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DISTRICT OF ARIZONA
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Stephanie Yurick, a protected person,
through Bernard Yurick, M.D.,

Plaintiff,

vs.

Liberty Mutual Insurance Company; et al.,

Defendants.

No.

CIV 99-766-PHX-ROS
CIV 99-1043-PHX-ROS

AMENDED ORDER

TIG Insurance Company,

Plaintiff,

vs.

Liberty Mutual Insurance Company; et al.,

Defendants.

Background

On August 7, 1995, Stephanie Yurick ("Yurick") was seriously injured in an automobile accident with a Tandy Corporation ("Tandy") truck. Tandy maintained primary automobile liability insurance from Defendant Liberty Mutual Insurance Company ("Defendant") in the amount of \$5 million and excess insurance from Transamerica

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1 Insurance Group ("Plaintiff") in the amount of \$20 million. On April 26, 1999, Yurick filed
2 an action against Defendant. This action was settled on January 4, 2001.

3 On June 11, 1999, Plaintiff filed a bad faith action against Defendant, alleging that
4 Defendant knew that there was a "substantial probability" that Yurick's damages would
5 exceed the limits of its primary \$5 million coverage and that Defendant therefore had a duty
6 to evaluate and promptly settle the Yurick claim. (Compl. ¶¶ 11-13.) Plaintiff alleges that
7 Defendant should have promptly investigated and settled the Yurick claim using only the \$5
8 million available under its policy, but that did "little or nothing" to resolve the Yurick claim
9 until 1997. (Id. ¶¶ 14,16.)

10 In 1997, Liberty tendered its policy limits to Plaintiff for settlement negotiations with
11 Yurick. (Id. ¶¶ 18-19.) On June 20, 1997, Plaintiff reached a settlement with Yurick, which
12 included "payments by Plaintiff that were far in excess of [Defendant's] primary coverage",
13 and then sued Defendant. (Id. ¶ 20.)

14 On March 7, 2001, the Court conducted an ex parte hearing with counsel for
15 Defendant to resolve whether Defendant's internal documents are discoverable,
16 notwithstanding the attorney-client or work product privileges. The Court indicated that
17 several of the documents at issue appeared protected by the attorney-client and work product
18 privileges, but ordered Defendant to submit affidavits establishing the relationships between
19 Defendant and the persons who created the documents in order to determine whether either
20 privilege applied. On March 23, 2001, Defendant filed a Notice, setting forth a list of several
21 confidential documents in the Retained Counsel, House Counsel, Paul Johnson, Karen
22 Borrego, MS Mail Notes, and David Pitts files.¹ (See Notice at 2-3.) Pursuant to the Court's
23

24 ¹ Retained Counsel was hired in May 1997 by Defendant for the purpose of
25 providing counsel and legal advice regarding Yurick and Plaintiff's claims. (Retained
26 Counsel Aff. ¶¶ 1-2.) House Counsel for Defendant also provided legal advice and counsel
27 with respect to threatened litigation by Plaintiff. (House Counsel Aff. ¶¶ 1-3.) Paul Johnson
28 ("Johnson") is a Compliance Examiner in Defendant's Home Office who relied on the advice
of counsel in evaluating, settling, and defending claims against Defendant. (Johnson Aff.
¶¶ 1,3.) Karen Borrego ("Borrego") is a Technical Claims Specialist for Defendant who

1 request, Defendant attached several affidavits stating that the documents were prepared as
2 a consequence of threatened litigation by Yurick and Plaintiff. (See House Counsel Aff. ¶
3 3; Johnson Aff. ¶ 3; Retained Counsel Aff. ¶ 2; Borrego Aff. ¶ 3.)

4 On April 5, 2001, Plaintiff filed a Response to Defendant's Notice, arguing that
5 because Defendant is equitably subrogated to the claims of Tandy, the insured, and that the
6 Yurick case has settled, Defendant cannot invoke the attorney-client or work product
7 privileges to shield the documents in question. (Resp. at 2.) On April 16, 2001, Defendant
8 filed a Reply, asserting that because "the Court has already determined that many of these
9 documents are protected on their face or presumptively privileged, they remain privileged
10 and should not be produced simply because an equitable subrogation case has been filed."
11 (Reply at 5.) Defendant also disputed whether the equitable subrogation principles applied,
12 requiring disclosure of the documents.

13 On May 17, 2001 ("May 2001 hearing"), the Court held a hearing to discuss these
14 issues and advised counsel that a written decision would be forthcoming.

