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# DISCOVERY OF AN INSURED'S STATEMENT TO THE AGENT OF HIS INSURER IN AN ACCIDENT REPORT SITUATION

## INTRODUCTION

Open discovery became a reality for the federal courts in 1938 with the passage of the Federal Rules of Civil Procedure. Nevertheless, the scope of discovery regarding documents prepared prior to trial remained largely undefined until 1947 when the Supreme Court in *Hickman v. Taylor*<sup>1</sup> held that non-party witness statements collected prior to trial were not within the scope of the attorney-client privilege. The Court did hold that such statements were discoverable only upon a showing of "good cause" because they were included in the "work product" of the attorney.<sup>2</sup> Later decisions by the federal courts have extended the rationale of *Hickman*<sup>3</sup> to allow the discovery of defendants' statements<sup>4</sup> and plaintiffs' statements<sup>5</sup> given to a defendant's attorney for use at trial. The federal courts have also permitted the discovery of a defendant's statement concerning the facts of an accident given to the agent of his insurer for transmission to an attorney in the event of litigation.<sup>6</sup>

As state legislatures have revised discovery procedures to provide for broader pre-trial discovery, the state courts have generally followed the lead of the federal courts in allowing discovery of witnesses<sup>7</sup> and plaintiffs' statements<sup>8</sup> given to an attorney

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1. 329 U.S. 495 (1947).

2. *Id.* at 508.

3. *Id.*

4. *Rucker v. Wabash R.R.*, 418 F.2d 146 (7th Cir. 1969); *Groover, Christie & Merritt v. Lo Bianco*, 336 F.2d 969 (D.C. Cir. 1964); *Southern Ry. v. Campbell*, 309 F.2d 569 (5th Cir. 1962); *Allmont v. United States*, 177 F.2d 971 (3d Cir. 1949); *Fort Howard Paper Co. v. Affiliated F.M.I. Co.*, 64 F.R.D. 694 (E.D. Wis. 1974); *Tiernan v. Westext Transport, Inc.*, 46 F.R.D. 3 (D.R.I. 1969); *Cummings v. Bell Tel. Co.*, 47 F.R.D. 373 (E.D. Pa. 1968).

5. *New York Cent. R.R. v. Carr*, 251 F.2d 433 (4th Cir. 1957); *Shupe v. Pennsylvania R.R.*, 19 F.R.D. 144 (W.D. Pa. 1956); *Gordon v. Robinson*, 109 F. Supp. 106 (W.D. Pa. 1952); *Viront v. Wheeling & Lake Erie R.R.*, 10 F.R.D. 45 (N.D. Ohio 1950).

6. *Jackson v. Froblin Refrigerated Xpress, Inc.*, 49 F.R.D. 134 (N.D.W. Va. 1970); *Gottlieb v. Bresler*, 24 F.R.D. 371 (D.D.C. 1959); *Martin v. Nederlandsche Amerikaansche Stoomvaart Maatschappij*, 8 F.R.D. 363 (S.D.N.Y. 1948).

7. *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961); *Phillips v. Delaware Power & Light Co.*, 194 A.2d 690 (Del. Super. Ct. 1963); *Nationwide Ins. Co. v. Monroe*, 276 So. 2d 547 (Fla. App. 1973); *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965); *Wilson v. Borchard*, 370 Mich. 404, 122 N.W.2d 57 (1963); *Reynolds v. Boston & Maine Transport Co.*, 98 N.H.

or the agent of an insurer for use in litigation. In contrast to the federal rule, a long line of state court decisions has held that under the proper circumstances, a defendant's statement given to the agent of his insurer is immune from discovery as a privileged communication between attorney and client.<sup>9</sup> These decisions rely on the logic of the traditional rule that a client may utilize an agent for the communication of privileged information to his attorney.<sup>10</sup> Thus, whenever the federal courts allow the discovery of a defendant's statement to the agent of his insurer upon a showing of good cause, the majority of state courts provide an absolute bar to the discovery of such statements.

The purpose of this note is to compare the reasoning behind these contrasting state and federal court rules, while analyzing each in light of the traditional view of the attorney-client privilege.

#### HISTORICAL ANALYSIS

The basis for the early English rule permitting the attorney-client privilege was the oath and honor of the attorney to keep his client's secrets. During the eighteenth century, courts began to regard the ascertainment of truth more highly than an attorney's

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251, 98 A.2d 157 (1953); *Norderde v. Pennsylvania R.R.*, 73 N.J. Super. 74, 170 A.2d 71 (1962); *Poppo v. Long Island R.R.*, 14 Misc. 2d 499, 183 N.Y.S.2d 49 (1958); *Medic Ambulance Serv., Inc. v. McAdams*, 216 Tenn. 304, 392 S.W.2d 103 (1965). Witness statements collected by an attorney or agent of the insurer may be included within the work product privilege of the attorney.

8. *Holm v. Superior Court*, 42 Cal. 2d 500, 267 P.2d 1025 (1954); *Clark v. Superior Court*, 177 Cal. App. 2d 577, 2 Cal. Rptr. 375 (1960); *Korhorn v. Smith*, 33 Ill. App. 3d 532, 278 N.E.2d 864 (1971); *Oberkircher v. Chicago Transit Auth.*, 41 Ill. App. 2d 68, 190 N.E.2d 170 (1963); *Schill v. Hammitt*, 18 Misc. 2d 87, 187 N.Y.S.2d 527 (1959); *Meehan v. McClory*, 266 App. Div. 706, 40 N.Y.S.2d 207 (1943); *Koller v. W.E. Plechaty Co.*, 6 Ohio Misc. 57, 216 N.E.2d 399 (1965); *Walsh v. Northland Greyhound Lines*, 244 Wis. 281, 12 N.W.2d 20 (1943). State courts may also include plaintiffs' statements collected by an attorney or agent of the defendant within the work product privilege of the attorney.

9. *Heffron v. Los Angeles Transit Lines*, 170 Cal. App. 2d 709, 339 P.2d 567 (1959); *Bellman v. District Court*, \_\_\_ Colo. \_\_\_, 531 P.2d 632 (1975); *Wise v. Western Union Tel. Co.*, 36 Del. 456, 178 A. 640 (1935); *Vann v. State*, 85 So. 2d 133 (Fla. 1956); *Atlantic Coast Line R.R. v. Willaims*, 21 Ga. App. 453, 94 S.E. 584 (1917); *People v. Ryan*, 30 Ill. 2d 456, 197 N.E.2d 15 (1964); *Koch v. Mettler*, 49 Ill. App. 2d 251, 199 N.E.2d 417 (1964); *Schmitt v. Emery*, 211 Minn. 547, 2 N.W.2d 413 (1942); *Brakhage v. Graff*, 190 Neb. 53, 206 N.W.2d 45 (1973); *In re Klemann*, 132 Ohio St. 187, 5 N.E.2d 492 (1936); *Ex parte Schoepf*, 74 Ohio St. 1, 77 N.E. 276 (1906); *Davenport Co. v. Pennsylvania R.R.*, 166 Pa. 480, 31 A. 245 (1895); *Gass v. Baggerly*, 332 S.W.2d 426 (Tex. App. 1960); *Robertson v. Commonwealth*, 181 Va. 520, 25 S.E.2d 352 (1943).

10. 8 J. WIGMORE, EVIDENCE § 2292 (McNaughton rev. 1961) [hereinafter cited as WIGMORE].

professional dignity. This shift in emphasis undermined the traditional justification offered for the attorney-client privilege. As a result, a new basis for the privilege had to be offered.<sup>11</sup> Since the law had reached such a state of complexity, it was generally proposed that a private person had great need of a skilled attorney in order to exercise his legal rights. This argument assumed that full disclosure between attorney and client was necessary for the effective operation of the legal system, and that such disclosure could be achieved only by guaranteeing that the client's confidences would be privileged.<sup>12</sup> This is the most frequently invoked basis for the modern attorney-client privilege. It is generally assumed that the benefit to justice from a full disclosure of the true facts between attorney and client outweighs the harm caused by the lack of full disclosure in court.<sup>13</sup> Wigmore has summarized the attorney-client privilege and its elements:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such (3) the communications relating to that purpose (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor (8) except that protection be waived.<sup>14</sup>

Traditionally, privileged communications<sup>15</sup> between attorney and client, whether written or oral,<sup>16</sup> have been immune from discovery.

The privilege has not been well received by all legal scholars. Wigmore himself, while defending the privilege, has admitted that "its benefits are all indirect and speculative; its obstruction is plain and concrete."<sup>17</sup> Some authors have set aside all of the purported

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11. Note, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 NW. U.L. REV. 235, 236 (1962) [hereinafter cited as *The Lawyer-Client Privilege*].

