired by the insurance company to defend the claim against the insured. Houston General Insurance v. Superior Court, 166 Cal. Rptr. 904 (Cal.App. 1980). The International Fund has been unable to demonstrate that the attorneys who advised American Casualty, other than those associated with the Olson firm in Las Vegas, were also representing the interests of the Fund. Quite the opposite, as the Fund has accused American Casualty of hiring Ross, Masback and other associated counsel to conspire with American Casualty to deprive the Fund of its right to coverage. It is undisputed that American Casualty hired the Olson firm to represent the interests of both the insurance company and the insured in the underlying litigation. American Casualty has produced the totality of the files, including correspondence, pleadings and other materials which were generated by the Olson firm.

American Casualty has cited the case of State Farm v. Superior Court (Durant), 265 Cal. Rptr. 372 (Cal.App. 1989), as

a case involving some similar problems as the case at bar. The Durant case involved a homeowner who had a policy with State Farm and Mr. Durant was then sued by a purchaser of the Durant home for defects in the foundation of the house. The homeowner tendered the defense to his insurance company who undertook the defense with a reservation of rights. The insurance company then filed a declaratory relief action saying there was no obligation to indemnify the homeowner pursuant to the terms of the policy. The homeowner counter-claimed for bad faith denial of coverage, etc. Pursuant to California case law, wherein the insurance company's defense to coverage under the policy may raise a conflict with its defense of the homeowner on the same policy, the company hired independent counsel to represent the insured on the defense of the underlying claim, while at the same time hiring separate coverage counsel to advise and litigate on the coverage question. [See McGee v. Superior Court, 221 Cal. Rptr. 421 (Cal.App. 1985)].

A complication in the Durant case arose because an insurance adjuster for State Farm worked for and communicated with both defense counsel on the underlying claim and with coverage counsel. The Court found that because State Farm made it perfectly clear through its adjuster it was in an adversarial position to the homeowner on the coverage question, the homeowner could not require production of documents protected by the attorney/client privilege which were exchanged among State

Farm, its adjuster and coverage counsel. The homeowner argued that there should not only be separate counsel, but also separate adjusters on each part of the case, and the attorney/client privilege should be deemed to have been waived. The Court found differently and held that separate counsel was adequate to protect the rights of the insured. In the case at bar American Casualty has undertaken the same safeguards, but without the complications found in Durant. Coverage counsel, such as Ross and Masback, have always been removed from the defense of the underlying claim against the International Fund. There has never been a doubt that the insurance company has been adverse to the insured in regard to coverage in this case.

In the case of State Farm v. Superior Court (Black), 254 Cal. Rptr. 543 (Cal.App. 1988), the insurance company hired separate counsel to advise on the insurer's offer to compromise an uninsured motorist claim with its insured driver. The underlying case was settled after suit was filed, but a bad faith claim persisted. The insured then moved to obtain the communications between the insurance company and counsel who had given advice on coverage. The Court in Black denied the insured's argument that by virtue of the insurance company's obligation to deal fairly with its insured, he became a joint client and the attorney/client privilege would not apply.

This point of view was also followed by the Florida Supreme Court in the case of Kujawa v. Manhattan National Life Insurance

Company, supra. In bad faith litigation arising from failure to pay benefits under a life insurance policy because of a coverage question, the Court concluded the relationship between the insurer and the insured was an adversarial relationship and not a fiduciary one. It is simply not rational to impose upon an insurance company a duty to totally disregard its own interests, when they conflict with its insured's interest. While the company must conduct itself with the utmost good faith for the benefit of the insured, that openness need not be so unlimited as to eviscerate the attorney client privilege.

