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**CONSULTANT AND EXPERT WITNESS CLAIM FILES:  
ARE THEY AN OPEN BOOK?**

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## **CONSULTANT AND EXPERT WITNESS CLAIM FILES: ARE THEY AN OPEN BOOK?**

The receipt of a bond claim triggers the surety's investigation into the merits of the claim. Depending on the magnitude or complexity of the claim, the surety may decide to retain outside consultants to assist in its investigation. If the surety decides to deny the claim, it may also find itself using these consultants as expert witnesses or hiring other expert witnesses in preparation for litigation with the claimant. Sureties may also need consultants or expert witnesses when pursuing affirmative claims against other parties who may have caused a bond loss or in seeking indemnity from their principal.

In order to effectively assist the surety in its defense or pursuit of claims, outside consultants and experts create their own claim files. Although the parties may assume that these files are privileged and protected from discovery, this assumption is often incorrect. In order to minimize potentially detrimental disclosures of sensitive documents contained in the files of consultants and expert witnesses, sureties and their counsel would be wise to operate under the assumption that documents in these claim files may be discoverable in the event of litigation. While some discovery of consultant and expert witness files may be unavoidable, some planning may help to minimize the amount of damaging disclosures.

### **I. Non-Expert Consultants**

#### **A. Introduction**

Surety claims representatives often find themselves needing to retain outside consultants. There are a number of reasons for this: the sheer volume of claims that require speedy investigation and response, the scattered geographic locations of troubled projects and principal's offices, and the general complexity of issues that arise in the context of a bond claim that require specialized knowledge. As a result, sureties hire consultants with expertise in a broad range of fields, including construction management, cost estimating, accounting, and engineering. On surety claims, these consultants investigate allegations of performance default, analyze the merits of different performance bond response options, provide estimated project completion costs, prepare and review schedules, review backcharges, assist in the preparation of affirmative claims against the obligee or other parties, meet with claimants to review documentation supporting bond claims, meet with principals to review bond claim defenses, inspect a principal's books and records in order to gauge a principal's current financial health, or ascertain the potential for salvage. On the fidelity side, outside consultants may review an insured's claim and supporting documentation, interview witnesses, investigate potential wrongdoers, analyze coverage and other possible defenses to the claim, and ascertain the potential for salvage.

#### **B. The Discoverability of Consultants' Claim Files**

The potential discoverability of consultants' claim files creates a dilemma for sureties. Naturally, sureties want their consultants to be able to provide as complete and accurate an assessment of the claim situation as possible. For most people, that requires the consultant to put into writing the information uncovered in an investigation and the results of the consultant's analysis. At the very least, the consultant's file will likely contain notes from meetings and phone calls with obligees, principals, and claimants, documents provided by others that may contain notes or comments by the consultant, and other materials that reflect the consultant's

thoughts, opinions and conclusions. On a complicated claim, the consultant may prepare a more formal written analysis or report for its surety client. While the surety may appreciate or even require a written report outlining the strengths and weaknesses of a bond claim (and perhaps the strengths and weaknesses of a principal's defenses to a bond claim), the surety does not want such a report to fall into the hands of an adverse party. Unfortunately, there may be very little recourse to prevent such a disclosure if a dispute evolves into litigation.

Sureties find themselves in litigation under a number of different scenarios. In the case of a surety bond, a surety may be in litigation against a performance or payment bond claimant whose claim has been totally or partially denied by the surety. Alternatively, a surety may find itself in litigation against its principal if the principal is financially unable or merely unwilling to reimburse the surety. In the case of a fidelity bond, the surety may find itself in litigation against its insured whose claim has been denied or against the alleged wrongdoer seeking restitution. Undoubtedly, as part of the discovery process, these adverse parties will propound subpoenas seeking the surety consultant's claim files. In most cases, at least some of the documents in these files will have relevance to the pending dispute.

There are generally two methods by which to protect otherwise relevant documents from disclosure in discovery: the attorney-client privilege and the work product doctrine. Because they differ in scope and application, both may apply to a particular situation and in other cases, only one or neither will apply. Can either the attorney-client privilege or the work product doctrine be used to prevent disclosure of surety consultant claim files? Unfortunately, there is very little case authority addressing these issues in the surety context. Although slightly more case law has developed in the insurance context which would be more applicable to fidelity claims, using this case law to predict how a court will rule in a particular case is problematic for two reasons: (1) surety and insurance are far from analogous in many scenarios;<sup>1</sup> and (2) even in the insurance setting, there is a divergence of opinions among the various courts as to what is properly discoverable. Nevertheless, the case law does provide some insight on how the courts handle these complicated discovery disputes.

## **1. Use of the Attorney-Client Privilege to Protect Documents in a Consultant's Claim File**

The attorney-client privilege is one of the oldest privileges existing at common law<sup>2</sup> and is intended to promote "full and frank communication between attorneys and their clients."<sup>3</sup> However, because it prohibits the full discovery of relevant facts, it is narrowly construed.<sup>4</sup> The

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<sup>1</sup> Unlike the relationship of insurer and insured, the surety relationship is a tripartite relationship involving a surety, principal, and obligee. *First Virginia Bank - Colonial v. Baker*, 301 S.E.2d 8, 11 (Va. 1983); *General Motors Acceptance Corp. v. Daniels*, 492 A.2d 1306, 1309 (Md. 1985). A surety has obligations to both the obligee and its principal, requiring it to engage in a delicate balancing act whenever a claim is filed. Because of a surety's obligations to its principal and the principal's indemnity obligations to its surety, a surety frequently finds itself on the same side as its principal and yet adverse at the same time.

<sup>2</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)(citing 8 J. Wigmore, Evidence § 2290 (McNaughton Rev. 1961)).