12. See *Connecticut Mutual Life Ins. v. Schaefer*, 94 U.S. 457, 458 (1876); *Blackburn v. Crawford*, 70 U.S. 175, 192 (1865).

13. *Id.*

14. WIGMORE, *supra* note 10, at § 2292.

15. *Id.* at § 2285. Wigmore points out that any privileged communication, whether between attorney and client or otherwise, must satisfy four prerequisites: (1) the communication must originate in confidence that it will not be disclosed; (2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties; (3) the relationship must be one which the community wishes to protect; and, (4) any injury to the relationship due to disclosure of the communication must be greater than the benefit gained in court by disclosure.

16. See *Lynde v. Judd*, 3 Day 499 (Conn. 1807); *Nelson v. Becker*, 32 Neb. 99, 48 N.W. 962 (1891); *Seldon v. State*, 74 Wis. 271, 42 N.W. 218 (1889).

17. WIGMORE, *supra* note 10, at 557.

justifications for the privilege and have suggested that the only reason for the perpetuation of the rule is a sentimental distastefulness to the bench, bar and laity of a forced breach of the lawyer-client confidence.<sup>18</sup> Some virtue has been seen in the tendency of the privilege to discourage litigation. Supposedly, when the attorney learns of all the facts within the client's knowledge he is able to discover groundless claims and prevent their prosecution.<sup>19</sup> This reasoning has been challenged by those who feel the privilege tends to foster litigation. They point out that it is possible for a dishonest client, after discovery of the attorney's opinion, to alter the facts and resubmit them to a new attorney and thus be protected from exposure by the first attorney because of the privilege.<sup>20</sup>

Consequently, the privilege has been construed restrictively and denied wherever the costs were unusually high, or wherever the benefits—in terms of encouraging communications with counsel—were particularly slight.<sup>21</sup> As a result, the courts have placed several limitations on the privilege. It is usually accepted that the presence of a third person will destroy the privilege, unless the third person is an agent of the attorney or client and is reasonably necessary for the function of either.<sup>22</sup> This limitation is fundamental because the privilege is meant to protect only confidential communications. The policy reasons for prohibiting disclosure cease to exist when the client does not appear to desire secrecy.<sup>23</sup> Thus, disclosure of the communication to a third party not acting as an agent of the attorney or client will destroy the confidentiality and the privilege.<sup>24</sup>

The fact that disclosure to an agent of the attorney or client will not destroy the privilege is a concession by the courts to the practicalities of everyday communications. A client's freedom of communication may require the employment of some other means besides face-to-face contact for the transmission of information to an attorney. Therefore, communications by almost any form of agency employed or set in motion by the client are within the privilege.<sup>25</sup>

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18. See C. McCORMICK, EVIDENCE § 87, at 176 (2d ed. 1972); Radin, *The Privilege of Confidential Communications Between Lawyer and Client*, 16 CALIF. L. REV. 487, 496 (1928) [hereinafter cited as Radin].

19. WIGMORE, *supra* note 10, at § 2291.

20. Radin, *supra* note 18, at 490.

21. WIGMORE, *supra* note 10, at § 2291.

22. *Id.* at § 2381.

23. *Id.*

24. See *Edison Elec. Light Co. v. United States Elec. Lighting Co.*, 44 F. 294, 298 (S.D.N.Y. 1890).

25. WIGMORE, *supra* note 10, at § 2317. Wigmore treats the matter very simply. He states that the communications of the attorney's agent to the attorney are

The simplest examples of agency are those of a client sending a letter through the mail or a message by word of mouth through a confidential agent.

A corollary of the agency rule is the necessary party rule. Simply stated it means that the privileged communications may pass only through the hands (or minds) of those agents reasonably necessary for its transmission to the attorney.<sup>26</sup> Disclosure on such a strictly "need to know" basis will not destroy the privilege.<sup>27</sup>

It is also well settled that a communication which originates independently of the attorney-client relationship is not privileged and will not become so if later entrusted to an attorney.<sup>28</sup> This is the classic distinction between "pre-existing" papers and "communicating" papers. A document prepared prior to and not for the purpose of legal consultation is a pre-existing paper and is not privileged. Such pre-existing papers do not contain confidential matters stimulated by the attorney and are not privileged in the attorney's hands if they were not so in the client's.<sup>29</sup> This rationale is often used to deny the privilege to business records which were created long before any threatened litigation and then were transferred to an attorney in an attempt to avoid discovery. Once the person seeking discovery demonstrates that the particular record is one which the organization ordinarily maintains without regard to legal advice, it is *prima facie* the equivalent of a pre-existing record. As such it would be not privileged.<sup>30</sup> As one author has pointed out, "if the mere fact of possession by the attorney were sufficient to raise the privilege, any documentary evidence . . . could be given into an

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within the privilege because his agents are the sub-agents of the client and as such are acting for the client.

26. See *Hawes v. State*, 88 Ala. 37, 7 So. 302 (1890); *Schmitt v. Emery*, 211 Minn. 547, 2 N.W.2d 413 (1942); *Davenport Co. v. Pennsylvania R.R.*, 166 Pa. 480, 31 A. 245 (1895). See also Gardner, *Agency Problems in the Law of Attorney-Client Privilege: Privilege and Work Product Under Open Discovery (Part I)*, 42 U. Det. L.J. 105, 135 (1964); Simon, *The Attorney-Client Privilege as Applied to the Corporation*, 65 YALE L.J. 953, 955 (1956) [hereinafter cited as Simon]. Simon says that in deciding the question of allowable agency, the presence or absence of a reasonable necessity would be an important factor.

27. Some courts have adopted a more liberal view that the report may be disclosed to other interested agents without the privilege being destroyed. See *United States v. Aluminum Co.*, 193 F. Supp. 251 (N.D.N.Y. 1960); *Jessup v. Superior Court*, 151 Cal. App. 2d 102, 311 P.2d 177 (1957).

28. *Grant & Burlington v. United States*, 277 U.S. 74 (1913); *Edison Elec. Light Co. v. United States Elec. Lighting Co.*, 44 F. 294, 298 (S.D.N.Y. 1890); *Parkhurst v. City of Cleveland*, 77 N.E.2d 735 (Ohio C.P. 1947).

29. Simon, *supra* note 26, at 978.

30. *Id.* at 981.

attorney's keeping . . . in order to avoid an order of discovery or notice to produce."<sup>31</sup>

### THE THREE TESTS FOR PRIVILEGED COMMUNICATIONS

A major problem arises in determining whether the document was created with a view toward litigation. Three tests have been developed by the courts to aid in this determination. Not surprisingly, the tests vary in strictness, and consequently the state and federal courts are in disagreement as to the proper test to be applied. The majority of state courts favor the more recently developed dominant purpose test<sup>32</sup> over the anticipation of litigation test, while the federal courts favor the older sole purpose test.<sup>33</sup>

#### *The Anticipation of Litigation Test*

The anticipation of litigation test is based on the proposition that communications originating with the client and transmitted to the attorney with a view toward their use at trial are privileged communications between attorney and client.<sup>34</sup> The problem arises in trying to interpret the term "in anticipation of litigation." At least one court has held that statements can be prepared in anticipation of litigation regardless of whether litigation has in fact commenced or the attorneys to whom the signed statements are intended to be transmitted have been selected.<sup>35</sup> Other courts have adopted the English rule that a mere possibility of future litigation will satisfy the test.<sup>36</sup>

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31. Note, *Attorney-Client Privilege as Applied to Documentary Evidence Originating with Client's Agent*, 88 U. PA. L. REV. 467, 468 (1940). See *People v. Minkowitz*, 220 N.Y. 399, 115 N.E. 987 (1917); *Jackson v. Burtis*, 14 Johns 390 (N.Y. 1817).

32. See note 9 *supra*.

33. See note 4 *supra*.

34. *Phillips v. Delaware Power & Light Co.*, 194 A.2d 690 (Del. Super. Ct. 1963); *Wise v. Western Union Tel. Co.*, 36 Del. 456, 178 A. 640 (1935); *Atlantic Coastline R.R. v. Williams*, 21 Ga. App. 453, 94 S.E. 584 (1917); *Watson v. Detroit Free Press*, 248 Mich. 237, 226 N.W. 854 (1929); *Schmitt v. Emery*, 211 Minn. 547, 2 N.W.2d 413 (1942); *Ex parte Schoepf*, 74 Ohio St. 1, 77 N.E. 276 (1906); *Davenport Co. v. Pennsylvania R.R.*, 166 Pa. 480, 31 A. 245 (1895); *Robertson v. Commonwealth*, 181 Va. 520, 25 S.E.2d 352 (1943).

