PROTECTING THE ATTORNEY-CLIENT PRIVILEGE: ETHICAL CONSIDERATIONS FOR INSURANCE COVERAGE COUNSEL WHEN TREATED AS AN ADJUSTER

Edward "Ned" Currie
James D. Boone
Currie Johnson & Myers, P.A.
Jackson MS

INTRODUCTION

The attorney-client privilege is a frequent discovery issue in insurance bad faith and coverage litigation whenever the policyholder seeks production of the insurer's claim file. But the privilege also is an ethical principle. *See* Rule 1.6, ABA Model Rules of Professional Conduct. Because the privilege belongs to the insurer client, coverage counsel must be vigilant to maintain the confidentiality of his or her communications with the insurer when handling assigned coverage questions. Courts recently have been chipping away at the privilege claimed by insurers for communications with coverage counsel. At least one state's Supreme Court has gone so far as to declare that in first party bad faith actions based upon "the handling and processing of claims", "there is a presumption of no attorney-client privilege". *Cedell v. Farmers Ins. Co. of Washington*, 295 P.3d 239, 247 (Wash. 2013). The burden is shifted to the insurer who must convince the state trial court that the privilege attaches to such communications, but only after producing the "privileged" communications to the court *in camera*. *Id.* Given the universal rules establishing an attorney-client relationship, when this presumption is applied in a discovery dispute there arises a troubling unanswered question: if it is presumed that the attorney-client privilege does not apply to communications between coverage counsel and the insurer client, does this presumption logically mean that the attorney-client relationship vanishes under those circumstances

notwithstanding coverage counsel's assignment?[1] And with respect to coverage counsel's ethical obligations to the insurer, what can coverage counsel do to maintain the privilege at all stages of the assignment, thereby protecting communications from future discovery when the clam is later litigated in a bad faith lawsuit?[2] Unfortunately, case law has not developed to provide answers to these questions. In fact, the questions do not appear to have arisen in any reported decision.

For centuries and beyond, the attorney client privilege has been the foundation that permits every lawyer to render frank, open and honest legal counsel to their clients regarding the latter's legal rights, duties and obligations under the law. The privilege is at the heart of coverage counsel's relationship with the insurer client. Coverage counsel's ability to communicate with the insurer, openly discuss the strengths and weaknesses of a claim, and finally render an opinion or make a recommendation free from concern of discoverability often can be vital to the insurer's decision to deny, pay, defend or indemnify the particular claim.

However, in recent years courts in some states dramatically have eroded the attorney-client privilege between insurance coverage counsel and their insurer clients.[3] In such states the insurer may be required to re-think the scope of the assignment of coverage questions to its counsel, and how to best utilize counsel in such a manner as to preserve the attorney-client privilege. Insurers handling claims for policyholders in states with no controlling precedent may want to pay heed to this same consideration. On the other hand, at the outset of a coverage assignment coverage counsel arguably might be required to expend considerable effort to ethically protect privileged

---

[1] The privilege attaching to such communications springs forth from the attorney-client relationship. *See Upjohn Co. v. United States*, 449 U.S. 383, 396, 101 S. Ct. 677, 686, 66 L. Ed. 2d 584 (1981).

[2] Consider the applicability of Rule 1.6(c), ABA Model Rules of Professional Conduct to coverage counsel where it states that counsel "shall make reasonable efforts to prevent the inadvertent...disclosure of...information relating to the representation of a client."

[3] Too aggressively, from the Authors' viewpoint.

communications from future discovery should a claim denial or controversy erupt in a bad faith action filed by the policyholder. Additionally, should coverage counsel know (or ought to know) when retained that the nature of the assignment likely will trigger the "No Privilege Presumption" rule, are there additional ethical obligations counsel should consider?