C. Attorney/Client Privilege Intact Unless a Waiver

The attorney/client privilege should allow for an honest, careful and confidential analysis of the legal problem by a qualified professional. In a bad faith case this will enable the insurer to evaluate and settle a claim expeditiously and will further the policy behind bad faith legislation. A free flow of information between the attorney and his insurance company client equally benefits the claimant as well, because this kind of communication most often results in a settlement of insurance claims. To put it most simply, the need for the attorney/client privilege outweighs the need of the insured to break that confidentiality. State v. Second Judicial District Court, supra. Insurance company communications to coverage counsel should be privileged unless those communications were not intended to be confidential, there is an exception to the

privilege or the privilege is waived. The rationale for this rule was stated by the California Appellate Court as follows:

> An insurance company should be free to seek legal advice in cases where coverage is unclear without fearing that the communications necessary to obtain that advice will later become available to an insured who is dissatisfied with coverage. A contrary rule would have a chilling effect on an insurance company's decision to seek legal advice regarding close coverage questions, and would disserve the primary purpose of the attorney-client privilege -- to facilitate the uninhibited flow of information between a lawyer and client so as to lead to an accurate ascertainment and enforcement of rights.

[State Farm v. Superior Court (Black), 254 Cal.Rptr. 543, 545 (Cal.App. 1988), quoting Aetna v. Superior Court, 200 Cal.Rptr. 471 (Cal.App. 1984).]

If attorneys who advise the insurance companies concerning coverage also become involved in other facets of the case, such as investigating the underlying claim or conducting negotiations to settle the case which are claimed to be in bad faith, then the scope of the attorney/client privileged communications will be narrowed. For example, if the attorney is acting in some other role, such as an ordinary businessman, the privilege may not properly be claimed. Standard Chtd. Bank v. Ayala

International Holdings, 111 F.R.D. 76 (S.D.N.Y. 1986). However, in the case at bar, the coverage attorneys did nothing more than handle coverage questions on behalf of the insurance company, litigate those questions and, on occasion, advise various people who claimed coverage as to the decision of the company.

Finally, American Casualty has never come close to waiving the attorney/client privilege, by injecting the issue of good faith reliance upon an attorney's advice, as a defense in this action. There has been no assertion by American Casualty other than to say its position on coverage is correct and the mere denial of the Fund's bad faith allegations does not waive the privilege. Transamerica Title Insurance v. Superior Court, 233 Cal. Rptr. 825 (Cal.App. 1987); Lorenz v. Valley Forge Insurance, 815 F.2d 1095 (7th Cir. 1987); McLaughlin v. Lunde Truck Sales, Inc., 714 F. Supp. 916 (N.D.Ill. 1989); Panter v. Marshall Field & Co., 80 F.R.D. 718 (N.D.Ill. 1978).

III. WORK PRODUCT PROTECTION

In addition to materials protected by attorney/client privilege American Casualty claims protection for various materials under N.R.C.P. 26(b)(3). This rule states in part:

> . . . a party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer,

> or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain a 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. . . . [N.R.C.P. 26(b)(3)]

Unlike the attorney/client privilege which depends upon the nature of the relationship involved, work product protection is dependent upon anticipation of litigation. Mission National Insurance Company v. Lilly, 112 F.R.D. 160 (D.Ct.Minn. 1986). Work product is not a privilege to protect confidential communications, but rather a tool of judicial administration designed to safeguard the adversarial system. Pete Rinaldi's Fast Foods v. Great American Ins., 123 F.R.D. 198 (M.D.N.C. 1988).

A further important distinction between work product protection and attorney/client privilege protection concerns the ability of the party seeking discovery to overcome work product protection by showing substantial need, while the attorney/client privilege cannot be similarly overcome by such a

showing. Upjohn Co. v. U.S., supra; Joyner v. Continental Insurance Companies, 101 F.R.D. 414 (S.D.Ga. 1983). Also, 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 the purposes of the litigation. 8 Wright and Miller, Federal Practice and Procedure: Civil § 2024 (1970 and 1990 Supp.); Soeder v. General Dynamics Corp., 90 F.R.D. 253 (D.Ct.Nev. 1980); Dunn v. State Farm, 122 F.R.D. 507 (N.D.Miss. 1988).

