TRIAL TALK

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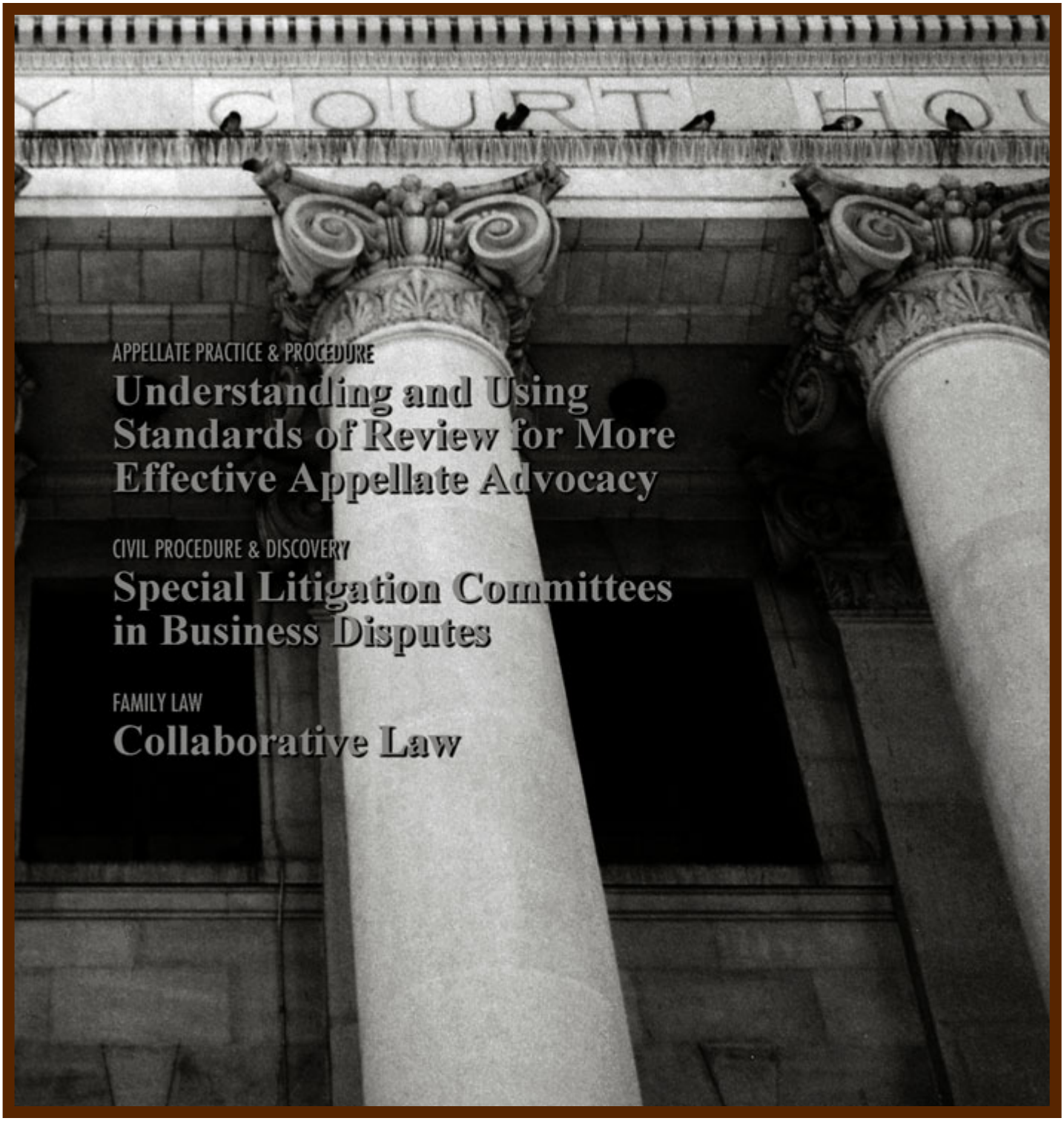


Insurance Claim File "Work Product" Myths Busted (Again) by the Colorado Supreme Court

By Mac Hester, Esq.

I. Introduction

The Colorado bench and bar have been laboring under various myths for the past several years regarding the "work product" doctrine as applied to liability insurance claim files. These myths are: first, that insurance claim file materials are discoverable in first party claims but not in third party claims; second, that insurance adjusters are privileged from having to testify; and third, that there is a "date of anticipation of litigation" after which all insurance claim file materials are protected from disclosure and discovery under the "work product" doctrine. This article busts those myths.

II. The Usual Situation

A. Facts

Driver D rear-ends Driver P's car causing injury to P. D's liability insurer takes recorded statements from D, P and Witness W. Several months later, P files suit against D. P never threatened or mentioned litigation prior to filing suit. D discloses the existence of his recorded statement but refuses to produce it. P files a motion to compel disclosure of D's recorded statement.

B. Question

Is D's recorded statement privileged from disclosure?

C. The Standard Insurance Company Answer

Yes. D's recorded statement is protected from disclosure under the "work product" doctrine because it was prepared in "anticipation of litigation." This much used and abused insurance company assertion is based upon a widely believed myth.