35. *Atlas Heating & Ventilating Co. v. Superior Court*, 25 Cal. Rptr. 532, 210 Cal. App. 2d 15 (1962); *Gene Compton's Corp. v. Superior Court*, 23 Cal. Rptr. 250, 205 Cal. App. 2d 432 (1962); *Hollien v. Kaye*, 194 Misc. 821, 87 N.Y.S.2d 782 (1949).

36. *Vann v. State*, 85 So. 2d 133 (Fla. 1956); *Hollien v. Kaye*, 194 Misc. 821, 87 N.Y.S.2d 782 (1949). In England the practical effect of this requirement has been eliminated where accident reports are concerned. The English rule is that litigation is threatened at the very moment an accident occurs. See *Seabrook v. British Transp. Comm.*, 2 All E.R. 15 (Q.B. 1959).

The test itself has been severely criticized for extending the privilege to defendant's statements rendered to the insurer as a matter of routine, litigation being viewed as a possibility in every accident report situation.<sup>37</sup> Other criticism has centered on the temporal factor of the test.<sup>38</sup> It is quite plausible that a statement could be taken years in advance of any litigation and still be prepared with the intent of using it at trial at some future date. This extended time period makes proof of intention more difficult, especially where the client fails to turn the materials over to the attorney and merely stores them with other papers or documents of a non-privileged nature. This problem is not insignificant in view of the fact that the dominant motive behind all three tests is to deny the privilege to ordinary business records later transferred to an attorney.<sup>39</sup>

Proponents of this test emphasize the fact that litigation arises from accident reports more often than from the subject matter of other business reports.<sup>40</sup> The name of the test itself implies a situation in which the privilege is often applicable.<sup>41</sup> Despite these arguments, the majority of state courts have interpreted the test to suit their goals by holding that the mere possibility of future litigation will satisfy the test.<sup>42</sup>

### *The Sole Purpose Test*

To establish the fact that a communication was made for the purpose of soliciting legal advice and was not simply a pre-existing document, several of the earlier state court rulings required that the communication originate either at the instance of the attorney or for the "sole purpose" of being laid before counsel.<sup>43</sup> Thus, a defendant's statement to his insurer would fall into one of two categories: (1) a statement which came into being solely for the purpose of communicating information to the attorney; or (2) a statement which originated

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37. Simon, *supra* note 26, at 980.

38. *Id.*

39. *Id.* at 960.

40. Comment, *Agent's Reports and the Attorney-Client Privilege*, 21 U. CHI. L. REV. 752, 768 (1954) [hereinafter cited as *Agent's Reports* 1].

41. *Id.*

42. One author points out that to the extent that state accident report cases tend to make imminence of litigation an absolute prerequisite, they are crossing over into the area of work product. See Simon, *supra* note 26, at 980. See also note 92 *infra*.

43. *Wise v. Western Union Tel. Co.*, 36 Del. 456, 178 A. 640 (1935); *Davis v. Columbia Gas & Electric Co.*, 68 N.E.2d 571 (Ohio C.P. 1938); *Davenport Co. v. Pennsylvania R.R.*, 166 Pa. 480, 31 A. 245 (1895); *Robertson v. Commonwealth*, 181 Va. 520, 25 S.E.2d 352 (1943).



for, serves purposes other than that of communicating with a lawyer. Under the "sole purpose" test only the former category would be protected from disclosure by the attorney-client privilege. The fact that the defendant's statement pre-dated the attorney-client relationship would not be decisive.<sup>44</sup>

Arguably, this is consistent with the policy reasons behind the privilege. If a statement is taken solely for eventual transmission to an attorney, the fact that no attorney-client relationship exists will not preclude it from containing the type of information which the privilege seeks to protect.<sup>45</sup> While the "sole purpose" test has fallen into disfavor with the majority of state courts, at least one author has felt it to be the most valid test in terms of limiting the attorney-client privilege to its proper scope.<sup>46</sup> That author emphasizes that this test most closely approximates the narrow scope of the traditional privilege in regard to communications through an agent.<sup>47</sup> Other critics of this test have noted that if any part of the client's purpose in creating the communication was to lay it before an attorney then the document may not have been made but for reliance on the privilege and should be protected from disclosure.<sup>48</sup> The trend in recent state court decisions has been to shun the strictness of the "sole purpose" approach in favor of the broader and more easily administered "dominant purpose" test.

Succinctly stated, the dominant purpose test holds:

If it appears that the communication is to serve a dual purpose, one for transmittal to an attorney in the course of professional employment and one not related to that purpose, the question presented to the trial court is as to which purpose predominates.<sup>49</sup>

If the dominant purpose for the creation of the statement is for communication with an attorney the whole of the document will be privileged.<sup>50</sup> Under this test, the transmission of the defendant's

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44. *Davenport Co. v. Pennsylvania R.R.*, 166 Pa. 480, 31 A. 245 (1895).

45. *Agent's Reports*, *supra* note 40, at 756.

46. Gardner, *A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy?*, 40 U. DET. L.J. 299, 389 (1963) [hereinafter cited as Gardner].

47. *Id.*

48. *The Lawyer-Client Privilege*, *supra* note 11, at 245.

49. *Heffron v. Los Angeles Transit Lines*, 170 Cal. App. 2d 709, 339 P.2d 567, 573 (1959).

50. *Holm v. Superior Court*, 42 Cal. 2d 500, 267 P.2d 1025 (1954); 1 MARTON, ATTORNEYS AT LAW § 98 (1914).

statement to his attorney through the agency of the insurer would not destroy the privilege even when the insurer made incidental use of the statement for bookkeeping purposes.<sup>51</sup>

Two basic criticisms of this test have developed. First, if a statement is taken by the insurer's agent for reasons in addition to later use by an attorney, the statement usually would have been made regardless of the privilege and no reason would exist for its application. In the typical accident report situation, the absence of the privilege would not change the defendant's decision to give a statement to his insurer.<sup>52</sup> Thus, the better rule would be that when the defendant's statement is given for a dual purpose, one of which is not privileged, the policy favoring discovery should prevail,<sup>53</sup> or at least only that part of the statement which came into existence for the sole purpose of attorney-client communication should be protected.<sup>54</sup>

The second major criticism involves the fact that unnecessary parties are involved in the transmission from insured to the attorney, and this destroys the required confidentiality of the statement.<sup>55</sup> In its long and complicated<sup>56</sup> route from the insured to

51. *Holm v. Superior Court*, 42 Cal. 2d 500, 267 P.2d 1025, 1030 (1954).

52. *Agent's Reports*, *supra* note 40, at 754.

53. *Id.*

54. *Id.* The court held that where a communication is only partially privileged on its face the whole will be denied the privilege if the claimant does not indicate which segments of the communication fall within the privilege. This seems to be consistent with the doctrine that the party asserting the privilege must allege facts sufficient to bring himself within the doctrine. *But see* *United States v. United Shoe Machine Corp.*, 89 F. Supp. 357 (D. Mass. 1950), in which the court held in reference to communications from the corporations' house attorney to independent lawyers that,

the privilege of nondisclosure is not lost merely because relevant non-legal considerations are expressly stated in a communication which also includes legal advice . . . [s]uch parts of them are privileged as contain, or have opinions based on, information furnished by an officer or employee of the defendant in confidence and without the presence of third persons.

*Id.* at 359.

55. *Gardner*, *supra* note 46, at 368.