As recently announced by the Nevada Supreme Court, materials resulting from an insurance company's investigation of an ordinary personal injury claim are not made in anticipation of litigation unless the insurer's investigation has been performed at the request of an attorney. Ballard v. Eighth Judicial District Court, 787 P.2d 406 (Nev. 1990); C.S.A.A. v. District Court, 788 P.2d 1367 (Nev. 1990). American Casualty appears to have complied with the legal requirements in this regard, as they have voluntarily turned over all materials generated in the underlying litigation.

A common justification in bad faith litigation for discovery of documents which may be imbued with work product protection is that the opposite party's knowledge can only be shown by the documents themselves. In respect to the bad faith issue in this case the remaining documents which the Fund seeks, supportive or not, would seem to be primarily within the

exclusive knowledge of the other party and, as the Fund is entitled to know what the insurer knew at the time of the claim denial, work product protection may be overcome upon a showing of substantial need and an inability to obtain the information elsewhere. Dunn v. State Farm, supra. APL Corp. v. Aetna Casualty & Surety, 91 F.R.D. 10 (D.Ct.Md. 1980); Mission National Insurance Company v. Lilly, supra. Of course, the documents sought must be relevant to the subject matter of the litigation.

The one remaining complication concerns the two types of work product material. As shown in the rule there are factual matters and there are also "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." While some courts indicate the mental impression type of discovery is absolutely privileged, [see Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730 (4th Cir. 1974), cert denied, 42 U.S. 997, 95 S.Ct. 1438, 43 L.Ed.2d 680 (1975)], a better reasoned view appears to be that there are some exceptions to the absolute immunity. The same exception that applied to the attorney/client privilege in the case of fraud should also apply to work product protection. Tackett v. State Farm, 558 A.2d 1098 (Del.Super. 1988); In Re sealed Case, 754 F.2d 395 (D.C.Cir. 1985).

The work product immunity for mental impressions should also give way when advice of counsel as to the underlying action is directly in issue. Charlotte Motor Speedway, Inc. v. International Insurance Company, 125 F.R.D. 127 (M.D.N.C. 1989); Truck Insurance Exchange v. St. Paul Fire, 66 F.R.D. 129 (E.D.Pa. 1975); Donovan v. Fitzsimmons, 90 F.R.D. 583 (N.D.Ill. 1981). Though material that would disclose an attorney's mental impressions is even more rigorously protected that the factual work product, such protection must give way when those mental impressions concerning the handling of the underlying claim are directly at issue.

Although the Fund suggests the activities of the coverage attorneys are at issue in this case, it is clearly only the actions of American Casualty which are in dispute and which must be examined to make a determination as to whether or not the insurance company was acting in bad faith. If the coverage attorneys were indeed employed as "hired guns" to defeat a legitimate claim by the Fund, that information should come out in the examination of documents generated by American Casualty and examination of American Casualty employees who were in charge of this case. However, the actions of the coverage attorneys would not be of the kind at issue in the underlying case, and therefore there would be no forfeit of work product protection for their mental impressions, etc. Substantial need and inability to obtain the information elsewhere would provide

an exception for the Fund to obtain factual work product information pertaining to the issue of bad faith.

A major concern must be to establish the parameters for this case in regard to when the work product protection arose. American Casualty suggests that litigation was anticipated as early as February to April, 1982, when the first demands were made upon the company for coverage of the Local Trustees and the Administrator named under the policy, William Meyers, Inc. However, as many "anticipation of litigation" claims, there was much saber rattling, but ultimately a defense with a reservation of rights was provided to William Meyers, Inc., while the Local Trustee's claim was denied and the Local Trustees proceeded to litigate without American Casualty's assistance. At the other extreme the International Fund asserts there was no anticipation of the current litigation until judgment was entered against the Fund on the Local Trustees' case in May of 1988. The International Fund misjudged the resolve of American Casualty in regard to its coverage position for these claims; as it appeared many years before, the insurance company would not hesitate to litigate the coverage questions which have now appeared in State Court.