<sup>3</sup> *Upjohn*, 449, U.S. at 389.

<sup>4</sup> See e.g., *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979).

party asserting the attorney-client privilege bears the burden of establishing each element of the privilege.<sup>5</sup>

The attorney-client privilege infrequently applies to the documents in a consultant's claim files because the document in question must be: 1) a communication; 2) between the attorney and the surety client; and 3) involve facts communicated to the attorney for the purpose of obtaining legal advice.<sup>6</sup> Documents in a consultant's claim file obtained from parties other than the surety or its counsel do not fall within the scope of the attorney-client privilege. Likewise, documents prepared by the consultant for the consultant's own use will not be protected from discovery on this basis. Any documents reflecting communications between the consultant and the surety claims representative to which counsel is not a party will likewise fail to generate a successful attorney-client privilege claim.

The only documents in a consultant's claim file for which the attorney-client privilege might be successfully invoked are the following: 1) communications between the consultant and the attorney where the consultant is acting as the client's agent or representative; or 2) communications between the attorney and client on which the consultant has been copied. Even then, the obstacles to establishing all elements of the privilege are high.

Only a handful of courts have addressed the issue of whether an attorney's direct communications with a client's independent (non-employee) consultant can be covered by the attorney-client privilege, none of which involved sureties. In the case of *In re Bieter Company*,<sup>7</sup> a partnership hired an independent consultant to provide assistance to the partnership in commercial and retail real estate development.<sup>8</sup> In this role, the independent consultant had frequent dealings with outside parties, including extensive one-on-one communications with Bieter's attorneys at which no employee of Bieter itself was present.<sup>9</sup> The consultant participated in activities pertinent to the subject matter of the litigation, which involved a failed real estate development.

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<sup>5</sup> See e.g., *Federal Trade Commission v. Shaffner*, 626 F.2d 32, 37 (7th Cir. 1980); *Super Tire Engineering Co. v. Bandag, Inc.*, 562 F. Supp. 439, 440 (E.D. Pa. 1983).

<sup>6</sup> The elements of the attorney-client privilege are succinctly set out in the case of *United States v. United States Shoe Machinery Corp.*:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

89 F. Supp. 357, 358-59 (D. Mass. 1950).

<sup>7</sup> 16 F.3d 929 (8<sup>th</sup> Cir. 1994).

<sup>8</sup> *Id.* at 933-934.

<sup>9</sup> *Id.* at 934.

In *Bieter*, the partnership claimed attorney-client privilege as to certain documents sent from the attorney directly to the consultant as well as to some documents sent from the attorney to the client on which the consultant was copied.<sup>10</sup> After the trial court ordered production of the documents, Bieter petitioned for a writ of mandamus, requiring the appellate court to answer the question “whether communications either between this consultant and counsel or merely disclosed to the consultant necessarily fall outside the scope of the attorney-client privilege because the consultant was neither the client nor an employee of the client.”<sup>11</sup>

The appellate court answered this question in the negative, ruling that an independent contractor could be considered a representative of the client under appropriate circumstances and thus qualify for the protections of the attorney-client privilege. Under the facts of the case, the Eighth Circuit found that the independent consultant was the “functional equivalent of an employee.”<sup>12</sup> Having overcome the first hurdle, the appellate court then held that Bieter had met the remaining elements necessary to establish the privilege because the communications in question fell within the scope of the consultant’s duties, were made at the behest of his superiors (the client), were made for the purposes of seeking legal advice, and were kept confidential by the consultant.<sup>13</sup>

In an anti-trust lawsuit, *In re Copper Market Anti-Trust Litigation*,<sup>14</sup> one of the defendants, a Japanese company, sought to withhold as privileged certain documents containing communications between the defendant’s counsel and a public relations firm hired by the defendant to deal expressly with Western media issues after it appeared that litigation was imminent. The defendant claimed the documents were protected from disclosure on the grounds of both the attorney-client privilege and work product doctrine. Under the facts of the case, the court found the public relations firm to be the functional equivalent of an in-house public relations department that had sought and received legal advice from the defendant’s counsel with respect to performing its duties.<sup>15</sup> In so finding, the court stated: “The Supreme Court in *Upjohn* looked to whether the corporation’s agents possessed the information needed by the corporation’s attorneys in order to render informed legal advice . . . In applying the principles set forth by the Supreme Court in *Upjohn*, there is no reason to distinguish between a person on the corporation’s payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice.”<sup>16</sup>

Other courts addressing the issue of the breadth of the attorney-client privilege as applied to outside consultants have taken a more narrow approach, finding that

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 938 (citing *McCaugherty v. Siffermann*, 132 F.R.D. 234, 239 (N.D. Cal. 1990)).

<sup>13</sup> 16 F.3d at 938-39.

<sup>14</sup> 200 F.R.D. 213 (S.D.N.Y. 2001).

<sup>15</sup> 200 F.R.D. at 219.

<sup>16</sup> *Id.* at 218-19.

communications with a third party consultant are privileged only when the third party consultant's role is to act as a facilitator of communications between the attorney and the client. For example, in *United States v. Kovel*,<sup>17</sup> the Second Circuit held that the attorney-client privilege applied to communications made by a client to an accountant employed by the client's attorney provided that the client made the communication for the purpose of seeking legal advice, not accounting advice. By analogy, the appellate court referred to the example of a third party translator who assists in the communications between an attorney and client who speak different languages.<sup>18</sup>

In a more recent Second Circuit case, the appellate court rejected a claim of privilege as to communications between a taxpayer's attorney and an investment banker who had provided advice to the taxpayer, finding that *Kovel* did not apply because the investment banker did not "translate or interpret information" given to the attorney by the client.<sup>19</sup> It appears that, at least in the Second Circuit, the privilege may apply only in narrow circumstances where the consultant acts as an intermediary between the client and the attorney.