A. Erosion of the Attorney-Client Privilege Applicable To Insurer and Coverage Counsel Communications[4]

The general rule is that coverage counsel's communications with the insurer are privileged so long as the lawyer truly serves his or her position as a legal advisor. *See Aetna Cas. & Sur. Co. v. Superior Court*, 153 Cal. App. 3d 467, 476, 200 Cal. Rptr. 471, 476 (Ct. App. 1984).[5] In bad faith litigation, the exceptions to this general rule are well known and fairly uniform. They include the "advice of counsel" defense to bad faith[6] and the "crime fraud exception."[7] However, states such as Washington, New York, Idaho, Louisiana and Ohio have altered traditional notions of the applicability and even existence of the privilege in the insurance bad faith and coverage litigation context.

---

[4] The authors acknowledge as a resource a paper written by ACCEC Fellow Diane L. Polscer, Gordon & Polscer, LLC, "Recent Assaults on the Most Sacred Privilege of All: Are Insurers Protected by the Attorney-Client Privilege?" Ms. Polscer's article was presented October 7-9, 2015 at the Litigation Counsel of America Conference in Charleston, South Carolina.

[5] In *Aetna Cas.*, the Court generally discussed the inapplicability of the attorney-client privilege in circumstances where the attorney acts in a capacity other than as a legal advisor, and held that it was error to allow the policyholder access to confidential communications where the attorney was acting as a legal advisor.

[6] *See* Restatement (Third) of the Law Governing Lawyers § 80 (2000); *The Bobrick Corp. v. Dwyer, Schraff, Meyer, Grant & Green*, 2008 WL 4173619, *1 (D. Haw. 2008); *Computer Associates Int'l, Inc. v. Simple.com, Inc.*, 2006 WL 3050883, *2 (E.D.N.Y. 2006); *Ropak Corp. v. Plastican, Inc.*, 2006 WL 1005406, *6 (N.D. Ill. 2006); *Henry v. Quicken Loans, Inc.*, 263 F.R.D. 458, 468 (E.D. Mich. 2008).

[7] *Shorter v. State*, 33 So. 3d 512, 518 (Miss. Ct. App. 2009); *Murphy & Demory, Ltd. v. Murphy*, 1994 WL 1031072 (Va. Cir. Ct. 1994); *People v. Superior Court (Bauman & Rose)*, 37 Cal. App. 4th 1757, 44 Cal. Rptr. 2d 734 (2d Dist. 1995).

1. Washington, Idaho and Louisiana

In *Cedell*, the Washington Supreme Court created a *de facto* presumption that the attorney client-privilege does not apply in "first party insurance claims by insureds claiming bad faith in the handling and processing of claims, other than [under insured motorist] claims." *Cedell*, 295 P.3d at 247. *Cedell* involved a first-party bad faith action against an insurer arising out of a fire that destroyed the insured's residence. Despite the fact that the Fire Department and the insurer's own arson investigation determined that the fire was accidental, the insurer delayed its coverage determination based on alleged inconsistent statements given by the insured's girlfriend who was not insured under the policy. The insurer estimated its exposure under the policy and retained coverage counsel to assist in making a coverage determination. The Court specifically determined that the insurer "hired [coverage counsel] to do more than give legal opinions." The Court noted that the record suggested that coverage counsel "assisted in the **investigation**" of the claim by conducting an examination under oath of the insured and his girlfriend, and corresponding with the insured. Additionally, coverage counsel "assisted in the **adjustment** of the claim" by negotiating with the insured. and *Id.* at 247 (Emphasis added).. Coverage counsel also "assisted in adjusting the claim" by sending the insured a letter making a "'one-time offer'" in an amount considerably less than the insurer's acknowledge exposure[8] and threatening denial of the claim if the offer was not accepted within 10 days. *Id.* at 247. At the time this offer was made, the insured had been out of his house for seven months.

[8] The offer was for "only a quarter of what the [trial] court eventually found the claims to be worth." Id. at 241.