In March of 1983, the management side Local Trustees filed a Counterclaim against the International Trustees for indemnification and for a defense pursuant to the merger agreement between the two Funds. The International Fund then

demanded a defense from American Casualty and in June, 1983, a defense was provided to the International Fund, but a reservation of rights was set in motion. (The parties are still arguing as to whether or not the reservation of rights was really understood by the International Fund as early as June, September or December of 1983.) In any event, just as the saber rattling in the Local Trustees' claim against American Casualty in February of 1982, litigation was still not assured in the International Fund coverage controversy. However, it is my opinion that litigation on all coverage questions became a foregone conclusion in October of 1983, when the Local Trustees filed their coverage suits in Federal Court against American Casualty. Such was the similarity of coverage questions in the Local Trustees' cases versus American Casualty and the International Fund's claim for coverage, that the International Fund attempted to intervene in the Local Trustees' cases in July of 1987. It was clear the die was cast when the Local Trustees filed suit demanding coverage and American Casualty chose to fight that suit to the bitter end. It was at this period of time, during the Fall of 1983, that American Casualty clearly enunciated its intention to defend the International Fund only after a reservation of rights and, at the same time chose to defend, not settle, a coverage action against the Local Trustees. While it is always difficult to assign a precise line of demarcation wherein work product protection takes over, when

the actions of the insurance company were rendered with a purpose of litigation in mind, documents generated from that point on should be entitled to the protection afforded by the work product doctrine. Baker v. CNA Insurance Company, 123 F.R.D. 322 (D.Ct. Mont. 1988).

This is not to say that beginning in October of 1983, no documents were generated in association with these cases that were not done in the ordinary course of business. American Casualty is strongly reminded that even though litigation was already a prospect, or even forward going, there is no work product immunity for documents prepared in the regular course of business. e.g. Westhemeco, Ltd. v. New Hampshire Insurance Company, 82 F.R.D. 702 (S.D.N.Y. 1979). Those documents upon which the parties cannot agree will be reviewed by the Commissioner in camera. Addition-ally, the parties should be reminded that the documents prepared for one case may have the protection in the second case where the two cases are closely related in parties or subject matter. Hercules, Inc. v. Exxon Corp., 434 F.Supp. 136 (D.Ct.Del. 1977); 8 Wright and Miller, Federal Practice and Procedure: Civil § 2024 (1970 and 1986 Supp.). I find the Local Trustee coverage cases and the instant case to be very much related.

IV. INADVERTENT PRODUCTION OF DOCUMENTS

One final problem with the production of documents in this case involves a group of documents which were originally

inadvertently produced by American Casualty in the coverage litigation involving the Local Trustees. The inadvertent production took place in February of 1984, but the question was not raised by American Casualty until December of 1984, some ten months later. The U.S. Magistrate and later Federal District Judge, Phillip M. Pro, found in February of 1985, that American Casualty failed to institute sufficient controls to enable it to recognize that it had produced alleged privileged documents until ten months later when that fact was brought to their attention by the opposing parties. [Order of Magistrate Pro in case number
CV-LV-83-694, HEC, February 7, 1985] The issue was briefed by both parties and well analyzed by Judge Pro who determined the documents had lost their privileged status.

The Judge followed a line of cases which held once the confidentiality of the communication had been breached, for whatever reason, there would be nothing left to protect. He further found there was no need to have an intent to waive the privilege and some recent case law supports the Judge's decision. e.g. International Digital Systems Corp. v. Digital Equipment Corp., 120 F.R.D. 445 (D.Ct.Mass. 1988); Liggett Group, Inc. v. Brown and Williamson Tobacco Corp., 116 F.R.D. 205 (M.D.N.C. 1986); also see Daniels v. Hadley Memorial Hospital, 68 F.R.D. 583 (D.Ct.D.C. 1975). Even if the other significant line of cases were followed, which line takes into

account the circumstances surrounding the inadvertent production, Judge Pro's ruling still makes good sense, when the facts of production were taken into account in the Local Trustee coverage case. See e.g. Kanter v. Superior Court (SafeCo Ins.), 253 Cal.Rptr. 810 (Cal.App. 1988).