15 Discussion

16 **I. The Attorney-Client Privilege**

17 The Ninth Circuit has set forth the following "essential elements" for invocation of
18 the attorney-client privilege: (1) legal advice is sought, (2) from a professional legal adviser
19 in his or her capacity as such, (3) the communication relates to that purpose, (4) is made in
20 confidence, and (5) and by the client. Admiral Ins. Co. v. U.S. Dist. Ct. for the Dist. of Ariz.,
21 881 F.2d 1486, 1492 (9th Cir. 1988) (citing In re Fischel, 557 F.2d 209, 211 (9th Cir. 1977)).
22 The Ninth Circuit in In re Fischel, 557 F.2d at 211, recognized that the privilege also protects
23 the attorney's communications to the client, but held the privilege does not extend beyond
24 the substance of the client's communications to the attorney.

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27 handled Yurick's claim against Tandy. (Borrego Aff. ¶¶ 1,2.) Finally, David Pitts ("Pitts")
28 is Defendant's Assistant Vice President and Operations Manager for Business. (House
Counsel Aff. ¶ 4.)

1 Federal and Arizona law have extended the attorney-client privilege to
2 communications made by corporate employees. See Admiral, 881 F.2d at 1492 (stating that
3 the attorney-client privilege “applies to communications by any corporate employee
4 regardless of position when the communications concern matters within the scope of the
5 employee’s corporate duties and the employee is aware that the information is being
6 furnished to enable the attorney to provide legal advice to the corporation.”) (emphasis
7 added) (quoting Upjohn Co. v. United States, 449 U.S. 383, 394 (1981)); Samaritan Found.
8 v. Goodfarb, 862 P.2d 870, 876 (Ariz. 1994) (“When a corporate employee or agent
9 communicates with corporate counsel to secure or evaluate legal advice for the corporation,
10 that agent or employee is, by definition, acting on behalf of the corporation and not in an
11 individual capacity. These kinds of communications are at the heart of the attorney-client
12 relationship.”).

13 “The party asserting attorney-client privilege has the burden of establishing all of the
14 elements of the privilege.” United States v. Munoz, 233 F.3d 1117, 1128 (9th Cir. 2000)
15 (citing United States v. Plache, 913 F.2d 1375, 1379 n.1 (9th Cir.1990)).

16 The Court has reviewed all the documents at issue and finds the following.²

17 **A. The Retained Counsel File**

18 The Court finds the attorney-client privilege applies to all communications from
19 Retained Counsel to his client, that is, all communications he had with employees of Liberty
20 which meet the specific criteria established in Admiral. In his affidavit, Retained Counsel
21 states that he directly communicated with Karen Borrego, House Counsel, Paul Johnson, and
22 David Pitts “regarding [Defendant’s] legal rights and options concerning the threats of
23 litigation by [Yurick and Plaintiff].” (Retained Counsel Aff. ¶ 3.) Retained Counsel also
24

25 ² Defendant has submitted various documents located in the Retained Counsel,
26 House Counsel, Paul Johnson, Karen Borrego, MS Mail Notes, and David Pitts files. The
27 Court has analyzed the substance of all of the communications in these files. Although the
28 Court does not expressly discuss each document, this Order applies to all the documents,
because they are duplicative of each other.

1 states that he was retained by Defendant "for the purpose of providing counsel and legal
2 advice regarding threatened claims by [Yurick and Plaintiff] against Liberty Mutual." (Id.
3 ¶ 2.) Further, at the May 2001 hearing, Defendant argued that Retained Counsel's affidavit
4 makes clear that he was retained solely to represent Defendant.³ Plaintiff has not disputed
5 these assertions. Thus, Defendant sufficiently established that Retained Counsel's
6 communications with House Counsel, Borrego, Johnson, and Pitts involved communications
7 for the purpose of providing Defendant with legal advice. Admiral, 881 F.2d at 1492.

8 Based on this information, the Court finds that documents RH 177, RH 178, and PCF
9 248, involving Retained Counsel's communications to Borrego, are protected under the
10 attorney-client privilege. The fax cover sheet attached to these documents (PCF 248) clearly
11 states that the information contained therein was "attorney/client privileged and confidential
12 information[.]" (See PCF 248; Description of PCF 248-250 in Borrego File ("Proposed draft
13 letters from [Retained Counsel] for Karen Borrego to consider sending to Wayne Howard,
14 Esq. dated 5/13/97, discussing Liberty Mutual's position regarding settlement.")) Defendant
15 has therefore met its burden of establishing that the attorney-client privilege should apply to
16 these documents. Munoz, 233 F.3d at 1128; Admiral, 881 F.2d at 1492.