D. The Myth

There is a date of "Anticipation of Litigation" after which everything in the defendant's insurance claim file is privileged from disclosure and discovery.

This myth is considered gospel by insurance companies, is worshipped by insurance defense counsel, and – unfortunately – is widely believed by many trial judges and even some plaintiff's attorneys. Fortunately, however, the Supreme Court of Colorado has recently busted this myth (again).

III. The Colorado Supreme Court Answer

D's recorded statement is not protected by the work product doctrine because it is an ordinary business record which was not prepared in anticipation of litigation.

On November 10, 2003, the Supreme Court of Colorado held in *Lazar v. Riggs*[1] that, in essentially the factual situation above, the insurance company failed to meet its burden of proving that the defendant's recorded statement was protected work product.

The specific holding of *Lazar* – a defendant's recorded statement is presumed to be an ordinary business record which is discoverable until that presumption is overcome by the defendant's demonstration that the recorded statement was prepared in order to defend the specific claim *and* that a lawsuit over that claim had already been filed or was imminent – is important. The greater significance of *Lazar* is the Supreme Court's clear and enthusiastic reaffirmation of the 1982 case *Hawkins v. District Court*[2] in light of recent questions about its continued vitality based upon the distinction between first party and third party claims and decisions in other jurisdictions.

In reaffirming *Hawkins*, the Supreme Court expressly shot down the first party/third party distinction dubiously created by the Colorado U.S. District Court in *Weitzman v. Blazing Pedals*[3] and, even more importantly, expressly shot down the "Date of Anticipation of Litigation" myth which has persisted, and even flourished, despite the crystal clear language to the contrary in *Hawkins*.

The *Blazing Pedals* first party/third party distinction will be addressed and disposed of first, followed by an examination of the busting of the Anticipation of Litigation myth.

IV. The *Blazing Pedals* First-Party/Third-Party Work Product Distinction Busted

Hawkins was a "first-party" case – that is, an action by an insured against his

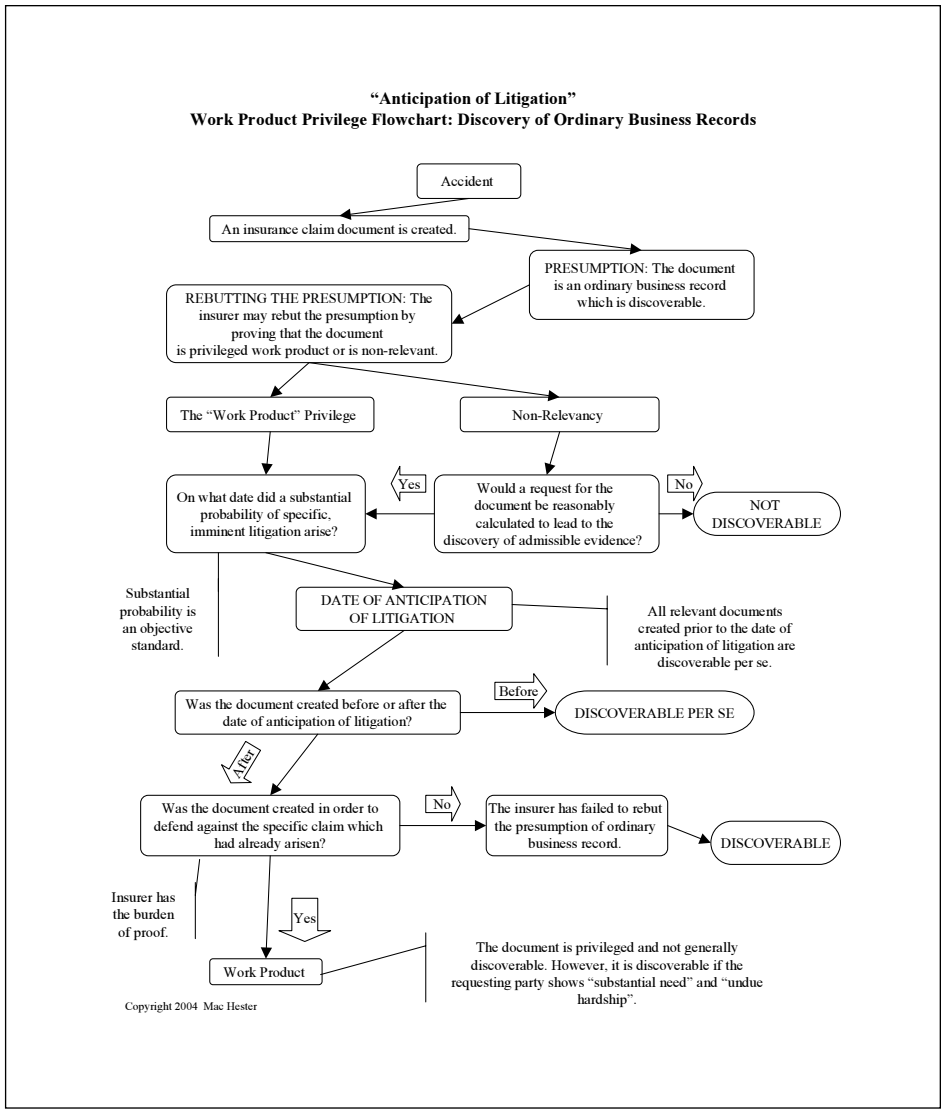
or her own insurer – as opposed to a "third-party" case – that is, an action by an injured party against a tortfeasor who is defended by his or her liability insurer.