56. *Id.* at 362-365. *Gardner* gives a brief narrative of the history of a statement from the time it leaves the insured until the time it reaches an attorney. A short summary may be helpful to the uninitiated. As soon as the insured notifies the insurer or his agent of the accident, his statement of the facts will be taken. The insured will be warned of his duty to cooperate; he will be examined as to other sources of information; and he will be instructed not to discuss the matter with anyone representing the adverse party. If no settlement is reached at this stage the statement will be forwarded to the main office of the insurance carrier for that claims district. There it will be received by the district claims manager. If the

the defense counsel, the defendant's statement will be handled by many persons, frequently will be disclosed to third parties, and undoubtedly will be copied and distributed within the insurance company. Policing this type of situation in order to insure that only necessary parties are involved in the transmission of the statement would involve complex and time-consuming administrative problems for the courts. According to this view, these disclosures justify a denial of privilege to the defendant's statements.<sup>57</sup>

These administrative problems become much more critical when both parties to the accident are insured by a common insurer.<sup>58</sup> This situation arose in *Monier v. Chamberlain*.<sup>59</sup> Both parties gave statements to the agent of their insurer containing their version of the accident. When discovery of the defendant's statement was later sought by the plaintiff, the court stated:

[We] believe that one of the essential conditions precedent to the attachment of the attorney-client privilege, i.e., that the communications must originate in a confidence that they will not be disclosed, cannot be said to exist. Making a statement to an agent who is also . . . an agent for a potential adversary is scarcely the type of communication contemplated by the privilege.<sup>60</sup>

In a common insurer situation the denial of the privilege seems proper. Both parties are bound by the cooperation clauses of their insurance contracts to provide all relevant information or risk the loss of coverage.<sup>61</sup> In order to protect the confidentiality of the statements in this fact situation the courts would be forced to police the internal workings of the insurer to ensure that it does not serve its own ends by disclosing the statement of one party to the opposing

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potential damages are large and evidence of liability is strong, the statement may be examined by the entire managerial staff. However, this depends on the policy of the particular company. As soon as a suit has been filed by the claimant, the original of the defendant's statement will be forwarded to local counsel who will handle the defense. The district claims office will retain one or more duplicates of the statement. *Id.*

57. *Id.* at 367.

58. *Monier v. Chamberlain*, 35 Ill. 2d 351, 213 N.E.2d 410 (1966).

59. *Id.*

60. *Id.* at 415-416. The court reaffirmed its holding in *People v. Ryan*, 30 Ill. 2d 456, 197 N.E.2d 15 (1964), that the statement of a defendant to the agent of his insurer for transmission to his attorney would be privileged. The court distinguished *Monier* factually.

61. A failure to cooperate properly and promptly could result in a disclaimer of liability by the insurer and a complete defense for breach of such condition. See *Coleman v. New Amsterdam Cas. Co.*, 247 N.Y.S. 271, 276, 160 N.E. 367, 369 (1953).

attorney. The apparent impossibility of this task prompted the court in *Monier* to deny protection to the defendant's statement where both parties had a common insurer.<sup>62</sup>

The strongest argument against recognizing the privilege in the common insurer situation is the lack of an expectation of confidentiality in regard to the statements.<sup>63</sup> Immediately after the accident both parties will become aware that they have the same insurer. Any expectation that their statements will remain confidential will be much less than if each party has a different insurer and gives his statement to a separate agent for transmission. It must be noted, however, that even those courts which allow discovery of a defendant's statement in the common insurer instance will not necessarily allow discovery of the same statement in the ordinary case.<sup>64</sup> The majority of the state courts have held that when each party has a separate insurer, a defendant's statement concerning the accident which is given to the agent of the insurer for transmission to an attorney in the event of possible litigation is given with an intent and reasonable expectation that it remain confidential. Moreover, transmission through the insurer should not destroy the confidentiality of the statement because the insurer, even with all of its clerks, executives and officers, acts as a "necessary party" in transmitting the information to the attorney.<sup>65</sup> Thus, the statement is immune from discovery as part of the attorney-client privilege.<sup>66</sup>

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62. Pace, *Some Problems Which Arise When An Insurer Has Coverage on Both Parties to An Accident*, 1967 INS. L.J. 532 (1967) [hereinafter cited as Pace].

63. *Monier v. Chamberlain*, 35 Ill. 2d 351, 213 N.E.2d 410 (1966).

64. *People v. Ryan*, 30 Ill. 2d 456, 197 N.E.2d 15 (1964).

65. See note 26 *supra*.

66. *Heffron v. Los Angeles Transit Lines*, 170 Cal. App. 2d 709, 339 P.2d 567 (1959); *Bellman v. District Court*, \_\_\_ Colo. \_\_\_, 531 P.2d 632 (1975); *Wise v. Western Union Tel. Co.*, 36 Del. 456, 178 A. 640 (1935); *Vann v. State*, 85 So. 2d 133 (Fla. 1956); *Atlantic Coast Line R.R. v. Williams*, 21 Ga. App. 453, 94 S.E. 584 (1917); *People v. Ryan*, 30 Ill. 2d 456, 197 N.E.2d 15 (1964); *Koch v. Mettler*, 49 Ill. App. 2d 251, 199 N.E.2d 417 (1964); *Schmitt v. Emery*, 211 Minn. 547, 2 N.W.2d 413 (1942); *Brakhage v. Graff*, 190 Neb. 53, 206 N.W.2d 45 (1973); *Hollien v. Kaye*, 194 Misc. 821, 87 N.Y.S.2d 782 (1949); *In re Klemann*, 132 Ohio St. 187, 5 N.E.2d 492 (1936); *Ex parte Schoepf*, 74 Ohio St. 1, 77 N.E. 276 (1906); *Davenport Co. v. Pennsylvania R.R.*, 166 Pa. 480, 31 A. 245 (1895); *Gass v. Baggerly*, 332 S.W.2d 426 (Tex. Civ. App. 1960); *Robertson v. Commonwealth*, 181 Va. 520, 25 S.E.2d 352 (1943). *Contra*, *Miller v. Harpster*, 392 P.2d 21 (Alas. 1964); *State Farm Ins. Co. v. Roberts*, 97 Ariz. 169, 398 P.2d 671 (1965); *Jacques v. Cassidy*, 28 Conn. Sup. 212, 257 A.2d 29 (1969); *Alseike v. Miller*, 196 Kan. 547, 412 P.2d 1007 (1966); *Wilson v. Borchard*, 370 Mich. 404, 122 N.W.2d 57 (1963); *Jacobi v. Podevels*, 23 Wis. 2d 152, 127 N.W.2d 73 (1964).

FEDERAL COURT TREATMENT OF THE ISSUES

Discovery in the federal courts under the Federal Rules of Civil Procedure has generally been much broader than that allowed under similar state discovery statutes.<sup>67</sup> However, following the adoption of the Federal Rules in 1938, the courts expressed no immediate agreement as to the scope of permissible discovery in regard to documents prepared by attorneys or agents of an insurer prior to trial. Frequent refusal to require disclosure of witness statements or pre-trial reports created a lack of uniformity in the application of the rules.<sup>68</sup> It was not until after the Supreme Court's landmark decision in *Hickman v. Taylor*<sup>69</sup> that any degree of consistency appeared in the decisions.

In *Hickman*, the client was a two-man partnership which had retained an attorney in a suit related to an accident involving one of its tugboats.<sup>70</sup> The attorney interviewed the crew members of the tugboat and the plaintiff sought discovery of the written reports and oral recollections of the interviews. The defendants refused to produce the information requested on the grounds that it was within the scope of the attorney-client privilege.<sup>71</sup> The Supreme Court declared that:

Memoranda, statements, and mental impressions prepared or obtained from interviews with witnesses by counsel in preparing for litigation after a claim has arisen are not within the attorney-client privilege and are not protected from discovery on that basis.<sup>72</sup>

However, the Court went on to hold that the witnesses' statements to the lawyer were qualifiedly immune from discovery as the "work product" of the lawyer.<sup>73</sup> Accordingly, the plaintiff would first have to show "good cause" before discovery would be allowed.<sup>74</sup> While

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67. 4 J. MOORE, FEDERAL PRACTICE, 26.23 (2d ed. 1953) [hereinafter cited as *Moore*]; 6 WIGMORE, EVIDENCE § 1845 (McNaughton rev. 1961).

68. Taine, *Discovery of Trial Preparations in the Federal Courts*, 50 COLUM. L. REV. 1026, 1027 (1950); Winner, *Procedural Methods to Attain Discovery*, 28 F.R.D. 37 (1961) [hereinafter cited as *Winner*].

69. 329 U.S. 495 (1947).

70. *Id.*

71. *Id.* at 499.

72. *Id.* at 508.

