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Privilege And Work Product In Insurance Coverage Disputes

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How do the attorney-client privilege, work product protection, and common interest doctrine work in insurance coverage disputes? Insurers and their insureds often rely on third parties like consultants, brokers, and experts in litigation. An insured may be able to use privilege and work product concepts to protect information exchanged with insurance brokers in order to prepare for litigation with its carrier. In contrast, many courts will not extend privilege and work product to protect an insurance carrier's documents from discovery if the documents were created in the ordinary course of claim handling.

From the perspective of an insured working with its broker on a claim, where the carrier has not agreed to provide coverage in full, the insured may need their insurance broker's help to prepare for anticipated litigation. If a broker is acting as a "representative" of the insured, its activity may be protected by the work product doctrine, pursuant to Federal Rule of Civil Procedure 26(b)(3) and equivalent state rules. Even if a broker is not a "representative," revealing work product material to it is not necessarily a waiver of work product protection. Unlike the attorney-client privilege, where a third party generally breaks the privilege, a third party only breaks work product protection if it has interests adverse to the insured. If the broker is needed as an ongoing consultant to assist the attorney in providing legal advice, an insured should consider application of the "*Kovel* privilege," established in *U.S. v. Kovel*. The common interest doctrine can also be a powerful shield to protect communications involving a broker, because it acts as an exception to the waiver of the attorney-client privilege.

In contrast to an insured's efforts to protect appropriate information, insurance companies often attempt to shield information related to the work of their consultants without a proper basis. For example, insurers will employ consultants to assist them with the claims investigation process, rely upon

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their reports and conclusions in denying a claim, and then take the position that all of that information is non-discoverable work product when they are in coverage litigation. Work product protection, however, typically is available only at the point where the insurer reasonably anticipated litigation. A best practice for an insured is to assess carefully when the insurer's claim evaluation process (not protected by work product) could have shifted to actual anticipation of litigation, or merely is the insurance carrier's effort to shield otherwise discoverable documents. In addition, even if some material is work product, an insured may still be able to get it by demonstrating a substantial need for it under Fed. R. Civ. P. 26(b)(3)(A).

A best practice is for insureds to evaluate these privileges when pursuing coverage for contested claims. Insurance company attorneys often take the most aggressive position possible regarding privilege and work product, trying to use them as a sword (by delving into protected exchanges that the insured has made for a contested claim), and as a shield (by trying to prevent discovery of documents created in the ordinary course of the insurance company's business). The insured often has substantial grounds to push back on these positions.