In *Blazing Pedals*, the U.S. District Court for the District of Colorado held that documents prepared by the defendant's insurer after receipt of the plaintiff's settlement demand were protectedd by the work product doctrine. The District Court stated that, "[W]hile claim files generated in relation to first party claims are made in the ordinary course of business and are discoverable, files generated during the investigation of third party claims are made in anticipation of litigation and are not discoverable."[4] But the District Court had to reluctantly admit that Colorado state courts had not adopted this distinction. Further, the Court then had to somehow explain away *Kay Laboratories v. District Court*[5] - which was another 1982 Colorado Supreme Court decision that not only followed *Hawkins,* but was a third party case *and* it rejected the defendant's first party/third party distinction argument. The *Blazing Pedals* court simply condemned the "broad pronouncements" of *Kay Laboratories* as "merely dicta made without proper briefing of the issue."[6]

The Colorado Supreme Court had stated in *Kay Laboratories:*

> The hospital's argument that *Hawkins* is distinguishable because it concerned a claim against an insurance company by its own insured – a so-called first-party claim - is without merit. As we made clear in *Hawkins,* it is as much a part of an insurance company's normal business activity to investigate potential claims by third parties against its insureds as it is to investigate potential claims by its insureds against itself. 638 P.2d at 1378. The hospital offers no rationale for holding that the former should be entitled togreater protection from discovery under C.R.C.P. 26 than the latter, and we do not discern one.[7]

Despite being expressly shot down by *Kay Laboratories,* the first-party/third-party distinction continued to be pressed by defense counsel and inadequately



opposed by plaintiffs' counsel to the point where it gained credence, however illegitimate, with many trial judges. The low point came with the *Blazing Pedals* anomaly.

Unfortunately, the odor of the *Blazing Pedals* decision lingered like the campfire scene of "Blazing Saddles" long enough so that the bench and bar became accustomed to it as a smell of quasi-legitimate authority. It even penetrated the Colorado Supreme Court in *Silva v. Basin Western.*[8] *Silva* held that requests for an insurer's reserves and the defense attorney's settlement authority are not reasonably calculated to lead to the discovery of admissible evidence and therefore are not discoverable. The court distinguished between first party and third party claims in its analysis. However, the *Silva* court did not adopt the *Blazing Pedals* position that third party claim files are automatically protected by the work product doctrine upon the receipt of a settlement demand. To the contrary, *Silva* was expressly based upon relevancy and did not even implicate the work product doctrine.

Fortunately, in *Lazar* the Colorado Supreme Court re-visited the first party/third party distinction and expressly reaffirmed *Hawkins* and *Kay Laboratories*:

> *Silva* involved the disclosure of insurance company reserves and settlement authority rather than the investigation of a third-party claim. Not only does our opinion in that case fail to imply any rejection of the *Hawkins/Kay Labs.* rationale concerning the investigation of

third-party claims; our other holdings distinguishing first from third-party claims strongly support that rationale. With respect to actions by insureds for bad faith breach of insurance contracts, we have actually imposed a higher duty of care on insurance companies in denying or delaying the approval of claims by third parties against insureds than in denying claims by insureds themselves.[9]

Thus, there is a distinction between first party and third party claims regarding the insurance company's standards of care owed to its insureds, but there is no distinction between first party and third party claims regarding the work product protection. And although the scope of discovery is broader in a first party case than in a third party case (*Silva*), insurance claim file materials in a third party case are not entitled to greater protection than in a first party case.[10]

In other words, plaintiffs in first party claims have greater latitude regarding relevancy and requests reasonably calculated to lead to admissible evidence than plaintiffs in third party cases. In contrast, insurers have the same burden of proof in both first party and third party claims as to whether documents are protected by the work product doctrine; i.e., they must demonstrate that the materials alleged to be protected were prepared in order to defend against the specific claim *and* that a lawsuit over that claim had already been filed or was imminent.

The first-party/third-party work product distinction is busted.

Insurance Claim File Materials Discoverability Timeline

A Accident	AOL Anticipation of Litigation	F Filing of Suit	T Trial
A to AOL:	1. Everything in the claim file is presumed to be an ordinary business record. 2. Nothing is work product per se (because work product by definition are documents prepared in anticipation of litigation or for trial, and the defendant/insurer has not yet anticipated litigation). 3. Everything is discoverable – except non-relevant materials such as reserves and settlement authority.		
AOL to F:	1. Everything in the claim file is presumed to be an ordinary business record. 2. Nothing is work product - unless the defendant/insurer overcomes the presumption by showing that the specific document was prepared in anticipation of specific, imminent litigation.		
F to T:	1. Everything in the claim file is presumed to be an ordinary business record ("the commencement of litigation is not sufficient by itself to confer a qualified immunity from discovery on a document thereafter prepared"). 2. Nothing is work product – unless the defendant/insurer overcomes the presumption by showing that the specific document was prepared for trial.		