American Casualty now wants to reinstate the waived privilege some five years later, even though the International Fund has also had the opportunity to review and digest the inadvertently produced documents. American Casualty relies on cases which would indicate the privilege is waived as to the inadvertently produced documents only in the proceeding in which they were produced, but not in later proceedings. e.g. Byrnes v. IDS Realty Trust, 85 F.R.D. 679 (S.D.N.Y. 1980). Confidential documents were produced at an S.E.C. hearing, but the privilege was deemed not to be waived in later antitrust litigation. However, the Byrnes, case, as well as others cited by American Casualty, deal with circumstances wherein a party was forced to relinquish a privilege at one proceeding and it would have been unfair to not be able to legitimately claim it at the second proceeding. In the case at bar it was through the party's own carelessness/fault that privileged documents were disclosed and the confidentiality broken. Neither does the instant case resemble circumstances of those cited by the Fund, as the party did not voluntarily disclose the confidential communication in one hearing and then choose not to disclose it

in a second, thereby seeking an unfair procedural advantage. Rather, the instant case seems to call for the dredging up of the old cliche concerning the strict construction of the attorney/client privilege. Since the privilege stands in derogation of the public's right to every man's evidence, it ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle. See von Bulow By Auersperg v. Von Bulow, 114 F.R.D. 71 (S.D.N.Y. 1987), revs'd. on other grounds, In Re Von Bulow, 828 F.2d 94 (2nd Cir. 1987). If an attorney waives the privilege by his own conduct, he simply cannot subsequently reclaim it. Once the confidential nature of the communication is destroyed, the rationale for the privilege in the first instance no longer applies. Biben v. Card, 119 F.R.D. 421 (W.D.Mo. 1987).

To reconstitute the documents at issue in this case as once again under a privilege would make a mockery of common sense. To indulge in such legal niceties would once again convince the layman that only attorneys could happily wander about with their eyes so foolishly closed.

V. DISCOVERY FROM AMERICAN CASUALTY COUNSEL

Although an attorney for a party is not immune from discovery, circumstances under which a court may order the taking of opposing counsel's deposition should be limited to where the party seeking to take the deposition has shown that no

other means exist to obtain information than to depose opposing counsel. Additionally the information sought must be relevant and not privileged, as well as be significant in the preparation of the case. Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986). The practice of taking the deposition of opposing counsel should be severely restricted and permitted only on the showing of extremely good cause. Spectra-Physics v. Superior Court, 244 Cal.Rptr. 258 (Cal.App. 1988).

The cases cited by the Fund, allowing the deposition of counsel in a bad faith case, concern a different bad faith beast then the one in the instant case e.g. Fireman's Fund Ins. v. Superior Court, 140 Cal.Rptr. 677 (Cal.App. 1977). This case deals with policy interpretation under an agreed set of facts for the most part. The coverage attorneys could lend no fact input to this case which could not be gleaned from American Casualty personnel. At least the Fund has made no showing to the contrary. When attorneys for the insurance company were involved in communication with the insured, they only acted in their capacity as legal advisors to pass along the studied position of the company. The insured has never contended otherwise. In fact, the Fund has contended throughout this case that the attorneys in question were never hired to negotiate a settlement, but were only hired to make a bad faith denial of coverage. [International Fund Motion to Compel at p. 11].

It has also been clearly shown that American Casualty has not raised the defense of reliance upon the opinion of counsel to support its denial of coverage to the Fund. U.S. v. Exxon, 94 F.R.D. 246 (D.Ct.D.C. 1981); Lorenz v. Valley Forge Insurance, supra. The participation of counsel, hired by American Casualty to advise on coverage and litigate coverage questions, has never risen to the level of involvement wherein there is no other means to obtain the relevant non-privileged information crucial to the outcome of this case. Spectra-Physics v. Superior Court, supra; Shelton v. American Motors Corporation, supra.