The insured retained counsel, who sued the insurer for bad faith in handling the claim. When plaintiff's counsel requested the insurer to produce its entire claim file, the insurer responded by producing "a heavily redacted claims file, asserting that the redacted information was not relevant or was privileged" under the attorney-client privilege. *Id.* at 242.. The trial court required an *in camera* inspection and then ordered the insurer to produce the disputed documents. The discovery dispute landed at the Washington Supreme Court and was resolved with draconian results. The Court created an analytical framework where trial courts in first-party bad faith actions start with the presumption that the attorney-client privilege does not apply to insurer claim files. The Court stated:

> [I]n first party insurance claims by insured's [sic] claiming bad faith in the handling and processing of claims . . . there is a presumption of no attorney-client privilege. However, the insurer may assert an attorney-client privilege upon a showing *in camera* that the attorney was providing counsel to the insurer and not engaged in a quasi-fiduciary function.[9] Upon such a showing, the insured may be entitled to pierce the attorney-client privilege. If the civil fraud exception is asserted, the court must engage in a two-step process. First, upon a showing that a reasonable person would have a reasonable belief that an act of bad faith has occurred, the trial court will perform an in camera review of the claimed privileged materials. Second, after in camera review and upon a finding there is a foundation to permit a claim of bad faith to proceed, the attorney-client privilege shall be deemed to be waived.

Id. at 246-247.

In short, the *Cedell* Court found that there is a presumption that the attorney client privilege does not exist in a first-party bad faith case when the claim is based upon claims "handling and processing". *Id.* at 246. In order to rebut the presumption and show that the communications are privileged, the insurer first must produce the disputed (*i.e.*, "privileged") documents *in camera*,

[9] The *Cedell* Court explained that quasi-fiduciary tasks are those associated with "investigating and evaluating or processing the claim." In other words, the type of tasks typically reserved for adjusters or other claims professionals. *Cedell* at 246.

prove that coverage counsel provided legal counsel or advice only, and was not performing any quasi-fiduciary function similar in nature to those performed by an insurance adjuster in adjusting the first party claim.[10] Even then, however, should the trial court rule that the communications are privileged, the policyholder has a second bite at the apple by arguing waiver under the civil fraud exception. The Court structured a two-step process requiring only that the insured show that the insurer acted in bad faith and that there is a foundation to permit a bad faith claim to proceed. *See Id.*[11]

The holding in *Cedell* is particularly troublesome for any number of reasons. First party claims handling, claims practices and claims processing are at issue in the vast majority of first party bad faith cases. Therefore, whenever insurance coverage counsel is engaged by the insurer, the "Presumption" rule created by the Court automatically assumes that coverage counsel has performed "quasi-fiduciary" tasks, the same as those performed by the claims adjuster. This is so even though the scope of coverage counsel's assignment goes far beyond that of the adjuster's.

---

[10] Federal courts in the state of Washington have been reluctant to conduct such *in camera* reviews. *See Ingenco Holdings, LLC v. Ace Am. Ins. Co.*, 2014 WL 6908512, at *3 (W.D. Wash. 2014), where the court observed that "every federal court to consider the issue has held that the *in camera* review mandate of *Cedell* does not apply in federal court." *See also., MKB Constructors v. Am. Zurich Ins. Co.,* No. C13–611JLR, 2014 U.S. Dist. LEXIS 78883, at *18–23, 2014 WL 2526901 (W.D. Wash. 2014); *Indus. Sys. & Fabrication, Inc. v. W. Nat'l Assur. Co.,* No. 2:14–cv–46–RMP, 2014 U.S. Dist. LEXIS 154021, at *4, 2014 WL 5500381 (E.D.Wash. 2014). In *Ingenco Holdings*, the court held that, "[i]nstead, a federal court exercises discretion in deciding whether in camera review is appropriate . . . [and that] [i]t is difficult to conceive of a circumstance in which the court would exercise its discretion to conduct an *in camera* review of more than 800 pages of documents." *Ingenco Holdings*, 2014 WL 6908512, at *3 (citing *MKB Constructors,* 2014 U.S. Dist. LEXIS 78883 at *19–20, 2014 WL 2526901; *Indus. Sys.,* 2014 U.S. Dist. LEXIS 154021, at *4, 2014 WL 5500381).