In a case with facts similar to a typical surety-consultant scenario, an outside engineering consultant hired by former outside counsel provided assistance to a chemical corporation during an environmental clean-up project.<sup>20</sup> After litigation ensued between the chemical corporation and the remediation services company hired to perform the clean-up, the chemical corporation sought to withhold from discovery certain documents prepared by or sent to the engineering consultant.<sup>21</sup> Although much of the opinion addresses the argument (also unsuccessful) that the work product doctrine protected the documents from disclosure, the court also discussed the applicability of the attorney-client privilege. Even though the consultant had been retained by outside counsel, the court rejected the attorney-client privilege argument, noting that the engineering consultant provided factual and scientific assistance rather than assistance in preparation for litigation.<sup>22</sup>

One issue that has come up and is likely to come up in the surety context is the outside consultant who also happens to be a licensed attorney. In such a case, does the fact that the consultant is an attorney bolster the claim of attorney-client privilege? Courts have varied in their answer to this question and the outcome appears to be tied to the specific facts of each case. If an outside law firm provides services purely as an investigator, performing the same role as an in-house claims adjuster might, rather than as a provider of legal advice, courts have found that the attorney-client privilege does not apply.<sup>23</sup> If the lawyer-consultant provides

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<sup>17</sup> 296 F.2d 918 (2d Cir. 1961).

<sup>18</sup> *Id.* at 921.

<sup>19</sup> *United States v. Ackert*, 169 F.3d 136, 139-40 (2d Cir. 1999).

<sup>20</sup> *Occidental Chemical Corp. v. Ohm Remediation Services Corp.*, 175 F.R.D. 431 (W.D.N.Y. 1997).

<sup>21</sup> 175 F.R.D. at 433.

<sup>22</sup> *Id.* at 437. See also *United States Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 162 (E.D.N.Y. 1994) ("There are few, if any, conceivable circumstances where a scientist or engineer employed to gather data should be considered an agent within the scope of the privilege since the information collected will generally be factual, obtained from sources other than the client.").

both claims investigation services and legal analysis, courts are more likely to find that the privilege applies.<sup>24</sup>

It is important for a surety and its consultant to think about privilege issues throughout the duration of the consultant's engagement to maximize the likelihood of a successful claim of privilege. Waiting to think about privilege issues until after a document request is pending may result in missed opportunities to bolster or preserve a privilege claim. For example, a surety may want to consider making a concerted effort to obtain the participation of outside litigation counsel in communications between the surety and the consultant to increase the chances of a successful attorney-client privilege claim as to the consultant's notes documentation such communications. In other cases, a surety that has not thought about privilege issues contemporaneously might find that it has waived an otherwise viable attorney-client privilege claim due to subsequent dissemination of privileged documents to others not covered by the scope of the privilege. In the event of a discovery dispute, the party seeking production of the documents will be entitled to find out exactly who had access to the alleged privileged document. With proper care and planning, waiver of privilege may be avoided.

As these cases demonstrate, a surety will face an uphill burden trying to withhold documents from its consultant's claim file on the grounds of the attorney-client privilege. First, the privilege probably applies to only a small number of documents that involve communications with counsel. Notes recording communications with witnesses or records of the consultant's analysis or thought processes would not be protected by the attorney-client privilege, although they may be protected under the work product doctrine discussed below. Second, to the extent that the client is not a participant in the communication, the client will have to convince the court that the independent consultant is the functional equivalent of the client. Given the predominant and active use of in-house claims representatives who direct the work of their outside surety and fidelity consultants and play an active role in the investigation of claims, it is doubtful that most outside consultants could demonstrate the level of involvement necessary to be considered the functional equivalent of the client. Finally, to be protected as attorney-client privileged communications, the communications between the outside consultant and counsel must be for the purpose of securing legal advice for the client. Surety consultants are usually hired to provide expertise in various aspects of construction management, design and engineering. Fidelity consultants mostly provide financial analysis of claims for alleged losses/thefts under commercial crime and financial institution bonds. Most courts are likely to look at communications involving primarily the rendering of engineering or accounting expertise as falling outside the parameters of information necessary for the rendering of legal advice. A surety or fidelity practitioner could argue that such information is essential to rendering meaningful legal advice because it is used to evaluate the strengths and weaknesses of a case as to both liability and damages; however, there is no current case law supporting such an argument.

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<sup>23</sup> *Reliance Ins. Co. v. Am. Lintex Corp.*, 2001 U.S. Dist. LEXIS 7140, at \*5-6 (S.D.N.Y. June 1, 2001) ("Merely because such an investigation was undertaken by attorneys will not cloak the reports and communications with privilege because the reports . . . are prepared as part of the "regular business" of the insurance company." (citations omitted)); *USF&G v. Canady*, 460 S.E.2d 677, 690 (W. Va. 1995).

<sup>24</sup> *See., e.g., Dunn v. State Farm Fire & Cas. Co.*, 122 F.R.D. 507, 509-10 (N.D. Miss. 1988); *Aetna Cas. & Surety Co. v. Superior Court*, 153 Cal. App.3d 467, 475-76 (Cal. Ct. App. 1984).