73. *Id.*

74. *Id.* See also *City of Philadelphia v. Westinghouse Elec. Corp.*, 214 F. Supp. 483 (E.D. Pa. 1962). Judge Kirkpatrick characterized the work product principle as this:

It is very important to keep in mind the fact that the work product principle is not and cannot properly be described as a privilege. Some

*Hickman* is principally known for the qualified immunity rule, what is of importance for this discussion is the Court's ruling that statements of non-party witnesses, prepared by an attorney for use at trial are not protected from discovery as part of the attorney-client privilege.<sup>75</sup> As a result, such statements lose their absolute protection from discovery. Instead, they become proper subjects of discovery only after good cause is shown for their production.<sup>76</sup>

The federal courts have reasoned that if *Hickman* held that the attorney-client privilege does not apply to non-party witness statements, even when taken by an attorney in anticipation of litigation, then defendants' statements given to an agent of the insurer for transmission to an attorney for possible use at trial are not within the protection of the attorney-client privilege. Such has been the holding of the majority of federal courts.<sup>77</sup> That the insurer actually turns the statements over to an attorney for use in defending the insured does not render the statements privileged.<sup>78</sup> Discovery has also been allowed in the federal courts of a plaintiff's own statement of the facts concerning an accident when it is given to the agent of the defendant's insurer.<sup>79</sup> Thus, the federal courts generally hold that witness statements, plaintiff statements and defendant statements given to an agent of an insurer are not included within the scope of the attorney-client privilege, and are subject to discovery under the proper conditions.<sup>80</sup>

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courts have confused the situation by calling it a qualified privilege, but it is not a privilege at all; it is merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case.

*Id.* at 487. As to the good cause requirement, see MOORE, *supra* note 68, at 26.23.

75. Since the district court sat en banc, no less than twenty-four federal judges in three courts passed on the question and ruled against the common law privilege. Cf. Morgan, *The Law of Evidence*, 59 HARV. L. REV. 418, 518 (1946).

76. *Hickman v. Taylor*, 329 U.S. 495, 508 (1947).

77. *Rucker v. Wabash R.R.*, 418 F.2d 146 (7th Cir. 1969); *Groover, Christie & Merritt v. Lo Bianco*, 336 F.2d 969 (D.C. Cir. 1964); *Southern Ry. v. Campbell*, 309 F.2d 569 (5th Cir. 1962); *Allmont v. United States*, 177 F.2d 971 (3d Cir. 1949); *Ford Howard Paper Co. v. Affiliated F.M.I. Co.*, 64 F.R.D. 694 (E.D. Wis. 1974); *Marron v. Atlantic Ref. Co.*, 7 F.R.D. 660 (E.D. Pa. 1947); *Colpak v. Hetternick*, 40 F. Supp. 350 (E.D.N.Y. 1941); *Bough v. Lee*, 29 F. Supp. 498 (E.D.N.Y. 1939); *Price v. Levitt*, 29 F. Supp. 164 (E.D.N.Y. 1939); *Kulrich v. Murray*, 28 F. Supp. 675 (S.D.N.Y. 1939).

78. *Price v. Levitt*, 29 F. Supp. 164 (S.D.N.Y. 1939); *Bough v. Lee*, 29 F. Supp. 498 (E.D.N.Y. 1939); *Colpak v. Hetternick*, 40 F. Supp. 350 (E.D.N.Y. 1941).

79. *New York Cent. R.R. v. Carr*, 251 F.2d 433 (4th Cir. 1957); *Gordon v. Robinson*, 109 F. Supp. 106 (W.D. Pa. 1952); *Vivant v. Wheeling & Lake Erie R.*, 10 F.R.D. 45 (N.D. Ohio 1950); *Kirshner v. Palmer*, 7 F.R.D. 252 (S.D.N.Y. 1945); *Bough v. Lee*, 28 F. Supp. 673 (S.D.N.Y. 1939).

80. See notes 4, 42, 43, 44 *supra* and accompanying text.

In formulating these opinions the federal courts have had occasion to interpret the wording of Rules 26, 33 and 34 of the Federal Rules of Civil Procedure. Each of these rules is limited to the discovery of matters "not privileged."<sup>81</sup> However, the words "not privileged" in the federal rules mean not privileged under the decisions of the federal courts.<sup>82</sup> A state statute plainly stating that such statements are part of the attorney-client privilege would be given effect in a federal court diversity of citizenship action. Generally the state statutes are not that precise in describing the scope of discovery.

The rationale underlying these rulings as to the statements of plaintiffs and non-party witnesses is sound. Non-party witnesses and plaintiffs do not give their statements to the agent of the defendant's insurer with the intention that they remain confidential. In addition, neither the witness nor plaintiff will ever stand in an attorney-client relationship with the lawyer eventually appointed to defend the insured.<sup>84</sup>

The more difficult question is whether a defendant's statement given to the agent of his insurer for possible transmission to his attorney in the event of litigation is sufficiently distinguishable from the statement of a non-party witness or plaintiff to come within the scope of the attorney-client privilege. The federal courts have refused to extend the attorney-client privilege to defendants' statements in the accident report situation.<sup>85</sup>

81. See FED. R. CIV. P. 26(b) (1) (1971).

82. Brookshire v. Pennsylvania R.R., 14 F.R.D. 154 (N.D. Ohio 1953); Humphries v. Pennsylvania R.R., 14 F.R.D. 177 (N.D. Ohio 1953); Parella v. Baltimore & Ohio R.R., 14 F.R.D. 196 (N.D. Ohio 1951).

83. See Gottlieb v. Bresler, 24 F.R.D. 371 (D.D.C. 1959) (lack of intended confidentiality in witnesses' statement); Bough v. Lee, 29 F. Supp. 498 (E.D.N.Y. 1939) (lack of intended confidentiality in plaintiff's statement). See also Wigmore's four prerequisites for privileged communications at note 15 *supra*.

84. Winner, *supra* note 34, at 40.

85. Rucker v. Wabash R.R., 418 F.2d 146 (7th Cir. 1969); Groover, Christie & Merritt v. LoBianco, 336 F.2d 969 (D.C. Cir. 1964); Southern Ry. v. Campbell, 309 F.2d 569 (5th Cir. 1962); Allmont v. United States, 177 F.2d 971 (3d Cir. 1949); Ford Howard Paper Co. v. Affiliated F.M.I. Co., 64 F.R.D. 694 (E.D. Wis. 1974); Jackson v. Kroblin Refrigerated XPress, Inc., 49 F.R.D. 134 (N.D.W. Va. 1970); Tiernan v. Westext Transport, Inc., 46 F.R.D. 3 (D.R.I. 1969); Cummings v. Bell Tel. Co., 47 F.R.D. 373 (E.D. Pa. 1968); Gottlieb v. Bresler, 24 F.R.D. 371 (D.D.C. 1959). Compare, Burns v. Mulder, 20 F.R.D. 605 (E.D. Pa. 1957); Meadows v. Southern Ry., 14 F.R.D. 164 (E.D. Tenn. 1953); Dennhardt v. Holman, 12 F.R.D. 79 (D. Colo. 1951); Ryan v. Lehigh Valley R.R., 5 F.R.D. 399 (S.D.N.Y. 1946); Matthies v. Connolly Co., 2 F.R.D. 277 (E.D.N.Y. 1941).

In support of this treatment, several reasons have been advanced. First, the defendant's statement is not given to an attorney or anyone acting in his behalf, nor does the defendant have an attorney at the time the statement is given.<sup>86</sup> This argument by the federal courts merely begs the question. Even under the sole purpose test which the federal courts have approved it is possible for a statement given under these conditions to be privileged. An example would be husband dictating a note to his wife which she is to deliver to an attorney. The information is clearly within the scope of the attorney-client privilege even if the husband has no previous dealings with the attorney to whom the note is delivered.<sup>87</sup> It also makes no difference that she is acting as an agent of her husband rather than on behalf of the attorney—the privilege will still attach.<sup>88</sup> A more technical argument, but one with some validity, would be that the insurance agent acts as the agent of the defendant, and that the insurance premium paid by the defendant acted as a retainer for the insurer's services in acquiring a lawyer. Thus, it might be argued that the insured stands in the same position as a person who has retained a law firm to represent him but who has not as yet been assigned an individual attorney.

Secondly, in denying the privilege in an accident report situation the federal courts have felt that the holding in *Hickman v. Taylor* implies that a defendant's statement given to the agent of an insurer should receive no greater protection than statements of non-party witnesses.<sup>89</sup> However, this interpretation of *Hickman* is too broad. There are two important distinctions between non-party witness statements and defendant statements. Non-party witnesses as in *Hickman* have no reasonable expectation that their statements will remain confidential. On the contrary, they give their statements with the intention that they be revealed at some later time and place. Non-party witnesses also have no contractual agreement with the party interviewing them to see that their statement is transmitted to an attorney representing them. Clearly, a defendant making his statement to his insurer's agent has a reasonable expectation that the contents will not be revealed to the opposing party. The contractual obligation to act as the client's agent in

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86. *Gottlieb v. Bresler*, 24 F.R.D. 371 (D.D.C. 1959); *Price v. Levitt*, 29 F. Supp. 164 (E.D.N.Y. 1939). See WIGMORE, *supra* note 10, at § 2286.