[11] Within weeks of being handed down, *Cedell* was adopted by an Idaho federal court in *Stewart Title Guar. Co. v. Credit Suisse, Cayman Islands Branch*, 2013 WL 1385264, at *4-5 (D. Idaho Apr. 3, 2013). In *Stewart Title*, the court stated that, "the Washington Supreme Court issued a well-reasoned decision concerning the extent of the attorney/client privilege in bad faith cases . . . [and] "if the Idaho Supreme Court were faced with the facts of this case, they would apply the holding in *Cedell*." Similarly, in *Shaw Grp., Inc. v. Zurich Am. Ins. Co.*, WL 199626, at *2 (M.D. La. Jan. 15, 2014), the United States District Court for the Middle District of Louisiana also adopted the *Cedell* framework.

Equally troubling is the Court's holding that in undertaking the *in camera* review, the trial court's finding of sufficient facts supporting a bad faith claim is the equivalent of the crime-fraud exception to the attorney-client privilege. Now potentially discoverable, are coverage counsel's opinion letters or portions thereof, notes and work product. Communications between coverage counsel and the insurer arising out of what the *Cedell* Court would deem to be truly and solely legal work nonetheless are not privileged unless and until the insurer produces them *in camera* and succeeds in convincing the trial court that the privilege applies.[12]

Another troubling aspect of *Cedell*, from coverage counsel's standpoint, is the mere assumption that coverage counsel's work preparatory to rendering legal advice to the insurer *de facto* is the equivalent of claims handling. Before insurer coverage counsel, or policyholder counsel for that matter, can render a coverage opinion regarding the claim (and meeting the standard of care imposed on coverage counsel), counsel often is required to perform legal due diligence by: 1) investigating and marshalling the relevant and material facts; 2) in first party claims, take the insured's statement under oath; 3) where the insured is not represented, communicate with the insured; and 4) negotiate with the insured. This does not in and of itself, as reasoned by the *Cedell* Court, render coverage counsel to that of an adjuster, for these functions often are merely a part of the whole of legal services provided by counsel to the insurer. Because of their knowledge of the law with respect to the specific claim or legal issue, referral to coverage counsel is often necessary in order for the insurer to act on the claim. Such might require coverage

[12] It begs the question where there may be voluminous amounts of attorney-client communications that require an inordinate amount of time for the trial judge to review and analyze each and every communication separately. This could prove to be a Sisyphean task for any trial judge with a busy docket.

counsel to undertake tasks similar in nature to "claims handling" if these are a necessary predicate for counsel to render advice to the insurer. Simply, this is called the practice of law.

Another troubling aspect of *Cedell* is that it offers the mischance, or perhaps the unforeseen consequence, that the trial court determines the existence of a triable issue of bad faith when making the *in camera* inspection during the early phase of document production motion practice. Such things should be left for substantive motion practice such as summary judgment. But under the scheme engineered by the Washington Supreme Court, the trial court could make substantive rulings on the sufficiency of evidence supporting the bad faith claim long before discovery is finished.

Cedell may – and ought to – be of limited application in other jurisdictions. The Court's holding is based upon its finding that in first party insurance claims, the insurer acts as the policyholder's quasi-fiduciary. *See Cedell*, 176 Wash.2d at 696. The duties a quasi-fiduciary owes to the principal are of a higher nature, and a quasi-fiduciary has a higher standard of care. *Id.* (citing *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wash. 2d 784, 791 (Wash. 2001)). However, the overwhelming majority rule in this country is that an insurer does not owe quasi-fiduciary duties to the first party insured.[13] As such, *Cedell* arguably should have potential appeal or applicability in only those states recognizing such a quasi-fiduciary relationship in first party claims. Nonetheless, it is noteworthy that Washington courts have extended *Cedell* to third-party