## 2. Use of the Work Product Doctrine to Protect Documents in a Consultant's Claim File

The work product doctrine has its origins in the seminal case of *Hickman v. Taylor*,<sup>25</sup> in which the United States Supreme Court held that it is “essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.”<sup>26</sup> Like the attorney-client privilege, the burden of proof that the work product doctrine applies to a document rests on the party asserting it.<sup>27</sup>

Unlike the attorney-client privilege, the work product exclusion belongs to counsel, not the client, and is not an outright privilege but rather a qualified immunity with limits to its application. For purposes of this paper, certain limitations on the doctrine are important to remember: 1) its primary purpose is to protect mental thought processes and opinions (“opinion work product” or core work product); 2) it is limited in scope to the protection of documents prepared in anticipation of litigation; and 3) it may be overcome by a showing of substantial need in the case of non-opinion work product (also known as “factual work product” or ordinary work product.)<sup>28</sup> At the federal level, Federal Rule 26(b)(3) sets forth the scope and limitations of the work product doctrine, providing that:

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

As Rule 26 reflects, the work product doctrine is not limited in scope to materials prepared by counsel but includes other client “representatives”,<sup>29</sup> although counsel's involvement in the preparation of a written document claimed to be work product is one factor in a court's determination as to whether the document falls under the parameters of being prepared “in anticipation of litigation.” Many states have adopted court rules similar or identical to Federal Rule 26 but when addressing discovery issues governed by state law, one must look to that particular state's rules and case law for guidance.

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<sup>25</sup> 329 U.S. 495 (1947).

<sup>26</sup> *Id.* at 510.

<sup>27</sup> See, e.g. *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 355 (4th Cir. 1992); *Binks Mfg. Co. v. National Presto Indus.*, 709 F.2d 1109, 1118 (7th Cir. 1983).

<sup>28</sup> *Hickman*, 329 U.S. at 511-12.

<sup>29</sup> Rule 26(b)(3) specifically identifies representatives other than counsel whose product could be protected: “consultants, surety, indemnitor, insurer, or agent.”

Courts have struggled somewhat with the work product doctrine's "in anticipation of litigation" requirement in its application to the work of insurance companies and their representatives. This is because the very nature of an insurance company's business is to investigate claims which, if unresolved, frequently wind up in litigation. As one court aptly described the dilemma:

The general rule for determining whether a document can be said to have been "prepared in anticipation of litigation" is whether "the document can fairly be said to have been prepared or obtained because of the prospect of litigation, . . . (and not) in the regular course of business." 8 Wright & Miller, Federal Practice & Procedure: Civil s 2024 (1970). Paradoxically, insurance company investigating documents straddle both ends of this definition, because it is the ordinary course of business for an insurance company to investigate a claim with an eye toward litigation. Yet a hard and fast rule in either direction would be contrary to the various goals of modern discovery practice. To foreclose from discovery all insurance company investigatory reports would unnecessarily hike the expense in proceeding against insurance companies, in violation of Rule 1 of the civil rules, and once again, may render the factfinding process a cat and mouse game. See Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367, 373 (N.D. Ill. 1972). Yet to open for discovery these internal documents may inhibit a claims adjuster from reporting all his thoughts and ideas regarding a claim, because no protection against discovery is afforded documents containing mental impressions not prepared in anticipation of litigation. Miles v. Bell Helicopter Co., 385 F. Supp. 1029, 1033 n.2 (N.D. Ga. 1974). Investigation reports might then be less reliable in evaluating and disposing of claims and an insurance company's claims evaluation process as a whole might be disrupted. In addition, full discovery may allow a plaintiff proceeding against an insurance company to co-opt "the wits" of his adversary, in contravention of the Hickman doctrine.<sup>30</sup>

As a result, there is a lack of uniformity in the courts' decisions regarding what constitutes "anticipation of litigation" for an insurance company. One line of cases holds that investigative material compiled by non-lawyers is not work product unless the party created or obtained the material at the behest of an attorney in anticipation of litigation.<sup>31</sup> On the opposite side of the spectrum, a small minority of courts hold that nearly all materials in the files of insurance claims adjusters must be considered to be collected in anticipation of litigation because of the very nature of the insurance business, although to the extent the materials are

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<sup>30</sup> *Carver v. Allstate Insurance Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982). See also *Taroli v. General Electric Co.*, 114 F.R.D. 97, 99 (N.D. Ind. 1987) *aff'd*, 840 F.2d 920 (7<sup>th</sup> Cir. 1988) ("[I]t must be determined when the insurance company shifted its focus from collecting information and evaluating a claim to preparation for a lawsuit.").

<sup>31</sup> See, e.g., *St. Paul Reinsurance Co. Ltd. v. Commercial Financial Corp.*, 197 F.R.D. 620, 632; *Mission National Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986); *Hawkins v. District Court*, 638 P.2d 1372, 1379 (Colo. 1982).

factual work product, they could be discoverable upon a showing of “substantial need.”<sup>32</sup> The third and most popular approach is to make a fact-specific inquiry on a case-by-case basis to determine whether a party prepared a given document in anticipation of litigation, regardless of whether attorneys were involved in its creation.<sup>33</sup> While the third approach is arguably the most well-reasoned as it takes the specific facts of a situation into account, it creates uncertainty as to what documents will and will not be discoverable.

To date, sureties have not had much success in convincing courts that documents prepared by their outside consultants meet the requirement of having been prepared “in anticipation of litigation.” Generally speaking, these documents are found to have been prepared in the ordinary course of the surety’s business arising from its obligation to investigate claims. There are only two reported cases dealing directly with surety matters.