87. WIGMORE, *supra* note 10, at § 1786.

88. *Id.*

89. See *Allmont v. United States*, 177 F.2d 971 (3d Cir. 1949), where the court said that the rationale of *Hickman v. Taylor*, "has a much broader sweep and applies to all statements of prospective witnesses. . . ." *Id.* at 976.



transmitting the information to an attorney only emphasizes the intended confidentiality of the statement.

Lastly, the federal courts have stated that the attorney-client privilege should be construed restrictively in the accident report situation because the benefit from full disclosure is unusually high and the harm, in terms of discouraging communication with counsel, is slight.<sup>90</sup> This premise is also questionable. The basic policy reason supporting the existence of the attorney-client privilege is that it promotes full disclosure of the facts to the attorney and this in turn assures the effective operation of our legal system.<sup>91</sup> Denial of the privilege to a defendant in the accident report situation would certainly result in a reluctance on the insured's part to disclose the facts fully to his agent or attorney. Thus, the policy reasons for recognizing the privilege here are just as significant as in the traditional attorney-client relationship.

Consequently, the federal court position has been rejected by a majority of the state courts which hold that the scope of the attorney-client privilege includes statements given by the defendant to the agent of his insurer for use by an attorney in any future litigation.<sup>92</sup>

#### STATE COURT TREATMENT OF THE ISSUES

Generally, state courts will allow the discovery of a statement of a non-party witness<sup>93</sup> or plaintiff<sup>94</sup> which was given to the agent of

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90. The statement of a witness taken shortly after the accident has been referred to as a "catalyst of unique value in the development of the truth through the judicial process." *De Bruce v. Pennsylvania R.R.*, 6 F.R.D. 403, 404 (E.D. Pa. 1947).

91. See note 12 *supra*.

92. *Heffron v. Los Angeles Transit Lines*, 170 Cal. App. 2d 709, 339 P.2d 567 (1959); *Bellman v. District Court*, \_\_\_ Colo. \_\_\_, 531 P.2d 632 (1975); *Wise v. Western Union Tel. Co.*, 36 Del. 456, 178 A. 640 (1935); *Vann v. State*, 85 So.2d 133 (Fla. 1956); *Atlantic Coast Line R.R. v. Williams*, 21 Ga. App. 453, 94 S.E. 584 (1917); *People v. Ryan*, 30 Ill. 2d 456, 197 N.E.2d 15 (1964); *Koch v. Mehler*, 49 Ill. App. 2d 251, 199 N.E.2d 417 (1964); *Schmitt v. Emery*, 211 Minn. 547, 2 N.W.2d 413 (1942); *Brakhage v. Graff*, 190 Neb. 53, 206 N.W.2d 45 (1973); *Hollien v. Kaye*, 194 Misc. 821, 87 N.Y.S.2d 782 (1949); *In re Klemann*, 132 Ohio St. 187, 5 N.E.2d 492 (1936); *Ex parte Schoepf*, 74 Ohio St. 1, 77 N.E. 276 (1906); *Davenport Co. v. Pennsylvania R.R.*, 166 Pa. 480, 31 A. 245 (1895); *Gass v. Baggerly*, 332 S.W.2d 426 (Tex. Civ. App. 1960); *Robertson v. Commonwealth*, 181 Va. 520, 25 S.E.2d 352 (1943). *Contra*, *Miller v. Hampster*, 392 P.2d 21 (Alas. 1964); *State Farm Ins. Co. v. Roberts*, 97 Ariz. 169, 398 P.2d 671 (1965); *Jacques v. Cassidy*, 28 Conn. Sup. 212, 257 A.2d 29 (1969); *Alseike v. Miller*, 196 Kan. 547, 412 P.2d 1007 (1966); *Wilson v. Borchard*, 370 Mich. 404, 122 N.W.2d 57 (1963); *Jacobi v. Podevels*, 23 Wis. 2d 152, 127 N.W.2d 73 (1964).

93. *Greyhound Corp. v. Merced County Superior Court*, 364 P.2d 266, 15 Cal. Rptr. 90 (1961); *Reynolds v. Boston & Maine Transp. Co.*, 98 N.H. 251, 98 A.2d 157 (1953); *Nordeide v. Pennsylvania R.R.*, 73 N.J. Super. 74, 179 A.2d 71 (1962); *Cote v. Knickerbocker Ice Co.*, 160 Misc. 658, 290 N.Y.S. 483 (1936).

the defendant's insurer for use by an attorney in any subsequent litigation. Such statements will usually be included within the work product of the attorney. Consequently, any discovery will be contingent upon a showing of good cause.<sup>95</sup> These decisions have been influenced by the holding in *Hickman v. Taylor* and the arguments proposed by the federal courts regarding the lack of intended confidentiality on the part of non-party witnesses and plaintiffs.<sup>96</sup> On the other hand, statements of defendants given to agents of their insurers have received a different treatment. In contrast to the federal rule, state court decisions based on statutory<sup>97</sup> and common law<sup>98</sup> authority have declared defendant's statements to be protected from disclosure by the attorney-client privilege. Such documents have been held to be privileged even when they remain in the insurer's files without even being transferred to an attorney for use at trial.<sup>99</sup> In maintaining the privileged status of defendant's statements the state courts have shown versatility and creativity: versatility in the interpretation of old theories to meet new situations and creativity in developing new rules regarding privileged communications. The following section will discuss the rationale behind the majority state court rule in light of recent decisions by several state supreme courts.

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94. *Clark v. Superior Court of State*, 177 Cal. App. 2d 577, 2 Cal. Rptr. 375 (1960); *Holm v. Superior Court*, 42 Cal. 2d 500, 267 P.2d 1025 (1954); *Korham v. Smith*, 33 Ill. App. 3d 532, 278 N.E.2d 864 (1971); *Schill v. Hammett*, 18 Misc. 2d 87, 187 N.Y.S.2d 527 (1959); *Meehan v. McClory*, 266 App. Div. 706, 40 N.Y.S.2d 207 (1943); *Koller v. W.E. Plechaty Co.*, 6 Ohio Misc. 57, 216 N.E.2d 399 (1965).

95. See MOORE, *supra* note 39, for definition of "good cause."

96. *Greyhound Corp. v. Merced County Superior Court*, 364 P.2d 266, 15 Cal. Rptr. 90 (1961).

97. *Hollien v. Kaye*, 194 Misc. 821, 87 N.Y.S.2d 782 (1949) (decided under §§ 324, 353 of the NEW YORK CIVIL PROCEDURE ACT). See *Doughty v. Greenburg*, 43 Misc. 2d 267, 250 N.Y.S.2d 681 (1964) (decided under the new New York C.P.L.R. § 3101). The *Doughty* court held that a statement made prior to the time suit was instituted is not a writing created in anticipation of litigation under § 3101(d) (2) and is, therefore, subject to disclosure.

98. *Heffron v. Los Angeles Transit Lines*, 170 Cal. App. 2d 709, 339 P.2d 567 (1958); *Vann v. State*, 85 So. 2d 133 (Fla. 1956).

99. *Gass v. Baggerly*, 332 S.W.2d 426 (Tex. Civ. App. 1960), was decided under Texas Code of Procedure Rule 167 which deals with instances in which the right to production of documents is granted. The provision of this rule which makes exceptions to the right of discovery states,

that the right herein granted shall not extend to the written communications passing between agents or representatives or the employees of either party to the suit or communications between any party and his agent . . . where made subsequent to the occurrence or transaction upon which the suit is based and made in connection with the prosecution or defense of such claim or the circumstances out of which same has arisen.

*Recent State Court Decisions*

Despite the fact that the vast majority of states have passed discovery statutes similar to those of the Federal Rules of Civil Procedure, the federal and state courts differ on the scope of "open" discovery.<sup>100</sup> A prime example of these differences is the contrasting treatment afforded discovery motions concerning defendants' statements given to the agent of an insurer for possible use at trial. The federal courts deny the privilege to such statements, citing as authority the "sole purpose" test and lack of confidentiality.<sup>101</sup> While the federal courts have generally included such statements within the work product of the attorney,<sup>102</sup> immunity under that rule can be overcome by a showing of a good cause.<sup>103</sup>

The majority of state courts have presented an absolute bar to the discovery of such statements by including them within the attorney-client privilege.<sup>104</sup> Most of the recent decisions have followed the reasoning laid down in the early New York case of *Hollien v. Kaye*.<sup>105</sup> In that case the court pointed out that compulsory liability insurance was becoming mandatory in most states and that the terms of the insurance contract obligated the motorist to make a full disclosure of the facts of any accident to his insurer.<sup>106</sup> Because of these two factors the court felt that the insured should not be prevented from "unbosoming"<sup>107</sup> himself regarding an accident to the very entity which he had paid to protect his interests in the event of just such an accident.<sup>108</sup> The court declared the defendant's statement to be privileged in order to encourage full disclosure between insured and insurer. Three other factors were noted by the court: (1) the defendant's statement was intended as a confidential communication to an attorney; (2) the delivery of the statement to the insurer's agent deemed the insurer an agent of the defendant for the purpose of transmitting the statement to an attorney; and (3) a

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100. WIGMORE, *supra* note 10, at § 1859.