[13] *See Metro Renovation, Inc. v. Allied Grp., Inc.*, 389 F. Supp. 2d 1131, 1135 (D. Neb. 2005) (holding that "Nebraska would adopt the general rule and not allow a fiduciary-duty claim in this first-party insurance dispute."); *Crabb v. State Farm Fire & Cas. Co.*, No. 2:04-CV-00454 PGC, 2006 WL 1214998, at *10 (D. Utah May 4, 2006)("in a first-party relationship between an insurer and its insured, the duties and obligations of the parties are contractual rather than fiduciary"); Gorman v. Se. Fid. Ins. Co., 621 F. Supp. 33, 38 (S.D. Miss.) aff'd, 775 F.2d 655 (5th Cir. 1985)("[u]nder Mississippi law, there is no fiduciary relationship or duty between an insurance company and its insured in a first party insurance contract.")

bad faith litigation. *See Carolina Cas. Ins. Co. v. Omeros Corp.*, No. C12-287, 2013 U.S. Dist. LEXIS 53225, at *6-7 (W.D. Wash. Apr. 12, 2013).

2. New York

New York courts have also developed similar restrictions on the attorney-client privilege where the insured alleges bad faith against the insurer. In *Nat'l Union Fire Ins. Co. of Pittsburgh v. TransCanada Energy USA, Inc.*, 119 A.D.3d 492, 990 N.Y.S.2d 510, 511-12 (2014), the Supreme Court of New York determined that the attorney-client privilege offered no protection to insurer documents that were created prior to the denial of an insured's claim where the insured alleged bad faith against the insurer. Specifically, the court stated:

> The motion court properly found that the majority of the documents sought to be withheld are not protected by the attorney-client privilege or the work product doctrine or as materials prepared in anticipation of litigation. Following an *in camera* review, the court determined that certain documents were privileged because they contained legal advice. As for the remaining documents, the court found that the insurance companies had not met their burden of demonstrating privilege. The record shows that the insurance companies retained counsel to provide a coverage opinion, i.e. an opinion as to whether the insurance companies should pay or deny the claims. Further, the record shows that counsel were primarily engaged in claims handling—an ordinary business activity for an insurance company. Documents prepared in the ordinary course of an insurer's investigation of whether to pay or deny a claim are not privileged, and do not become so "'merely because [the] investigation was conducted by an attorney'" (*see Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 191 [1st Dept 2005]).

Id. at 511-12.

Like *Cedell*, the Court in *TransCanada* held that certain documents and communications might fall under the attorney-client privilege where they contain legal advice. And like *Cedell*, the *TransCanada* Court held that the attorney-client privilege did not exist where coverage counsel's work was deemed to be "primarily claims handling." However, the Court in *TransCanada* did not specify whether a coverage opinion falls under the protection of the attorney-client privilege. *Id.*

at 511. As such, there is an argument that a coverage opinion is privileged if it contains only legal opinions and advice to the insurer regarding the interpretation of certain policy provisions. But the precise issue of whether a coverage opinion constitutes a privileged communication under the attorney-client privilege was not addressed in *TransCanada*. Insurers and insurance coverage attorneys are faced with the potential that a coverage opinion does not constitute a protected attorney-client communication if it was authored prior to the denial of coverage and created in the "ordinary course of an insurer's investigation of whether to pay or deny a claim." *Id.*

3. Ohio Case Law

In *Boone v. Vanliner Insurance Company*, 91 Ohio St.3d 209 (Ohio 2001), the Ohio Supreme Court held that, "in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claim file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage." *Id.* At 213-214. Arguably, the holding in *Boone* stands for the proposition that insurance coverage opinions containing legal advice about policy provisions issued prior to a denial of coverage are discoverable, and that the attorney-client privilege will not apply. Under the *Boone* framework, this arguably would be true regardless of whether insurance coverage counsel performed the same function of or otherwise acted in the capacity of a claims adjuster. The *Boone* Court reasoned that "[a]t that stage of the claims handling, the claims file materials will not contain work product, *i.e.*, things prepared in anticipation of litigation, because at that point it has not yet been determined whether coverage exists."