17 Defendant, however, has failed to establish that the following communication from
18 Retained Counsel was made in confidence, an essential element of the attorney-client
19 privilege:

20 RH 119⁴: Draft letter from Retained Counsel to Defendant's Home Office
21 discussing conditions imposed by Plaintiff on policy limits.

23
24 ³ Counsel for Defendant asserted that Retained Counsel was retained after May 8,
25 1997, when Plaintiff threatened Defendant with a bad faith action, and that Retained Counsel
was retained specifically to provide advice to Defendant, not Tandy or Plaintiff.

26 ⁴ Defendant has submitted a list of documents which contains several repeat
27 documents. Again, the Court's findings apply to all documents which contain
28 communications identical to the communications in the documents addressed if made solely
between Retained Counsel and an employee.

1 Admiral, 881 F.2d at 1492. Although Defendant has sufficiently established that this
2 communication involved Retained Counsel's communications to his client for the purpose
3 of providing his client with legal advice, Retained Counsel's affidavit does not provide that
4 the communications were made in confidence. (See Retained Counsel Aff.) Because
5 Defendant has the burden of establishing each element of the attorney-client privilege,
6 Defendant has failed to meet its burden of establishing that the communication in document
7 RH 119 was made in confidence. Munoz, 233 F.3d at 1128; Admiral, 881 F.2d at 1492.

8 Similarly, the Court finds that Borrego's communications to Retained Counsel are not
9 protected by the attorney-client privilege because they do not meet the specific criteria in
10 Admiral. In Borrego's affidavit, she states that her "communications with . . . [Retained
11 Counsel] were for the purpose of seeking legal counsel and advice with respect to the duties,
12 rights and responsibilities of Liberty Mutual Insurance Company in light of the threats of
13 litigation by [Yurick and Plaintiff]." (Borrego Aff. ¶ 3.) Borrego also states that as part of
14 her responsibility of handling the Yurick claim, she frequently communicated with Retained
15 Counsel. (Id. ¶ 2.) Although Defendant has sufficiently established that Borrego's
16 communications concerned matters within the scope of her corporate duties and related to
17 Retained Counsel's legal advice to Defendant, Borrego's affidavit does not provide that her
18 communications were made in confidence, an essential element of the attorney-client
19 privilege. Admiral, 881 F.2d at 1492. Because Defendant has again failed to meet its burden
20 of establishing that the attorney-client privilege applies to Borrego's communications, the
21 following communications are not protected under the privilege:

22 (1) RH 186: Fax cover sheet from Borrego to Retained Counsel regarding the
23 potential settlement with Yurick;

24 (2) PCF 285-286, DP 60: Borrego's handwritten notes from her May 13, 1997
25 discussion with Retained Counsel;⁵ and

26 ⁵ The Court's analysis regarding Borrego's handwritten notes is based on
27 Defendant's description of the documents provided in the Pitts' File. (See DP 60-62.) If the
28 Court had based its decision solely on Defendant's description of the documents provided
in the Borrego File, Defendant would not have met its burden of establishing that Borrego's

1 (3) PCF 290: Borrego's notes describing May 15, 1997 conversation with
2 Retained Counsel.

3 See Munoz, 233 F.3d at 1128; Admiral, 881 F.2d at 1492.

4 **B. The House Counsel File**

5 The Court will also uphold the invocation of the attorney-client privilege for all
6 communications from House Counsel to his client Liberty, which includes all of Defendant's
7 employees, which meet the specific criteria established in Admiral. In his affidavit, House
8 Counsel states that as inside counsel for Defendant, he was responsible for advising and
9 providing legal advice for Liberty's claims personnel, who therefore constituted his clients.
10 (House Counsel Aff. ¶ 2.) At the hearing, Defense counsel again argued that House
11 Counsel's affidavit makes clear that he was specifically retained to represent Defendant, not
12 Tandy, and that the documents in the House Counsel File involve advice given only to
13 Defendant. Plaintiff has not offered evidence disputing these facts. Hence, the Court finds
14 that House Counsel was not representing Tandy during the time that the communications