In *Levingston v. Allis-Chalmers Corp.*,<sup>34</sup> the surety, Hartford Accident and Indemnity Company, sustained substantial bond losses when its principal, Farrish Gravel Company, went out of business. Farrish and Hartford, as subrogee, blamed Allis-Chalmers for the destruction of Farrish’s business and Hartford became a plaintiff in litigation against Allis-Chalmers. In that litigation, Hartford sought to withhold from discovery a number of documents, including some prepared by or reviewed by its outside consultants. Using the case-by-case fact-specific approach, the court reviewed the disputed documents in camera and concluded, as to a majority of the documents,<sup>35</sup> that the consultants prepared or reviewed the documents during the completion of the principal’s projects and the resolution of numerous disputed bond claims. In rejecting the surety’s claim of protection under the work product doctrine, the court found that Hartford hired its consultants not “in anticipation of litigation” but rather to ascertain the status of projects, determine what needed to be completed, and estimate completion costs.<sup>36</sup> As such, the consultants were “‘actors’ or ‘viewers’ who are to be treated as ordinary witnesses from whom all facts known and opinions held are freely discoverable.”<sup>37</sup>

Some of the documents that Hartford sought to withhold related to litigation between Hartford and various Farrish subcontractors and suppliers seeking payment under Hartford payment bonds.<sup>38</sup> Hartford argued that these documents were prepared in anticipation of

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<sup>32</sup> See, e.g., *Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89, 92 (E.D. Mo. 1980); *Ashmeade v. Harris*, 336 N.W.2d 197, 200-01 (Iowa 1983).

<sup>33</sup> See, e.g., *F.D. Warren Co. v. E. Elec. Corp.*, 201 F.R.D. 280, 282-84 (D. Me. 2001); *Shaffer v. Northwestern Mut. Life Ins. Co.*, 2006 U.S. Dist. LEXIS 59294, at \*8 (N.D. W. Va. August 21, 2006); *Ring v. Commercial Union Ins. Co.*, 159 F.R.D. 653, 656 & n.1 (M.D.N.C. 1995).

<sup>34</sup> 109 F.R.D. 546 (S.D. Miss. 1985).

<sup>35</sup> The court noted that it had excepted certain documents from the order requiring production but the opinion does not describe those documents or elaborate on the court’s reasons. It is presumed that these documents involved communications between the consultants and Hartford’s counsel and were excluded as either “opinion work product” or on the basis of attorney-client privilege.

<sup>36</sup> *Id.* at 550.

<sup>37</sup> *Id.* (citing ALAN WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2029, 2033 pp. 250-51, 258).

<sup>38</sup> *Id.* at 551-52.

litigation, even though the litigation at issue had since been completed.<sup>39</sup> The *Levingston* court correctly noted that there is also a split of authority among courts about the duration of the work product protection. Some courts hold that the work product privilege applies only if the materials in question were prepared in anticipation of the litigation pending before that court, and if the documents were prepared for another case, they are freely discoverable in the present case.<sup>40</sup> Other courts have held that once protected by the cloak of work product, the documents do not lose that protection in subsequent cases.<sup>41</sup> Finally, there is an intermediate position that the protection extends to subsequent cases only if the cases are related.<sup>42</sup>

Like the majority of courts, the *Levingston* court adopted the intermediate approach but rejected Hartford's work product claim because there was no relationship between the prior payment bond claim litigation and the pending tort action against Allis-Chalmers for the alleged destruction of Farrish's business.<sup>43</sup> The opinion does not disclose the nature of the relationship between Farrish and Allis-Chalmers, making it difficult to assess the accuracy of the court's holding that the matters were unrelated.

In *USF&G v. Braspetro Oil Services Co.*,<sup>44</sup> plaintiffs USF&G and American Home Assurance Company as co-sureties issued two multi-million dollar performance bonds guaranteeing the construction of two oil production facilities in Brazil by a construction consortium. The sureties provided a dual obligee rider in favor of the lenders providing the financing for the construction.<sup>45</sup> The sureties alleged that the construction consortium began to experience financial difficulties and that the owner knew of these financial problems, but rather than terminating the contracts, took certain steps to increase the cost of performance and caused delays.<sup>46</sup> The sureties also alleged that the owner misdirected funds from the projects, made premature payments for work not yet completed, and by all of its actions materially increased the sureties' risks under the bonds.<sup>47</sup> After the owner did default the consortium, the sureties investigated further and denied liability under the bonds, saying that the default was unjustified and caused by the owner's own improper actions.<sup>48</sup> The sureties filed both a

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<sup>39</sup> *Id.* at 552.

<sup>40</sup> See, e.g., *United States v. Int'l Business Machines Corp.*, 66 F.R.D. 154, 178 (S.D.N.Y. 1974); *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D. Pa. 1970); *Gulf Construction Co. v. St. Joe Paper Co.*, 24 F.R.D. 411, 415 (S.D. Tex. 1959).

<sup>41</sup> See, e.g., *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 483-84 (4<sup>th</sup> Cir. 1973); *In re Murphy*, 560 F.2d 326, 333-35 (8<sup>th</sup> Cir. 1977); *United States v. O.K. Tire Co.*, 71 F.R.D. 465, 468 n.7 (D. Idaho 1976).

<sup>42</sup> See, e.g., *Republic Gear Co. v. Borg-Warner Co.*, 381 F.2d 551, 557 (2d Cir. 1967); *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 153 (D. Del. 1977).

<sup>43</sup> 109 F.R.D. at 552.

<sup>44</sup> 2000 U.S. Dist. LEXIS 7939 (S.D.N.Y. 2000).

<sup>45</sup> 2000 U.S. Dist. LEXIS 7939, at \*6-7.