101. *See* Gottlieb v. Bresler, 24 F.R.D. 371 (D.D.C. 1959) (lack of confidentiality destroys privilege); Colpak v. Hetternick, 40 F. Supp. 350 (E.D.N.Y. 1941) (statement not for sole purpose of communicating with attorney).

102. *See* MOORE, *supra* note 68, at 26.23.

103. *Hickman v. Taylor*, 329 U.S. 495 (1947). *See also* *Thomas v. The Red Jacket, Inc.*, 16 F.R.D. 349, 351 (D. Mass. 1954), where the court said, "The prohibition of the *Hickman* case is not an absolute one even as to the work product of the lawyer himself."

104. *See* note 94 *supra*.

105. 194 Misc. 821, 87 N.Y.S.2d 782 (1949).

106. *Id.* at 823, 87 N.Y.S.2d at 784.

107. *Id.*

108. *Id.*

statement is taken in anticipation of litigation if it was taken at a time when an action has been instituted or is likely to be instituted.<sup>109</sup> Basically, the court used a broad interpretation of the anticipation of litigation test and the agency rule of transmission to bring the defendant's statement within the protection of the attorney-client privilege. Apparently, it did this in order to protect the intent and reasonable expectations of the insured. Other courts in the very recent past have also thought these two interests to be worth protecting.

In 1964,<sup>110</sup> the Illinois Supreme Court faced the following fact situation in *People v. Ryan*.<sup>111</sup> On February 18, 1961, the insured was involved in an automobile/truck collision. Two days later she made a statement to the investigator from her insurance company in which she admitted consuming several bottles of beer just prior to the accident. She was later charged with driving while under the influence of intoxicating liquor. On February 24, 1961, the insured employed attorney to defend her in the criminal action. The attorney subsequently obtained the written statement of the defendant and was thereafter served with a subpoena for its production by the county prosecutor. When the attorney refused to produce the statement he was found in contempt of court and fined \$100. An appeal to the Illinois Supreme Court on constitutional grounds<sup>112</sup>

109. *Id.* at 824, 87 N.Y.S.2d at 785. See also note 61 *supra*.

110. The Illinois Supreme Court was not the only court faced with this issue in 1964. In that year the Supreme Court of Wisconsin overruled its decision in *Wojciechowski v. Brown*, 274 Wis. 364, 80 N.W.2d 434 (1957), and held that the statement of a defendant to the agent of his insurer for use by an attorney in the event of litigation was not within the attorney-client privilege. *Jacobi v. Podelvels*, 23 Wis. 2d 152, 127 N.W.2d 73 (1964). The decision was not made without some reluctance, as evidenced by this statement of the opinion writer,

Recognizing that a policy choice must be made with respect to confidentiality of statements by an insured to the insurer, some of the members of the court, including the writer of this opinion, would adhere to *Wojciechowski v. Brown*, wherein the choice has previously been made. . . .

*Id.* at 75.

111. 30 Ill. 2d 456, 197 N.E.2d 15 (1964).

112. *People v. Ryan*, 25 Ill. 2d 233, 184 N.E.2d 853 (1962). Ryan proposed that the written statement was privileged and that compelling him to produce it would be a violation of the client's constitutional right against self-incrimination. The court responded that,

The privilege against self-incrimination is a purely personal one, and it is well established that the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity.

*Id.* at 854.

was denied and the case was transferred to the appellate court where the trial court's ruling was affirmed.<sup>113</sup> Back on appeal to the Illinois Supreme Court the issues were (1) whether an insured's written statement given to her liability insurance carrier's investigator regarding the details of such an accident was within the attorney-client privilege, and (2) whether the transmission of such a statement with her consent to the attorney defending her on criminal charges arising out of the same accident constituted a voluntary waiver of the privilege. In upholding the privileged character of the statement and denying any waiver, the court said:

We concede that such communications are normally made by the insured to a layman and in many cases no lawyer will actually be retained for the purpose of defending the insured. . . . [U]nder such circumstances we believe that the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured. We believe that the same salutary reasons for the privilege as exist when the communication is directly between the client and attorney were present when [the insured] made her statement to the investigator for her insurer.<sup>114</sup>

The court went on to hold that in the absence of disclosure to a person not in an attorney-client relationship with the insured there was no waiver of the privilege.<sup>115</sup>

The *Ryan* decision has at least three important aspects. First, the court felt that the defendant's expectation that the statement would remain confidential was worth protecting. Second, the court adopted the more modern "dominant purpose" test in regard to privileged communications. Third, a broad view of the anticipation of litigation test was accepted — so broad a view that the

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113. *People v. Ryan*, 40 Ill. App. 2d 352, 189 N.E.2d 763 (1963). The appellate court ruled that the insured's statement would be privileged while in the insurance company's hands or if transmitted to the attorney of its choice for defense of the insured. However, the court held that the privilege was waived when transmitted to Ryan for use in the criminal proceeding — a use which the court thought was entirely different from that which the statement was originally intended. Ryan was seen as a third party to whom a privileged communication was revealed with the consent of the client, thereby waiving the privilege.

114. *People v. Ryan*, 30 Ill. 2d 456, 458, 197 N.E.2d 15, 17 (1964).

115. *Id.*

statement would have remained privileged even if it remained in the insurer's files and had never been used in litigation.<sup>116</sup>

In 1973, the Supreme Court of Nebraska followed the lead of *People v. Ryan* by holding a defendant's statement to be within the attorney-client privilege for the sole purpose of its discovery statute.<sup>117</sup> The Nebraska court emphasized that the defendant's statement was obtained in the performance of the insurer's obligation to investigate and settle or defend claims made against the insured. The court also commented that the statement was intended for the use of the attorneys eventually selected by the insurer for defense of the insured.<sup>118</sup>

The Supreme Court of Colorado considered the issue for the first time in 1975.<sup>119</sup> In that case the insured was involved in a head-on collision in which one person was killed and two others seriously injured. The insured was subsequently charged with manslaughter, vehicular homicide, assault, vehicular assault and driving while intoxicated.<sup>120</sup> When the state attempted to discover a statement which the insured had given to his insurer's investigator immediately after the accident, the court, in a terse opinion,<sup>121</sup> declared the communication to be immune from discovery as part of the privileged communications between attorney and client.<sup>122</sup> The court emphasized the insured's contractual duty to fully cooperate with the insurer; and the insurer's contractual obligation to defend all suits arising out of the accident.<sup>123</sup> The state attempted to refute the court's argument by pointing out that the legislature had spoken fully and comprehensively on the subject of privilege and nowhere in the discovery statute was it indicated that the attorney-client

116. A number of the early state accident report cases contain dicta that the statement, to qualify as privileged, must ultimately be turned over to counsel and remain in his possession. See *Atchison, Topeka & S.F.R.R. v. Burks*, 78 Kan. 515, 526, 96 P. 950, 961 (1908); *In re Keough*, 151 Ohio St. 307, 85 N.E.2d 550 (1949).

117. *Brakhage v. Graff*, 190 Neb. 53, 206 N.W.2d 45 (1973). The statute involved read as follows: "Upon motion of any party showing good cause therefore the court may order the production of any document not privileged."

118. *Brakhage v. Graff*, 190 Neb. 53, 206 N.W.2d 45, 48 (1973).

119. *Bellmann v. District Court*, \_\_\_ Colo. \_\_\_ 531 P.2d 632 (1975).

120. Both *People v. Ryan* and *Bellmann v. District Court* involved criminal charges rather than civil. In neither case did the courts attempt to support their decisions on this factor, but instead implied that their holdings would be the same in the usual accident report situation.

121. The court made no mention of any constitutional issues revolving around self-incrimination.

122. *Bellmann v. District Court*, \_\_\_ Colo. \_\_\_ 531 P.2d 632 (1975).