V. The Myth of the Date of Anticipation of Litigation

A. The Myth

There is a magical "Date of Anticipation of Litigation" after which everything in the Defendant's insurance claim file is protected from disclosure and discovery.

B. The Reality

There is no such thing as a magical "Date of Anticipation of Litigation" after which everything in the Defendant's insurance claim file is protected from disclosure and discovery.

More importantly, in law, the main significance of the "date of anticipation of litigation" is that **nothing** in the Defendant's insurance claim file created or obtained before the date of anticipation of litigation is protected by the work product doctrine.

That's right. **There is no such thing as a work product protection for any document in an insurance claim file prior to the date of anticipation of litigation**.

Certain documents may be protected by the attorney/client privilege and certain documents may not be relevant or requests for certain documents may not be reasonably calculated to lead to the discovery of admissible evidence (reserves, settlement authority), but **there is no such thing as a work product protection for any document in an insurance claim file prior to the date of anticipation of litigation**.

C. The Truth Revealed

Hawkins v. District Court is the word direct from the source and it is clear and simple:

> Because a substantial part of an insurance company's business is to investigate claims made by an insured against the company or by some other party against an insured, it must be presumed that such investigations are part of the normal business activity of the company and that reports and witness' statements compiled by or on behalf of the insurer in the course of such investigations are ordinary business records as distinguished from trial preparation materials. [citations omitted] This is not to say, however, that under appropriate circumstances

an insurance company's investigation of a claim may not shift from an ordinary business activity to conduct "in anticipation of litigation."

Admittedly, there is no bright line which will mark the division between these two types of activities in all cases. On the one hand a document may be prepared "in anticipation of litigation" and, on the other, the commencement of litigation is not sufficient by itself to confer a qualified immunity from discovery on a document thereafter prepared. The general standard to be applied is whether, in light of the nature of the document and the factual situation in the particular case, the party resisting discovery demonstrates that the document was prepared or obtained in contemplation of specific litigation.[11]

The major principles of the above quote are:

1. Insurance companies engage in ordinary business activity from notice of the claim all the way through trial; therefore ordinary business records (which are discoverable) are generated before the date of anticipation of litigation, after the date of "anticipation of litigation", and even **after** the commencement of litigation.

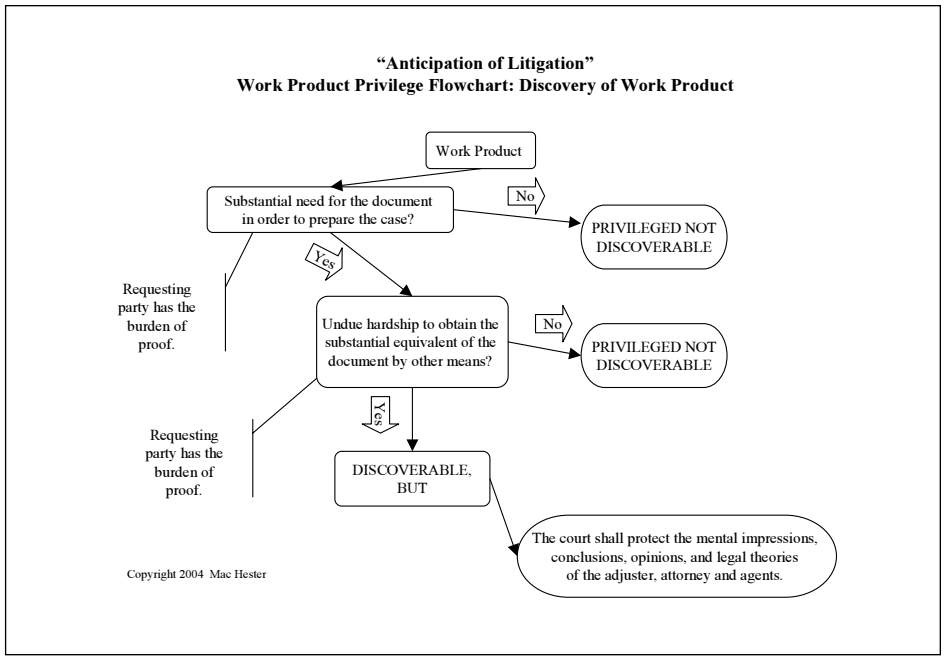
2. Everything in the claim file is **presumed** to be an ordinary business record (which is discoverable) regardless of date.

3. Accordingly, the defendant/insurer has the burden of overcoming the presumption that a claim file document is not a discoverable ordinary business record.

4. There is no *universal* date of anticipation of litigation. *Hawkins* expressly rejected the notion that a bright line date of anticipation of litigation could be identified in all cases as a matter of law.

5. The standard for determining the applicability of the work product privilege is based upon the nature of the specific document in question and the factual situation in the particular case. There is no case specific "date of anticipation of litigation" after which all claim file documents are privileged. In other words, the court cannot choose a specific date and declare that claims file materials prior to that date are discoverable and that claims file materials after that date are privileged. It must determine discoverability on a document-by-document basis.