Boone was modified by the Ohio legislature in 2007 when the statute regarding privileged communications was amended as follows:

The following persons shall not testify in certain respects:

***

> An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima-facie showing of bad faith, fraud, or criminal misconduct by the client.

Ohio Rev. Code Ann. § 2317.02(A). Under the modified statute, there is now a presumption that the attorney-client privilege applies—even if the insured alleges bad faith. In order to compel production of the privileged communication, the amended statute now requires the insured to make a prima-facie showing of bad faith and provides for an *in camera* inspection by the court with respect to the communications between insurer and attorney.

Some Ohio courts have either refused or paid no heed to the applicability of the legislative amendment to § 2317.02(A). These courts have reasoned that the legislative amendment does not apply to written communications or claim documents.[14] Other courts have simply continued to apply *Boone* without any recognition of the legislative amendment.[15] Thus, there remains uncertainty as to whether attorney-client communications predating the denial of a claim are discoverable upon a prima facie showing of bad faith after an *in camera* review, or whether such communications are discoverable by simply alleging that the insurer committed bad faith.

While taking different routes, Washington, New York, Idaho, Louisiana and, to a limited extent, Ohio courts refuse to recognize the attorney-client privilege for communications between

---

[14] *See Little Italy Dev., LLC v. Chicago Title Ins. Co.*, 1:11 CV 112, 2011 WL 4944259, at *2 (N.D. Ohio Oct. 17, 2011)

[15] *See DeMarco v. Allstate Ins. Co.*, 2014-Hoio-933, ¶¶ 15-19, 2014 WL 1327846 (Ohio App. 2014); *Park-Ohio Holdings Corp. v. Liberty Mut. Fire Ins. Co.*, No. 1:15-CV-943, 2015 WL 5055947, at *2 (N.D. Ohio Aug. 25, 2015).

insurer and its coverage counsel made prior to the denial. The decisions in these states are a warning shot to insurer coverage counsel nationwide that courts are showing an increased willingness to erode the time honored protection of the attorney-client privilege in the insurance coverage context. Given this increased willingness to minimize application of the attorney-client privilege in the insurance coverage context, insurance coverage counsel are being called upon to advise their insurer clients how to preserve the privilege and protect communications from future discovery. But going further, with respect to protecting from discovery communications to and from the insurer client, do coverage counsel have additional considerations arising out of ethical rules?

B. Maintaining and Preserving the Attorney-Client Privilege

The *Cedell* prospect of opening to discovery the insurer's and coverage counsel's communications might prompt a temptation to severely limit written communications, and most certainly the content. Reducing open discourse to oral communications between coverage counsel and insurer has drawbacks, for many states, to one degree or another, require the insurer to maintain a claim file sufficiently documenting all activities. *See Creating Defensible Files and Avoiding Bad Faith Claims*, 16 Andrews Ins. Indus. Litig. Rep. 25 (2000)("[U]nfair insurance or claims practices regulations and statutes . . . require that [an] insurer maintain claim files in sufficient detail that pertinent events and dates of the events can be reconstructed").[16]

The attorney-client relationship in a coverage dispute begins when coverage counsel is consulted and/or retained by the insurer. Coverage counsel will at that point want to consider how to maintain and protect privileged communications from future discovery. In light of existing

[16] *See also* Wash. Admin. Code 284-30-340; N.Y. Comp. Codes R. & Regs. Tit. 11, §216.11.

regulatory and statutory requirements requiring insurers to maintain complete claim files, a suggested approach is for coverage counsel to have a thorough initial discussion with the insurer regarding responsibilities and tasks, and limit the scope of the engagement letter or agreement accordingly. For example, if coverage counsel is retained solely to provide a coverage opinion, the engagement letter or agreement can be limited to make it clear that coverage counsel is retained only to provide a coverage opinion, that such opinions are being prepared in anticipation of litigation, that such opinions are being provided pursuant to the attorney-client relationship and that the attorney is not retained to perform any tasks associated with the adjustment of the claim. By memorializing the expectations of the insurer and coverage counsel, when the policyholder seeks discovery of communications between insurer and coverage counsel, the insurer can show that the coverage counsel was acting as a legal advisor only and not performing adjuster functions. This approach is consistent with the Model Rules of Professional Conduct. For example, Rule 1.2 states:

> Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer
>
> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.
>
> ***
>
> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

In regard to limiting the scope of an agreement between insurer and attorney, comment 6. to Rule 1.2 states:

> **Agreements Limiting Scope of Representation**

> [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

In addition to limiting the scope of the engagement letter or agreement, coverage counsel can label reports and coverage opinions as "attorney-client protected" documents, and use the subject line in e-mails to state that coverage counsel is providing legal advice. Thereafter, coverage counsel should remain aware of his or her specific responsibilities, stay within the confines of those responsibilities and promptly advise the insurer whether certain requested tasks potentially fall outside the scope of representation. Otherwise, the insurer runs the risk of losing the benefit of the attorney-client privilege.

Unfortunately, despite the insurer's and coverage counsel's best efforts, the modern reality of today's legal climate is that the attorney-client privilege may not apply. As noted in the Washington, New York, Idaho, Louisiana and Ohio decisions, at the outset of a bad faith suit there may be a presumption that the attorney client privilege does not exist for pre-denial communications and the insurer must overcome the presumption. In some instances, coverage counsel tasked with rendering a coverage analysis and advising the insurer may find it next to impossible to avoid undertaking activities some courts deem to be ordinary claims handling, thereby potentially affecting the attorney-client privilege.

Because there are no bright-line guidelines, what can insurance coverage counsel consider to fulfill his or her ethical obligations to the insurer in maintaining and preserving the attorney-

client privilege in the event a court determines that he or she was performing "adjuster activities" rather than serving solely as legal advisor?

C. Implications For Coverage Counsel When Deemed to be Acting as Claims Adjusters?[17]

In the *Cedell* context, there are implications when insurance coverage counsel is held by a trial court to have performed claims handling functions resulting in a ruling that the attorney-client privilege does not exist prior to the insurer's denial of a claim. These implications include the question as to what standard of care and what ethical obligations apply to counsel. For example, with respect to the policyholder, is counsel to be considered as an adjuster only, or both adjuster and lawyer? This is a distinction with a difference, for the lawyer typically must adhere to a professional standard of care while the adjuster generally has an ordinary standard of care.[18] With respect to counsel's relationship with the insurer, if a court holds that there is no attorney-client privilege applicable to pre-denial communications, the existence of the attorney-client relationship is implicated. In this context, what standard of care applies to coverage counsel undertaking claims functions—professional or ordinary?

Coverage counsel should become familiar with the ethical obligations, if any, the client's adjusters are expected to follow, and consider how such obligations may impact dealings with both the insurer and the policyholder. It is beyond the scope of this paper to discuss every potential ethical duty imposed upon claims adjusters. However, a cursory review of some of the more

[17]The authors acknowledge and credit as a resource a paper co-authored by ACCEC Founding Regent, Lewis F. Collins, Butler Wehmuller Katz Craig LLP, "Bad Faith: When Attorneys Act in a Claims Role," presented at the 2015 CLM Annual Conference.

[18] *See* 3 Modern Tort Law: Liability and Litigation § 26:22 (2d ed.)(discussing the fact that attorneys are to adhere to a professional standard of care maintained by practicing attorneys in that particular area); *See also Injury at Sea v. Pac. Claims, Inc.*, 122 Wash. App. 1020 (2004)(noting that insurance claims adjusters are held to a lower standard of care unless acting in the capacity of an attorney).

significant adjuster ethical considerations may shed light on ethical obligations a court potentially could apply to coverage counsel if deemed to be performing the same role as a claim adjuster.