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17 notes were taken from her direct communication with Retained Counsel. (See Description
18 of PCF 285-286 in Borrego File ("Claim file notes of Karen Borrego dated 5/13/97
19 containing notes from conference with home office discussing settlement and release of
20 Tandy."); Description of DP 60-62 in Pitts File ("Handwritten claim file notes of Karen
21 Borrego dated 5/13/97 containing notes from discussion between Ms. Borrego and [Retained
22 Counsel], and legal advice to Liberty Mutual.")). See also United States v. Motorola, Inc.,
23 No. Civ. 94-2331, 1999 WL 552553, at *5 (D.D.C. May 28, 1999) ("Disclosure of the
24 client's notes of what he told the attorney would have the same inhibiting effect on the client
25 as asking him directly to state what he told the attorney in confidence." (emphasis added);
26 Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, Inc., 190 F.R.D. 505, 515 (W.D.
27 Tenn. 1999) (stating that the attorney-client privilege applied to handwritten notes describing
28 a discussion between an attorney and a client "for the purposes of legal advice [which] was
intended to be confidential[.]") (emphasis added); cf. In re Ford Motor Co., 110 F.3d 954,
967 (3d Cir. 1997) (refusing to find that handwritten notes were protected under the attorney-
client privilege because the notes did not involve "confidential communications made to
secure legal advice") (emphasis added); Blumenthal v. Drudge, 186 F.R.D. 236, 241 (D.D.C.
1999) (stating that a party's notes did not contain protected information because they merely
contained conversations between a non-lawyer and other third parties).

1 were made.⁶ House Counsel also states that he directly communicated with Retained
2 Counsel and James Kelleher (“Kelleher”), Vice-President and Assistant General Counsel for
3 Liberty, in order to provide “legal advice with respect to [Defendant’s] rights and
4 responsibilities[.]” (Id. ¶ 6.) Further, House Counsel states that in order to provide legal
5 advice to Defendant, he communicated in confidence with Borrego, Lenkowski, and Pitts.
6 (Id. ¶ ¶ 4-5.) Based on this information, the Court finds that the following communications
7 are protected under the attorney-client privilege because they involve House Counsel’s
8 confidential communications to his client relating to the legal advice sought by Defendant:

9 (1) LMRS 1: Letter from House Counsel to Donald Myles;

10 (2) LMRS 7⁷: Email communication from House Counsel to Johnson and
11 Kelleher on May, 16, 1997, which expressly states that it is “Privileged &
Confidential”; and

12 (3) LMRS 38: Email communication from House Counsel to Pitts on May 28,
13 1997.

14 See Admiral, 881 F.2d at 1492.

15 House Counsel’s affidavit, however, fails to establish that the following
16 communications were made in confidence, an essential element of the attorney-client
17 privilege:

18 (1) LMRS 11: Email communication from House Counsel to Johnson on May 16,
1997; and

19 (2) MSMN 11: Email communication from House Counsel to Kelleher on June
20 11, 1997.

21 Admiral, 881 F.2d at 1492.

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24 ⁶ The Court is aware of the Arizona Supreme Court’s holding in State Farm Mut.
25 Auto. Ins. Co. v. Lee, 13 P.3d 1169, 1175 (Ariz. 2000), that when an insurance company
26 asserts a defense of good faith, which necessarily incorporates communications between the
27 company and counsel, the company impliedly waives the attorney-client privilege and the
communications between the company and counsel are discoverable. The parties, however,
have not briefed the issue. Therefore, it will not be addressed and resolved at this time.

28 ⁷ Documents LMRS 7-9 and 13 are the same as documents MSMN 1-3.

1 Defendant has also failed to meet its burden of establishing that communications made
2 by Pitts, Lenkowski, and Kelleher to House Counsel concerned matters within the scope of
3 their corporate duties and that each of these corporate employees were aware that the
4 information was being furnished to enable House Counsel to provide legal advice to
5 Defendant. Admiral, 881 F.2d at 1492; Munoz, 233 F.3d at 1128. In fact, Defendant has
6 failed to offer the affidavit testimony of Pitts, Lenkowski, and Kelleher regarding their
7 communications with House Counsel. The Court therefore finds that the following
8 communications are not protected under the attorney-client privilege:

9 (1) LMRS 9 (same as LMRS 12): Email communication from Pitts to House
10 Counsel on May 16, 1997;⁸

11 (2) LMRS 11: Email communication from Lenkowski to House Counsel on May
12 13, 1997;

13 (3) LMRS 38: Email communication from Pitts to House Counsel on May 28,
14 1997;

15 (4) HOXPJ 51: Fax cover sheet from Pitts to House Counsel on May 16, 1997;

16 (5) MSMN 6: Email communication from Pitts to Grylls and House Counsel on
17 May 16, 1997; and

18 (6) MSMN 11: Email communications from Pitts to House Counsel and from
19 Kelleher to House Counsel on June 11, 1997.