6. The date of creation of a document is just one factor to consider in the totality of the circumstances of the case.



These principles are visually illustrated in the following timeline:

D. The Truth Obscured and Perverted

Although the language in *Hawkins* is crystal clear, insurers and defense attorneys have seized upon one sentence taken out of context ("This is not to say, however, that under appropriate circumstances an insurance company's investigation of a claim may not shift from an ordinary business activity to conduct 'in anticipation of litigation,'")[12] and have succeeded in convincing most trial court judges (and even some plaintiffs' attorneys!) that *Hawkins* supports the proposition that there is a date of anticipation of litigation after which the entire claims file becomes protected work product. This is a truly perverse result that must be remedied.

The sentence which immediately follows the one quoted in the preceding paragraph expressly negates the myth of a universal date of anticipation of litigation - "Admittedly, there is no bright line which will mark the division between these two types of activities in all cases."[13] Nevertheless, many at the bench and bar still cling to the myth of a bright line date.

Fortunately, *Lazar* rises above the confusion to reaffirm the true holding and principles of *Hawkins* and busts the myth of a per se work product privilege based solely on the date of anticipation of litigation.

VI. The Re-Enlightenment and the Busting (again) of the Myth of the Date of Anticipation of Litigation

In *Lazar*, the defendant/insurer acknowledged the existence of a recorded statement of the defendant but refused to disclose it. The plaintiff moved to compel disclosure. The trial court denied the motion on the ground that the defendant's recorded statement was taken in anticipation of litigation and was therefore privileged from disclosure. The Colorado Supreme Court exercised original jurisdiction pursuant to C.A.R. 21 and ordered the trial court to compel disclosure of the recorded statement as an ordinary business record.

The Court stated that it was exercising its original jurisdiction to expressly address the first party/third party distinction as well as to address decisions from other jurisdictions which seemed to call

into question the vitality of *Hawkins.* As discussed earlier, *Lazar* shot down the first party/third party distinction and enthusiastically reaffirmed *Hawkins*:

> The general contours of the phrase, "in anticipation of litigation," as it appears in [Rule 26] and the test for determining when documents fall within the protections of the rule, have been well-established for more than twenty years. In *Hawkins v. District Court*, 638 P.2d 1372, 1377 (Colo. 1982), we made clear that the rule was not intended to protect materials prepared in the ordinary course of business, **whether litigation had already commenced or not**, *id.* at 1378; and that the "general standard to be applied is whether, in light of the nature of the document and the factual situation in the particular case, the party resisting discovery demonstrates that the document was prepared or obtained in contemplation of specific litigation." *Id.* at 1379. (emphasis added)[14]

As emphasized in the preceding paragraph, *Lazar* makes it clear that insurance companies generate discoverable ordinary business records after the date of anticipation of litigation and even after the commencement of litigation. Therefore, the issue of a *per se* work product protection arising on the date of anticipation of litigation is no longer even debatable.

The myth of the date of anticipation of litigation is busted. *Lazar* not only busted that myth, but it also busted the myth of the insurer/insured privilege.

VII. The Myth of the Insurer/Insured Privilege Busted

Insurers and defense attorneys have a strange notion that there is an insurer/insured privilege and that insurance companies and insurance adjusters are privileged from having to be sullied by testifying in depositions, hearing or trials.

Lazar specifically rejects that notion: "No insurer/insured privilege has been recognized by this court or the General Assembly."[15]

Another myth busted.

VIII. The Myth of The "Mental Impressions" Privilege Busted

A. The Myth

Another myth widely believed by the bench and bar is that the "mental impressions" of insurance adjusters and attorneys are absolutely protected from disclosure and discovery.

The "mental impression privilege" as customarily asserted – that all of the mental impressions, conclusions, opinions, or legal theories of insurance adjusters and defense attorneys are *per se* protected under the work product doctrine- is totally erroneous.

B. The Myth Busted

There **is** a mental impression privilege, but it arises only after a specific document containing the mental impressions has been held to be work product **and** the party seeking discovery of that work product proves two things: first, that the party has a substantial need for the materials in order to prepare its case and second, that non-disclosure of the materials would impose an undue hardship on the party in obtaining the substantial equivalent of the materials by other means.

After the finding that the material sought is work product and a finding of substantial need and undue hardship on the party seeking discovery, then and only then does the issue of "mental impressions" arise. That is, the court compels disclosure of the work product but the mental impressions of the adjuster or defense attorney contained within the disclosed work product must be protected (redacted).

This is the literal expression of the first paragraph of C.R.C.P. 26(b)(3),[16] but most of the bench and bar seems to have misread the rule or to have forgotten it and to have fallen under the spell of the myth that all "mental impressions" are absolutely privileged. It is not so. The mental impressions, conclusions, opinions, or legal theories of adjusters and attorneys that relate to ordinary business activity are not privileged and are discoverable. Why? Because work product – by definition – cannot exist prior to the date of anticipation of litigation.