<sup>46</sup> *Id.* at \*8.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at \*9.

declaratory judgment action with regard to their obligations and liabilities under the bonds and a separate action, subsequently consolidated with the first action, seeking damages for tortious interference with contract and breach of obligations owed to the sureties under the bonds and indemnity agreements.<sup>49</sup>

The defendant lenders sought discovery of, among other things, materials produced by investigators and engineering consultants retained directly by outside counsel during the investigation of the default prior to the period where the sureties declined liability under the bonds. These materials included witness statements, notes from witness interviews, documents identifying witnesses, translations and investigative reports.<sup>50</sup> The sureties refused to produce these documents saying that they were protected by the work product doctrine as the sureties had retained outside counsel in contemplation of litigation and that the work product doctrine covered all documents created by the law firm or created on its behalf.<sup>51</sup>

Like the *Levingston* court before it, the *Braspetro* court undertook a fact-specific inquiry to determine whether the work product doctrine applied to the documents at issue. It also recognized the difficulty of addressing the issue in this context, stating “the application of the work product doctrine to documents prepared by insurance companies during claims investigations is difficult because ‘the nature of the insurance business is such that an insurance company must investigate a claim prior to determining whether to pay its insured,’ and thus pre-litigation investigation is the routine business of insurance companies . . . . Although at some point, a company’s investigation may shift from the ordinary course of business to an anticipation of litigation, there is no hard and fast rule and to when this occurs; rather a fact-specific inquiry is required to determine when this shift occurs.”<sup>52</sup>

In *Braspetro*, the sureties pointed to the fact that they had retained outside counsel solely in anticipation of litigation and that counsel had retained the consultants whose materials were at issue. Although the court acknowledged that the retention of counsel was “one indicia of the anticipation of litigation,” it did not consider this factor to be dispositive.<sup>53</sup> While acknowledging that the documentary evidence “suggests the belief and the likelihood of litigation,” the court also found that “there were complicated business and contractual negotiations going on, in which [counsel] played a pivotal role.”<sup>54</sup> The key issue in the court’s analysis appears to be whether the investigation being done would have been done for business purposes regardless of the possibility of litigation because the sureties had to perform certain tasks to fulfill their various obligations to the obligee and the principal and to determine what course of action to take under the bond. The court noted: “Tellingly, in their many submissions to the Court on this issue, the sureties have not made any assertions about what their routine business practice is when confronted with claims of the magnitude of those in issue here, and how the investigation that occurred in this situation differed from the type of

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at \*29.

<sup>51</sup> *Id.* at \*29-30.

<sup>52</sup> *Id.* at \*32-34.

<sup>53</sup> *Id.* at \*36.

<sup>54</sup> *Id.* at \*38.

investigation they would routinely undertake when confronted with large claims in a complex surety matter.”<sup>55</sup> Ultimately, the court found that the consultants’ documents created during the investigation period prior to the denial of the claim were not prepared in anticipation and were thus discoverable, although it did allow the sureties to redact from the documents any notes or other items dealing directly with litigation strategy or possible litigation defenses as privileged.<sup>56</sup>

Sureties are not the only parties who have not fared well in attempting to claim work product as to their consultants’ files. Although there appear to be no reported cases dealing directly with fidelity carriers and their consultants, there are numerous cases dealing with the issue generally in the context of insurance. In *Westhemeco Ltd. v. New Hampshire Ins. Co.*,<sup>57</sup> a first-party insurance case, the plaintiff sought reports issued to and by a surveyor and investigator retained by the insurance company’s attorneys. In reviewing the facts of the case, the court decided the consultants prepared their reports in the usual course of business of the insurer in investigating a claim rather than in anticipation of litigation even though the insurance company had already engaged counsel and had already denied coverage.<sup>58</sup> In *Company of North America v. M/V Savannah*,<sup>59</sup> the court found that a lien surveyor’s report related to cargo damage was discoverable as prepared in ordinary course of business.<sup>60</sup> Likewise, in *Fine v. Bellefonte Insurance Company*,<sup>61</sup> the court held that outside experts’ reports on the investigation of the cause of a fire to insured premises were discoverable as prepared in the ordinary course of business.<sup>62</sup>

Some courts appear to draw the line as to when “anticipation of litigation” occurs upon date when coverage is denied or some other overt action by the insurance company. For example, in *Mt. Vernon Fire Insurance Co. v. Try 3 Building Services, Inc.*,<sup>63</sup> the case involved a coverage dispute over a building collapse that occurred during demolition work by an independent contractor. Even though the insurer testified that it anticipated litigation from the first notice of the accident due to the serious nature of the incident and the involvement of an independent contractor, the court permitted the discovery of all investigative reports, photographs, and witness statements obtained by the insurer prior to the issuance of a reservation of rights letter and denied discovery of all such documents prepared after issuance of the letter.<sup>64</sup> This type of “bright line” test may have application in the fidelity context and also

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<sup>55</sup> *Id.* at \*44.

<sup>56</sup> *Id.* at \*48.

<sup>57</sup> 82 F.R.D. 702 (S.D.N.Y. 1979).

<sup>58</sup> *Id.* at 709.

<sup>59</sup> 1995 U.S. Dist. LEXIS 15247 (S.D.N.Y. 1995).

<sup>60</sup> 1995 U.S. Dist. LEXIS 15247 at \*2-3.

<sup>61</sup> 91 F.R.D. 420 (S.D.N.Y. 1981).

<sup>62</sup> *Id.* at 423.

<sup>63</sup> 1998 WL 729735 (S.D.N.Y. Oct. 16, 1998).

<sup>64</sup> *Id.* at \*5-8.

in the surety context in discovery disputes involving performance and payment bond claimants, but is not likely to provide much guidance in surety litigation involving indemnitors or third parties.