The specifics of adjuster ethics vary from state to state. The following ethical duties and responsibilities are a compilation gleaned from the Code of Professional Conduct ("the Code") issued by the American Institute for Chartered Property Casualty Underwriters, which is an industry leader in property-casualty insurance education, research and ethics.[19] The Code emphasizes that the adjuster deal fairly and truthfully with the insured.[20] Central to this ethical responsibility is that the adjuster's investigation should include an evaluation of all facts available, and render a fair result based on applicable policy provisions and the facts available. In addition, if added facts become available, the adjuster should consider such facts and reconsider the coverage decision if applicable. In addition, Cannon Four requires that adjusters diligently and competently discharge their duties.[21] Arguably tied to this ethical responsibility, is the adjuster's duty to evaluate and process the claim in a timely manner and ensure that the claim decision is communicated to the policyholder in a timely manner. As an additional consideration, Cannons 1 and 6 of the code require that the adjuster should always avoid the appearance of impropriety,[22] and strive to maintain dignified and honorable relationships.[23] Cannons 1 and 6 go to the heart of

---

[19] *See The Canons, Rules, and Guidelines of the CPCU Code of Professional Conduct*, The Institutes, 1st Edition, 3rd Printing, July 2013, http://www.theinstitutes.org/doc/canons.pdf. The CPCU's Code, which was introduced in 1976, prescribes a minimum standard by which all member adjusters are expected to comply, and provides Canons and Rules regarding ethical conduct, as well as disciplinary rules, procedures and penalties.

[20] *See* Cannon 3 of the Code requiring that the adjuster obey all applicable laws and regulations, and avoid any conduct that would cause unjust harm.

[21] *See* Cannon 4 of the code.

[22] *See* Cannon 1, R.1.1 (indicting that an adjuster should avoid even the appearance of impropriety when performing his or her professional duties and should act in a manner that ultimately will best serve his or her own professional interests).

[23] *See* Cannon 6.

avoiding conflict of interest issues that often times arise between policyholder, adjuster and insurer.

Again, the aim of this paper is not to discuss every potential ethical duty imposed upon claims adjusters, but to recognize that adjuster ethics can most certainly influence and shape the efficacy of a defense if the claim goes into litigation. By way of example, an adjuster's failure to adhere to applicable ethical considerations can lead to the policyholder filing a bad faith suit. Under Cannon four, an adjuster's ethical failure to competently discharge their duties by evaluating a claim and communicating a coverage decision in a timely manner might result in a waiver of applicable policy defenses in certain states.[24]

At this time, there appear to be no reported decisions imposing ethical standards of an adjuster on insurance coverage counsel deemed to be acting as a claims adjuster. Notwithstanding this, a policyholder's bad faith expert might attempt to proffer such an opinion. Until case law is developed, insurance coverage counsel in consideration of the insurer client's best interests should adhere to those obligations when the particular tasks and responsibilities requested by the insurer client could potentially result in a ruling that counsel performed adjuster functions leading to abrogation of the attorney-client privilege.

CONCLUSION

Insurance coverage counsel cannot assume that every pre-denial attorney-client communication will be protected under the cloak of privilege—even where those communications

---

[24] *See Yowell v. Seneca Specialty Ins. Co.*, 2015 WL 4575450, at *4 (E.D. Tex. 2015)(generally holding that failure of the insurer to provide a timely coverage determination can lead to the application of waiver); *Peavey Co. v. M/V ANPA*, 971 F.2d 1168, 1176 (5th Cir. 1992)(holding that Zurich waived non-coverage defense based on untimely investigation);

are contained in opinion letters. With this in mind, insurance coverage counsel is tasked with determining how ethically to protect communications with the insurer client. By limiting the scope of their engagement letters or agreements, coverage counsel can minimize the risk that courts will deem them to be acting as adjusters rather than as legal advisors and counsellors.

However, and despite counsel's best efforts to frame the engagement letter or agreement so as to only assume tasks and responsibilities of a legal advisor or counsellor, should more courts adopt the *Cedell* rule in discovery, there remains the possibility that a court will remove the attorney-client privilege and deem the insurance coverage attorney to be acting as a claim adjuster. Facing that possibility, there is also the risk that a court will impose the same standard of care involved with the adjustment of claims on the insurance coverage attorney.