C. Mental Impressions, etc. Prior to the Date of Anticipation of Litigation

How can an ordinary insurance business record contain mental impressions, conclusions, opinions and legal theories and not be work product? Here's an example:

> A tortfeasor calls his insurance company to report an auto accident. The auto liability insurance adjuster pulls out his telephone log. The adjuster writes: "Insured says that his car struck the rear end of a car which was completely stopped at a red light. Insured says he dropped a cigarette on the floor of his car and was bent down trying to pick it up when he hit the other car. Little visible damage to the other car. Insured doesn't know if the other driver is injured. I believe that our insured was negligent and is 100% at fault. Reserve set at $5000" The adjuster has not yet had any contact with the injured party. The normal business activity of the insurance company is to take telephone notes when an incident is reported. Therefore, the telephone log note is an ordinary business record. At this point in time and with the information available, there is absolutely no reason to believe that litigation regarding the incident is imminent. There is no substantial probability of imminent litigation; thus, there is no anticipation of litigation. Consequently, the adjuster's mental impressions conclusions, opinions and legal theories cannot – by definition – be work product. The adjuster's mental impressions conclusions, opinions and legal theories are therefore discoverable. On the other hand, the reserve information is not discoverable. It is not discoverable because it is not relevant. The reserve information is not privileged work product because the date of anticipation of litigation has not yet arrived.

If the document being requested is not work product, then the "mental impressions" issue never even arises. If the document being requested has been determined to be work product by the court, then and only then, does the issue of mental impressions arise. In other

words, a judicial finding of work product is the threshold for the defense even being able to assert the "mental impressions" issue.

In *Leland v. Travelers Indemnity Company*,[17] the plaintiff sought discovery regarding conversations between Travelers' employees and an insurance broker. The trial court denied the discovery pursuant to C.R.C.P. 26(b)(3) because the conversations would contain the mental impressions, conclusions, opinions or legal theories of the Travelers employees. The Court of Appeals reversed, stating that the trial court had failed to apply the correct legal standard. The Court then identified the correct legal standard as the rule of *Hawkins v. District Court* and stated:

Hence, the test is whether, in light of the nature of the evidence sought to be discovered and the factual situation of the particular case, the party resisting discovery demonstrates that the evidence was prepared, uttered, or obtained in contemplation of specific litigation. In the absence of such a showing, the trial court must presume that any documents were prepared or statements were made in the ordinary course of the insurer's business and, therefore, that they are not subject to the special discovery requirements of C.R.C.P. 26(b)(3). Rather, the only requirement for discovery in such event is that the matter to be discovered is reasonably calculated to lead to discovery of admissible evidence. And, even if the insurer demonstrates that the requested materials or statements fall within the purview of C.R.C.P. 26(b)(3), plaintiffs may nevertheless obtain discovery upon a showing of substantial need.[18]

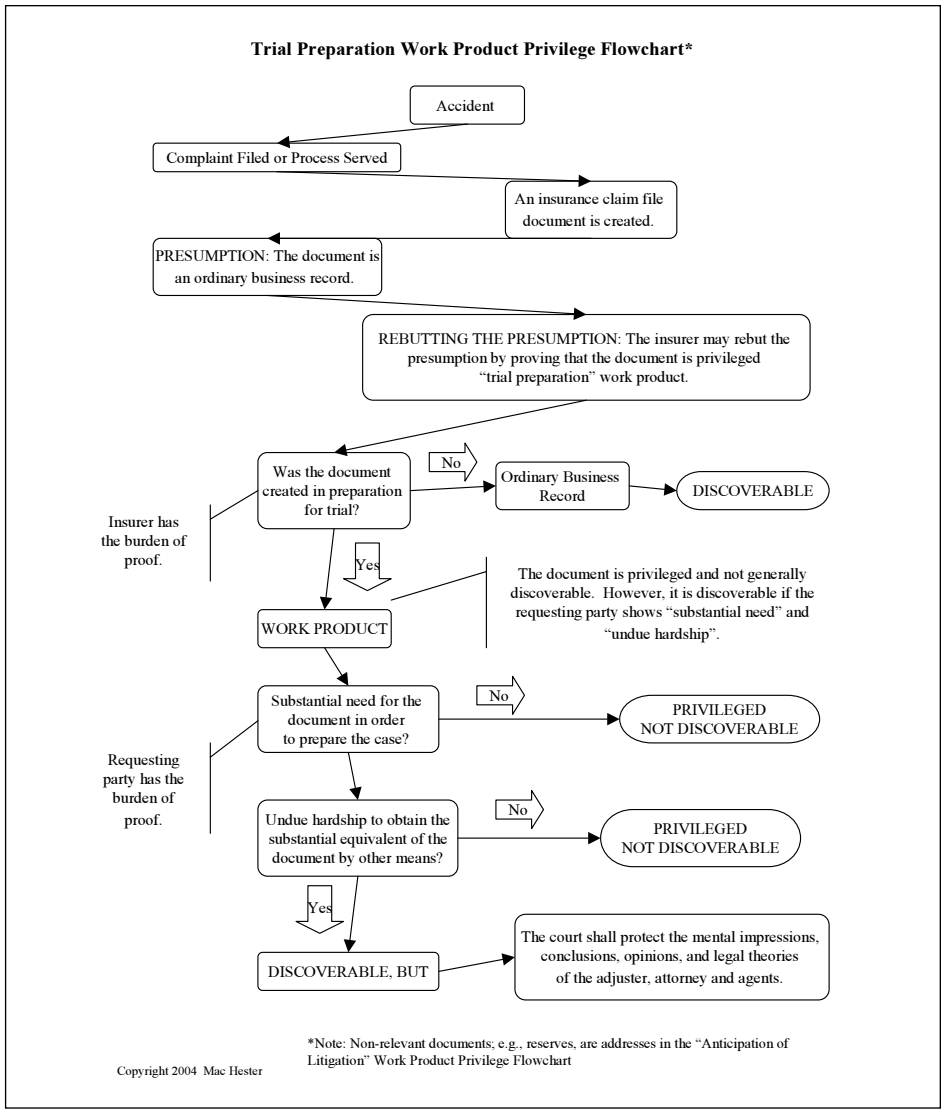
National Farmers Union v. District Court[19] illustrates the disclosure of mental impressions, conclusions, opinions and legal theories contained in an ordinary business record. In *National Farmers Union*, the plaintiff made a claim under a lease guaranty insurance policy. Outside counsel for National Farmers Union drafted a memorandum to inform National Farmers Union's in house counsel of the results of outside counsel's investigation regarding the issuance of the policy and conclusions as to whether a claim under the policy should be paid. The plaintiff requested the memorandum. National Farmers Union refused to produce it. The plaintiff moved to compel production. Following an *in camera* inspection of the memorandum, the trial court ruled that the first twenty-seven and one-third pages of the memorandum were discoverable as ordinary business records. National Farmers Union filed a motion under C.A.R. 21 for review. The Colorado Supreme Court upheld the trial court.