Although the work product doctrine appears to provide a better opportunity for a surety to successfully withhold sensitive documents in a consultant's claim file than does the attorney-client privilege, challenges still exist. For one, it is difficult to make any firm predictions about whether a particular document will be safe from prying eyes given the dearth of case law in the context of surety and fidelity bonds and the lack of uniformity among the courts about the meaning of "anticipation of litigation" and whether the work product privilege lasts in perpetuity or only for the duration of one particular case. Second, a consultant's claim file is more likely to contain documents constituting factual or ordinary work product than to contain opinion or core work product and thus, a surety may successfully establish work product only to have it overcome because the party seeking the document proves a "substantial need" for the document. Despite these challenges, there are some steps that a surety company can take to decrease the likelihood of a damaging disclosure of documents from a consultant's claim file:

- 1) As to any document prepared or obtained prior to the commencement of actual litigation, assume the document will be discoverable and leave candid assessments of strengths and weaknesses primarily to verbal discussions;
- 2) As to any document (such as a form or report) that would have been prepared whether or not litigation is anticipated, assume the document will be discoverable and choose words and topics carefully;
- 3) Treat the document as if it is work product, including labeling the document as such and preventing disclosure of the document to other parties that would result in waiver of the right to claim either attorney-client privilege or work product protection;
- 4) Engage litigation counsel early and when possible, have litigation counsel participate in communications between the surety and its consultant to maximize the chances of being able to successfully argue that a document is privileged, prepared in anticipation of litigation, or opinion work product.

## **II. The Discoverability of Experts' Claim Files**

### **A. Introduction**

Experts are outside parties retained specifically to provide support and testimony in litigation or another form of dispute resolution such as mediation or arbitration. Individuals retained as experts may have expertise in various fields, including construction design, estimating, scheduling, project management, constructability or engineering. Expert accountants may be retained to provide support for damage claims being affirmatively brought by a surety or to defend against damage claims being asserted against the surety bond. Attorneys may also be retained as experts to refute "bad faith" claims or to provide support for indemnity claims requesting recovery of attorneys' fees.

## B. The Discoverability of Experts' Claim Files

As a general rule, the file of an expert expected to testify is fully open for discovery. This includes drafts of an expert's reports, documents provided by the client and third parties, project records, and communications with the expert. This requirement arises from Federal Rule 26(a)(2), which requires a party to not only identify all expert witnesses it plans to use at trial, but also to provide a disclosure regarding the expert's intended testimony. The Rule requires the disclosure to contain a written report that includes "the data or other information considered by the witness in forming the opinions."<sup>65</sup> This allows the opposing party the opportunity to understand the basis for the expert's opinion and to fully cross-examine the expert in an effort to determine inconsistencies, information gaps, and other problems with the expert's analysis.

Most courts have broadly construed this provision of Rule 26, adopted by amendment in 1993, to mean that an expert must produce all documents provided to the expert, regardless of whether the information in the documents has actually been relied upon by the expert in forming his or her opinion.<sup>66</sup> Generally speaking, the courts have no difficulty requiring parties to produce copies of factual work product materials provided to testifying experts. Problems arise when it comes to the production of opinion work product materials, which may include counsel comments on expert report drafts, written documents prepared counsel or their staff providing information to the expert regarding facts or legal issues involved in the dispute, or verbal communications between counsel and the expert reflected in notes taken by the expert. There appears to be a direct conflict between the Rule 26 expert disclosure requirements and the heightened protection afforded to opinion work product found elsewhere in Rule 26. Before the 1993 amendment to Rule 26, there existed a split of authority among the courts as to whether work product materials provided to experts had to be produced in discovery. Even after the Rule change, the courts remain somewhat split, although a majority has emerged in favor of full disclosure.<sup>67</sup>

The majority of courts addressing this issue have read Federal Rule 26(a)(2) strictly and adopted a bright-line test that all information or materials exchanged between an attorney and testifying expert must be disclosed.<sup>68</sup> Those courts adopting the bright-line test point to the

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<sup>65</sup> Fed. R. Civ. P. 26(a)(2)(B).

<sup>66</sup> See, e.g. *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277, 282 (E.D. Va. 2001) and the authority discussed therein. The *Trigon* court agreed with other courts that the Federal Rules Advisory Committee intended to include a broader scope of materials for disclosure because it had rejected a draft version of the proposed rule amendment that used the term "relied upon" instead of "considered."

<sup>67</sup> Not all states have adopted corresponding state court rules so a surety in a state court action may have more discretion to limit the disclosure of an expert's file if the applicable state court rule has been construed more narrowly.

<sup>68</sup> See, e.g. *Elm Grove Coal Co. v. Director, O.W.C.P.*, 480 F.3d 278, 299-301 (4<sup>th</sup> Cir. 2007); *Reg'l Airport Authority v. LFG*, 460 F.3d 697, 713-17 (6<sup>th</sup> Cir. 2006); *Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375-76 (Fed. Cir. 2001) (by providing documents and information to testifying expert in connection with opinions and testimony, party waives attorney-client work product privilege with respect to such documents and information); *Karn v. Ingersoll-Rand*, 168 F.R.D. 633, 637-41 (N.D. Ind. 1996); *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 387-88 (N.D. Cal. 1991) (holding that absent extraordinary showing of unfairness beyond interest generally protected by the work product doctrine, work product is discoverable if communicated by counsel to expert as it relates to the expert's testimony); *Boring v. Keller*, 97 F.R.D. 404, 407 (D. Colo. 1983) ("The opinion work product rule is no

fact that had the Federal Rules Advisory Committee wished to carve out an exception for opinion work product in the 1993 Rule amendment, it could have done so. These courts also stress that it is important to the fairness of the judicial system to know whether an expert witness is simply regurgitating what has been told to him by counsel.<sup>69</sup> No doubt, the practical benefit of eliminating discovery disputes also plays a factor in the decision to adopt a bright-line test.

One court adopting the bright-line test has noted that there is an easy enough way to avoid the unwanted disclosure of opinion work product:

[I]t is the lawyer who retained the expert who makes the decision to provide that expert with material that would, under different circumstances, be protected by the work product doctrine. This means that the work product can remain protected so long as it is not given to the expert to consider in the development of his opinions. An attorney wishing to maintain the protection afforded by the work product doctrine can choose to provide the expert with all relevant facts instead of directing the expert's attention to certain facts and instead of including opinions and conclusions drawn by the attorney. This approach permits an attorney to know whether information provided to an expert will later become discoverable and in no way interferes with a lawyer's development of his case in private consultation with his client.<sup>70</sup>

A persistent minority of courts continue to reject the so-called bright-line test arguing that to adopt such a test renders the provisions of Rule 26 protecting opinion work product meaningless contrary to the rules of statutory construction.<sup>71</sup> These courts adhere to the opinion that the value to be gained in knowing all of the information provided to an expert does not override the strong public policy of protecting core attorney work product.