123. *Id.*

privilege encompassed this situation.<sup>124</sup> However, a majority of the court did not adopt this argument.<sup>125</sup>

### REFLECTIONS

Those courts which refuse to recognize an attorney-client privilege in regard to a defendant's statement given to an agent of his insurer for possible transmission to an attorney in the event of litigation cite the following arguments:

1. Because the "sole purpose" of the statement is not communication with the attorney, the policy favoring disclosure should prevail.<sup>126</sup>
2. The unnecessary parties involved in the communication of the statement between the client and attorney destroy the confidentiality and thus the privileged character of the statement.<sup>127</sup>
3. The argument that non-applicability of the privilege would tend to restrict the full disclosure of facts to the insurer is false. The insured is not always totally honest with his insurer, especially where such honesty might endanger his coverage.<sup>128</sup>
4. The fact situation involves a contractual relationship which is something less than the traditional relationship

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124. The statute involved stated:

An attorney shall not be examined without the consent of his client, as to any communications made by the client to him, or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, stenographer or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

COLO. REV. STAT. § 13-90-107(1)(b) (1973).

125. One judge dissented:

Not only does the court's construction go beyond the apparent intent of the statute, but it is contrary in spirit to our civil and criminal rules of discovery. Therefore, consistent with our discovery policies of openness so that truth may be the ultimate goal of the judicial process, I would [deny the privilege].

Bellmann v. District Court, \_\_\_ Colo. \_\_\_, 531 P.2d 632, 635 (1975).

126. This argument is based upon the pre-existing documents rule. See Vann v. State, 85 So. 2d 133 (Fla. 1956), *In re Keough*, 151 Ohio 307, 314, 85 N.E.2d 550, 553 (1949); *In re Hyde*, 149 Ohio 407, 79 N.E.2d 224 (1948).

127. Gardner, *supra* note 46, at 369.

128. Pace, *supra* note 62, at 536-537.

between attorney and client. Because this relationship does not fit the traditional attorney-client role, the privilege should not be extended to protect the insured.<sup>129</sup>

5. The principle of open discovery, as embodied in the modern discovery statutes, constitutes the legislative recognition of the fact that public policy favors making such evidence available to the opponent in order that all relevant evidence shall ultimately be placed before the trier of fact. This in turn will insure that justice is done.<sup>130</sup>

These reasons are not convincing. The majority rule of the state courts is correct in including the defendant's statement to his insurer within the scope of the attorney-client privilege. The defendant, in making his statement, has a reasonable expectation of confidentiality. This expectation creates an important distinction between a defendant's statement and those of witnesses and plaintiffs, a distinction which the federal courts have failed to observe. Also, the statement of the defendant is usually in his own words and contains only his version of the facts. The agent of the insurer adds nothing to the statement in the way of context. Therefore, the statement satisfies all the prerequisites of the privilege<sup>131</sup> because it originates solely with the defendant and is intended for transmission to an attorney through the agency of the insurer. The attorney-client privilege has always allowed the transmission of a confidential statement to an attorney via an agent of the client. A contractual obligation to act as the client's agent in transmitting the information to an attorney should only emphasize the intended confidentiality of the statement.

Moreover, transmission through the insurer should not destroy the confidentiality of the statement because the insurer with all of its clerks, executives and officers acts as a "necessary party"<sup>132</sup> in

129. Gardner, *supra* note 46, at 364.

130. Allmont v. United States, 177 F.2d 971, 976 (3d Cir. 1949); Jackson v. Kroblin Refrigerated Xpress, Inc., 49 F.R.D. 134 (N.D.W. Va. 1970); Gottlieb v. Bresler, 24 F.R.D. 371 (D.D.C. 1959). In *Magida v. Continental Can Co.*, 12 F.R.D. 74 (S.D.N.Y. 1951), it was said in regard to the attorney-client privilege:

There is nothing sacrosanct about it; it is a product of legislation, without constitutional guarantee, and it is far from inviolate. Basically, it is an expression of policy, sacrificing full disclosure for the considered advantage of untrammelled attorney-client relations. It is not a boundless right, and its limits constantly shift.

*Id.* at 76.

131. WIGMORE, *supra* note 10.

132. In the case of intra-corporation communications, it is possible that the communication—at least while en route to the house counsel—need be kept confidential only as between the corporation and the outside world. See *United States v.*



communicating the information to the attorney. The "necessary party" rule and the "dominant purpose" test are merely concessions to the practicalities of everyday life in a complicated legal environment. Nearly every motorist carries automobile liability insurance, but not every motorist is in a position to insist on the addition or deletion of clauses from the standard policy. Even if the insured was aware of the problems posed here he would lack the bargaining power to insist on specific methods of transmitting his statement to an attorney. Through the terms of the insured's policy he contracts with the insurer for the availability of an attorney in the event of litigation and for the insurer's services as his agent in transmitting information to the attorney selected. The insured is not in a position to demand more.

A majority of the state courts are aware of this broadening of the traditional attorney-client relationship, but they have realized that the policy reasons behind the original privilege are applicable to this situation.<sup>133</sup> One important policy consideration is that denial of the privilege would create an adversary relationship between the insurer and insured. This in turn would result in a reluctance on the insured's part to disclose fully the facts of the accident to the attorney. If the insured realizes that his statement will be revealed to the adverse party, he will be less likely to give all the facts to the insurer. As a result the insured may withhold facts which might aid his attorney or allow the insurance company to settle out of court, because he erroneously felt they were prejudicial.<sup>134</sup> Here the policy reasons for recognizing the privilege are just as significant as in the traditional attorney-client relationship. Because automobile liability insurance is litigation insurance, it is an "institutionalized"<sup>135</sup> substitute for the individualized attorney-client relationship. In appropriate and parallel contexts it is entitled to a similar protection.

While every evidentiary privilege excludes relevant information and to that extent is a mixed good, the exclusion of information contained in the defendant's statement is minimal. The original

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United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1958); Zenith Radio Corp. v. R.C.A., 121 F. Supp. 792 (D. Del. 1954).

133. *People v. Ryan*, 30 Ill. 2d 456, 197 N.E.2d 15 (1964).

134. Violation of the cooperation clause of his policy may allow the insurer to avoid all liability. See note 61 *supra*.

135. *Aldrich v. Catel Serv. Co.*, 51 Misc. 2d 16, 20, 272 N.Y.S.2d 582, 586 (1966).

source of the information—the defendant himself—is usually<sup>136</sup> available to testify as to the matters within his knowledge. Furthermore, the very existence of the privilege may enhance the confidence of the general public in the judicial process. If no privilege was recognized, public respect for the judicial system would likely be damaged by the frequent forced breach of the insured's reasonable expectation of confidentiality.

A balancing of the interests involved shows that the increased respect for the judicial system, the protection of the insured's reasonable expectations, and the need for recognizing this institutionalized form of the attorney-client relationship far outweigh the harm resulting from a lack of full disclosure. Therefore, the majority state court rule is correct in upholding the privilege in regard to a defendant's statement given to the agent of his insurer for possible transmission to an attorney in the event of litigation.

#### CONCLUSION

The contrasting state and federal court rules regarding the discovery of a defendant's statement in an accident report situation are based on two competing policy factors. On the one hand, the federal courts are committed to the principle of open discovery. The Federal Rules of Civil Procedure indicate the legislative recognition of the fact that public policy favors making such evidence available. This in turn necessitates a narrow interpretation of the scope of the attorney-client privilege. As a result the federal courts have strictly adhered to the traditional scope of the privilege.

A divergent policy has been followed by the majority of state courts. In seeking to protect the individual's reasonable expectation of confidentiality these courts have broadened the scope of the attorney-client privilege while arguably staying within its traditional frame work, that is, the agency theory and the necessary party rule. Emphasizing the changing roles of attorney and client in today's impersonal society, the state courts have pointed out that the modern automobile insurance contract is simply an institutionalized form of the traditional attorney-client relationship. The state courts have also noted that recognition of the privilege in the accident report situation serves the same basic policy as recognition of the privilege under more customary circumstances, that policy being the promotion of full disclosure between attorney and client.

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136. The author realizes that in criminal actions the defendant may avoid testifying by exercising his fifth amendment privilege; the defendant in a civil action may have died between the time of the accident and the time of the suit.

Thus, while both the state and federal courts agree as to the issues involved, each has selected a different policy factor as controlling. Accordingly, until the time that the legislatures speak clearly on the issue, the discovery of an insured's statement to his insurer in an accident report situation will hinge directly on the attorney's ability to argue policy in the face of a vague discovery statute.