The Court stated:

> Here, the record adequately supports the trial court's determination that NFU has not met its burden of showing that the first twenty-seven and one-third pages of the memorandum were prepared in anticipation of litigation. At the time the investigation was conducted and the memorandum prepared, no lawsuit had been filed nor was there any indication that litigation was imminent. Indeed, until the investigation was completed and the reports submitted, NFU was itself uncertain whether or not it would deny the claim. It was only **after** NFU denied the claim that litigation arose (emphasis in original).[20]

The Court also rejected National Farmers Union's claim of attorney-client privilege regarding the memorandum.

The Court, unfortunately, did not discuss the remainder of the memorandum, except to state that the portion of the memorandum which contained legal



conclusions was not ordered by the trial court to be produced.[21] At first blush, this might seem to somewhat undercut the assertion that *all* mental impressions, conclusions, opinions and legal theories formed prior to the date of anticipation of litigation are discoverable. However, it does not - because the referenced statement was contained in the Court's discussion of the attorney/client privilege, rather than its discussion of work product. Therefore, it is reasonable to assume that the Court was more concerned with attorney/client communication than it was with the substance of the legal conclusions.

However, as a practical matter, it should be anticipated that while legal conclusions regarding a factual investigation (e.g., "our insured rear-ended a stopped car so our insured is at fault") are discoverable, legal conclusions regarding litigation defense strategy (e.g., "this is how we are going to overcome our insured's fault…") will probably be protected by trial courts despite the fact that work product cannot exist prior to the date of anticipation of litigation.

D. Mental Impressions, etc. after the Date of Anticipation of Litigation

Mental impressions, conclusions, opinions and legal theories created after the date of anticipation of litigation may or may not be work product.

If the mental impressions, conclusions, opinions and legal theories relate to ordinary insurance business activity and not to litigation defense or trial preparation, then the mental impressions, etc. are not work product and are discoverable.

If the mental impressions, conclusions, opinions and legal theories created after the date of anticipation of litigation relate to litigation defense or trial preparation, then the mental impressions, etc. are protected work product and do not have to be disclosed.

If a document is 100% ordinary business record or 100% work product (e.g., defense attorney trial strategy memo), then usually there is no disclosure issue. However, problems arise when a document is part business record and part work product.

One problem is that the insurer may withhold the entire document if it contains work product. Another problem is that the insurer may disclose the document but redact discoverable material as well as protected work product. Still another problem is that the insurer correctly redacts only privileged and protected material, but the opposing party does not trust the redaction.

The practical solution has been and is an *in camera* inspection by the court of the original document, as illustrated by *National Farmers Union*.

Although the memorandum at issue in *National Farmers Union* was created before the date of anticipation of litigation, the result would be the same had the document been created after the date of anticipation of litigation or even after the filing of suit. The decision was not based solely upon the date of creation of the memorandum relative to the date of anticipation of litigation, but also upon the nature and purpose of the memorandum. The Court stated:

> NFU may not avail itself of the protection afforded by the work product doctrine simply because it hired attorneys to perform the factual investigation into whether the claim should be paid. The attorneys were performing the same function a claims adjuster would perform, and the resulting report is an ordinary business record of the insurance company. Given these circumstances, we believe that the respondent court was fully justified in granting the motion to compel discovery of the twenty-seven and one-third pages of the memorandum.[22]

After a threshold court ruling that a document is work product, the plaintiff has a choice: either accept non-disclosure of the work product, or isist on obtaining it.