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exception to discovery under circumstances where documents which contain mental expressions are examined and reviewed by expert witnesses before their expert opinions are formed.”).

<sup>69</sup> See *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611, 615-16 (D.N.J. 1989) (in holding that draft expert reports and correspondence between counsel and testifying expert were discoverable, the court noted that the “weight accorded to an expert’s opinion must vary in accordance with the expert’s competence and knowledge; an expert who can be shown to have adopted the attorney’s opinion as his own stands less tall before the jury than an expert who has engaged in painstaking inquiry and analysis before arriving at an opinion.” )

<sup>70</sup> *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 306 (W.D. Va. 1998).

<sup>71</sup> See, e.g. *Krisa v. Equitable Life Assurance Society*, 196 F.R.D. 254, 260 (M.D. Pa. 2000); *Nexus Products Co. v. CBS New York, Inc.*, 188 F.R.D. 7, 8-9 (D. Mass. 1999); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642-43 (E.D.N.Y. 1997) (“Rule 26(a)(2) should not be construed as vitiating the attorney work product privilege, and the laudable policies behind it, in the absence of clear and unambiguous authority under the Federal Rules of Civil Procedure.”); *Haworth, Inc. v. Miller*, 162 F.R.D. 289, 295 (W.D. Mich. 1995) (“[F]or the high privilege accorded attorney opinion work product not to apply would require clear and unambiguous language in a statute . . . no such language appears here”); *All West Pet Supply Co. v. Hill’s Pet Prod.*, 152 F.R.D. 634, 638 (D. Kan. 1993) (holding that the attorney work product was not waived by sharing the documents with expert witnesses).

Given the likelihood that the surety will find itself in a jurisdiction that already has decided or will decide to adopt the majority view that all materials, including opinion work product materials, provided to a testifying expert will be discoverable, it is important for the surety, its counsel, and the expert to discuss the parameters of the situation at the time the expert is retained. All three players must have a clear understanding of what materials will be provided to the expert and what communications will be conveyed to the expert in order to both protect the expert from potential damaging cross-examination and prevent the disclosure of counsel's opinions and litigation strategy.

If economically feasible, it is preferable that a consultant who has already been involved in the matter not be designated as an expert witness. In many cases, the consultant will have already been exposed to privileged communications and work product documents during the course of his or her work as a consultant and these materials may become discoverable if the consultant is later designated as a testifying expert. Only a handful of courts have addressed this issue.<sup>72</sup> In theory, if the surety can establish that materials in the consultant's files fall under the protection of the work product doctrine (no easy task in and of itself) and it can clearly be shown that the materials were conveyed or produced as part of the consultant's role as a consultant rather than as an expert, the materials will be protected from disclosure. In practice, very few documents will be protected from disclosure. As one court noted:

If an expert is retained as both a consultant and a testifying witness, the work-product doctrine may be invoked to protect work completed by the expert in her consultative capacity as long as there exists a clear distinction between the two roles. Any ambiguity about which function was served by the expert when creating a document must be resolved in favor of discovery.<sup>73</sup>

In such a scenario, the biggest obstacle for the surety is how to provide affirmative proof that a document prepared by or provided to the consultant while wearing his or "consultant hat" was not considered by that same individual in forming his or her expert opinion because Federal Rule 26 clearly requires production of all documents considered by an expert in forming an opinion. As one court explained, "Defendant should not have to rely on plaintiffs [sic] representation that these documents were not considered by the expert in forming his opinion."<sup>74</sup> In order to prevent the potential waiver of both the attorney-client privilege and work product doctrine related to certain materials in a consultant's claim file, the wiser course is to engage a different individual as the surety's testifying expert.

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<sup>72</sup> See, e.g. *In re Aircrash at Dubrovnik Croatia*, 2001 U.S. Dist. LEXIS 14334 (D. Conn. June 4, 2001); *Messier v. Southbury Training School*, 1998 U.S. Dist. LEXIS 23221 (D. Conn. June 29, 1998); *B.C.F. Oil Refining, Inc. v. Consolidated Edison Company of New York, Inc.*, 171 F.R.D. 57 (S.D.N.Y. 1997); *Detwiler v. Offenbecher*, 124 F.R.D. 545 (S.D.N.Y. 1989); *Beverage Market v. Ogilvy & Mather*, 563 F. Supp. 1013 (S.D.N.Y. 1983).

<sup>73</sup> *Messier*, 1998 U.S. Dist. LEXIS 23221, \*7.

<sup>74</sup> *B.C.F. Oil Refining, Inc. v. consolidated Edison Company of New York, Inc.*, 171 F.R.D. 57, 62 (S.D.N.Y. 1997).

### **III. Conclusion**

Given the complex nature of surety and fidelity claims and the ever present threat of litigation with a variety of adversaries, chances are good that a surety company will find itself in need of consulting and expert assistance. Although the case law in the surety area is minimal and the case law in the insurance area is often conflicting, sureties would be wise to operate under the assumption that the claim files of their surety and fidelity consultants and experts will be discoverable. In order to minimize the disclosure of sensitive documents, it is important for all of the players on the team to discuss the ground rules of communications between them early and often. With careful planning, disciplined use of electronic mail and other forms of communication, and clear separation of the roles of consultant and testifying expert, the amount of damaging disclosures can be minimized.

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