The Fund has simply shown no reason to overcome the usual restrictions on taking the deposition of opposing counsel. There has been no doubt what the role of coverage counsel has been throughout this litigation; this would include attorneys for Hogan & Hartson as well as Ross & Masback. There is no dispute as to the position of American Casualty in regard to coverage for the Fund. Depositions of any of those attending counsel for American Casualty would be worthless, as any question after the opening preliminaries could be met with a valid objection as to relevancy or attorney/client privilege Dowd v. Calabrese, 101 F.R.D. 427 (D.Ct.D.C. 1984); also see Mission National Insurance Co. v. Lilly, supra. The process would be disruptive and would have a chilling effect on attorney/client relations. Transamerica Title Ins. v. Superior

Court, supra. In this type of bad faith case, wherein reliance upon an attorney's advice has not been put at issue nor have the attorneys conducted alleged bad faith negotiations, discovery from the attorneys should be foreclosed. This ruling in no way forecloses the Fund from obtaining all their answers directly from American Casualty. This ruling reaffirms the sanctity of the attorney/client relationship where the client has done nothing more than seek the legal advice and counsel of a qualified attorney.

R E C O M M E N D A T I O N S

IT IS HEREBY RECOMMENDED that International Fund's Motion to Compel be denied as to any attorney/client communications between or among American Casualty and its coverage counsel, which would include members of the firm Hogan & Hartson and/or Ross, Dixon & Masback;

IT IS FURTHER RECOMMENDED that counsel for American Casualty produce all documents for which an attorney/client privilege or relevance objection is not claimed and which were generated on or before October 15, 1983;

IT IS FURTHER RECOMMENDED that counsel for American Casualty review all documentation generated subsequent to October 15, 1983, for which they are asserting immunity from production by way of work product protection, and abstract those documents to protect against disclosure of mental impressions, conclusions, opinions or legal theories of counsel or other

representative of American Casualty concerning this litigation; the Commissioner specifically finds there is substantial need on the part of the Defendants to obtain said materials, even if work product protection is assumed; any claimed work product documents which are not produced shall be submitted to the Discovery Commissioner for in camera inspection, if designated by counsel for the Fund after review of the designated list of documents withheld by American Casualty.

IT IS FURTHER RECOMMENDED that counsel for American Casualty produce in camera for inspection by the Discovery Commissioner all documents heretofore labeled by counsel as irrelevant and that all documents submitted to the Defendant with redacted portions claimed to be mental impressions, etc. be submitted for in camera inspection;

IT IS FURTHER RECOMMENDED that Defendants may challenge any document designated by American Casualty as protected by attorney/client privilege, and may request the Discovery Commissioner to review said document in camera to check that the attorney/client privilege is applicable;

IT IS FURTHER RECOMMENDED that counsel for both sides work to resolve the question of production of as many documents as possible prior to submission to the Commissioner in camera, and counsel for all parties are cautioned that the remainder of the discovery in this case be continued in the utmost good faith;

IT IS FURTHER RECOMMENDED that no depositions of counsel for American Casualty go forward at this time, including, but not limited to, prior counsel at Hogan & Hartson and counsel with Ross, Dixon & Masback; counsel for Defendants are not foreclosed from seeking the deposition of coverage counsel in the future, if the necessary showing can be made for taking the deposition, as set forth in the above opinion;

IT IS FURTHER RECOMMENDED that all documents inadvertently produced by American Casualty in Federal Case No. CV-LV-83-694, HEC be produced in this case;

IT IS FURTHER RECOMMENDED that production of all documents pursuant to this recommendation be made on or before July 20, 1990, and that any documents which need to be submitted for in camera inspection be submitted on or before July 27, 1990.