If the plaintiff insists on obtaining the work product, then the plaintiff must prove first, a substantial need for the work product in order to prepare the case and, second, that the plaintiff would suffer undue hardship by not being able to obtain the substantial equivalent of the work product by other means.

If the plaintiff proves both elements, then the work product must be disclosed. However, the court is **required** by C.R.C.P. 26(b)(3) to protect the mental impressions, conclusions, opinions and legal theories of the insurer and its agents. If the work product consists entirely of mental impressions, conclusions, opinions and legal theories, then there is nothing that can be disclosed. But if the work product contains material in addition to the mental impressions, etc., then everything except the mental impressions, etc, must be disclosed.

Watson v. Regional Transportation District[23] is an example of court ordered disclosure of work product. In *Watson,* the plaintiff was hit by a bus while it was turning. During litigation, RTD's counsel videotaped an RTD bus making the same turn. Watson requested the videotape and RTD refused to provide it. The Court ruled that the videotape was work product. However, the Court also found that Watson proved substantial need and undue hardship and ordered RTD to produce the videotape.

RTD then argued that the way its counsel conducted the videotape revealed its legal theories of the case. The Court disagreed, noting that "The tape is no more than a visual depiction of a bus turning and simply cannot be characterized as reflecting the mental processes of RTD's counsel."[24]

Watson v. RTD would have been a little more interesting if the videotape had contained mental impressions, conclusions, opinions and legal theories such as the RTD counsel expressing conclusions or opinions during the taping. In that event, the court would have protected the audio component of the videotape as mental impressions, conclusions, opinions and legal theories required to be protected by Rule 26(b)(3).

The myth of an **absolute privilege** for mental impressions, conclusions, opinions and legal theories is hereby busted.

IX. Visual Clarity

Because of genuine confusion and disingenuous obfuscation about the work product doctrine in relation to insurance claim files and the superiority

of visual illustration over lengthy text, three flowcharts are appended to illustrate the flow of work product analysis: 1. "Anticipation of Litigation" Work Product Flowchart: Discovery of Ordinary Business Records. 2. "Anticipation of Litigation" Work Product Flowchart: Discovery of Work Product. 3. Trial Preparation Work Product Flowchart.[25]

X. Conclusion

In *Lazar v. Riggs* the Colorado Supreme Court enthusiastically reaffirmed *Hawkins v. District Court* and *Kay Labs v. District Court*. In *Lazar*, the Court spoke in a strong, clear voice that there is no such thing as an insurer/insured privilege, that there is no first-party/third-party distinction in insurance claim file work product privilege matters, and that all insurance claim file materials are presumed to be discoverable ordinary business records regardless of the date of creation of the document - unless and until the insurer rebuts that presumption on a document by document basis.

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ENDNOTES

1 *Lazar v. Riggs*, 79 P.3d 105 (Colo. 2003).

2 *Hawkins v. District Court*, 638 P.2d 1372 (Colo. 1982).

3 *Weitzman v. Blazing Pedals*, 151 F.R.D. 125 (D. Colo. 1993).

4 *Id*., at 126.

5 *Kay Laboratories v. District Court*, 653 P.2d 721 (Colo. 1982).

6 *Weitzman v. Blazing Pedals*, 151 F.R.D. at 126.

7 *Kay Laboratories v. District Court*, 653 P.2d at 722-3.

8 *Silva v. Basin Western*, 47 P.3d 1184 (Colo. 2002).

9 *Lazar v. Riggs*, 79 P.3d at 08.

10 *Id*. at 107.

11 *Hawkins v. District Court*, 638 P.2d at pages 1378-79.

12 *Id*. at 1378.

13 *Id*.

14 *Lazar v. Riggs*, 79 P.3d at 107.

15 *Id*. at 108.

16 "(3) Trial Preparation: Materials. Subject to the provisions of subsection (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and 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, conclusion, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

17 *Leland v. Travelers Indemnity Company*, 712 P.2d 1060 (Colo. App.).

18 *Id*. at 1066-67.

19 *National Farmers Union v. District Court*, 718 P.2d 1044 (Colo. 1986).

20 *Id*. at 1048.

21 *Id*. at 1049.

22 *Id*. at 1048.

23 *Watson v. Regional Transportation District*, 762 P.2d 133 (Colo. 1988).

24 *Id*. at 42.

25 The "anticipation of litigation" work product protection and the "trial preparation" work product protection are separate and independent components of the work product doctrine. They are temporally separated; i.e., the first arises upon the actual anticipation of specific, imminent litigation and ceases upon the filing of suit (or maybe upon service of process) and the second arises upon filing of suit (or service of process) and runs through trial. Although they are temporally based, both aspects of the doctrine are determined on a document by document basis – not by points in time; e.g., when the insurance adjuster generates a document after concluding that specific litigation is imminent. The document is not considered work product due solely to its time of creation, but the nature of the document itself must be examined along with the factual circumstances of the claim. The same goes for documents generated by adjusters and defense attorneys after the filing of suit - all the way to the time of trial.