20 Defendant has also failed to meet its burden of establishing that the communications
21 in document LMRS 8 are protected under the attorney-client privilege. Munoz, 233 F.3d at
22 1128. Document LMRS 8 involves a communication between Susan Grylls and David Pitts
23 on May 16, 1997, which was carbon copied to House Counsel. Defendant has failed to offer
24 any legal authority establishing that the attorney-client privilege extends to such
25

26 ⁸ The Court will not protect the email communication from Borrego to Susan Grylls
27 printed on document LMRS 9, because the email was not sent to or from Retained Counsel
28 or House Counsel, and it does not meet the Admiral requirements for protection of attorney-
client communications. (See Discussion at 9.)

1 communications.⁹ See Cont'l Ill. Nat'l Bank and Trust Co. of Chicago v. Indemnity Ins. Co.
2 of N. Am., No. C 87-8439, 1989 WL 135203, at *3 (N.D. Ill. Nov. 1, 1989) (stating that a
3 letter which merely assigned a carbon copy to an attorney fell beyond the scope of the
4 attorney-client privilege because it was "not primarily directed to an attorney", did not seek
5 legal advice, and merely served to keep the attorney informed of the contents of the letter);
6 Royal Surplus Lines Ins. v. Sofamor Danek Group, 190 F.R.D. 463, 475 (W.D. Tenn. 1998)
7 ("Simply sending a carbon copy to in house counsel does not cloak a routine business
8 communication with attorney client privilege. The communication must have been for the
9 purpose of securing legal advice.").

10 In addition, document LMRS 13 involves a communication between Borrego and
11 David Pitts, which expressly discusses legal advice from Retained Counsel.¹⁰ Defendant has
12 failed to meet its burden of offering sufficient legal authority and/or factual information to
13 establish that the attorney-client privilege should be extended to a communication solely
14 between Retained Counsel's client's employees. Munoz, 233 F.3d at 1128. In particular,
15 absent from the affidavits is any indication that Retained Counsel directed Borrego to
16 communicate the contents of document LMRS 13 to Pitts on Retained Counsel's behalf.¹¹

18 ⁹ For the same reason, the Court finds that documents MSMN 8, 9, 14, and 15 are
19 not protected under the attorney-client privilege. Documents MSMN 14 and 15 involve
20 email communications between Borrego and Pitts on June 20, 1997, which were carbon
21 copied to House Counsel. At the May 2001 hearing, Defendant argued that because all
22 communications occurred after December 1996, the damages period established in Plaintiff's
23 claims, these communications are not relevant. Plaintiff appeared to have conceded at the
24 May 2001 hearing that the June 1997 communications are not relevant, but reminded the
25 Court that relevance was not the issue to be decided at the hearing. The issue of relevance
26 has not been briefed and may be the subject for later motions. Thus, this Order does not
27 address the relevance of all documents, including MSMN 14 and 15.

25 ¹⁰ Document LMRS 13 also involves an email communication between Grylls and
26 Borrego on May 15, 1997, which discusses Tandy's involvement in an interpleader.

27 ¹¹ The Court acknowledges that in her affidavit, Borrego expressly states that she
28 "was directed by [Retained Counsel] to research and investigate certain issues and
communicate with others at Liberty Mutual as part of the fact finding mission in determining

1 **II. The Work Product Privilege**

2 The work product privilege provides a qualified immunity for materials prepared in
3 anticipation of litigation by a party, an attorney, or other representatives of the party.
4 Hickman v. Taylor, 329 U.S. 495 (1947). In an effort to address the inconsistent opinions
5 in federal courts after the Hickman decision, in 1970 the Supreme Court adopted Federal
6 Rule of Civil Procedure 26(b)(3), which provides in relevant part:

7 [A] party may obtain discovery of documents and tangible things otherwise
8 discoverable under subdivision (b)(1) of this rule and prepared in anticipation
9 of litigation or for trial by or for another party or by or for that other party's
10 representative (including the other party's attorney, consultant, surety,
11 indemnitor, insurer, or agent) only upon a showing that the party seeking
12 discovery has substantial need of the materials in the preparation of the party's
13 case and that the party is unable without undue hardship to obtain the
14 substantial equivalent of the materials by other means.

15 Fed. R. Civ. P. 26(b)(3); see also 1997 Advisory Committee Notes for Rule 26(b)(3),
16 reprinted in Wright & Miller, Federal Practice and Procedure, App. C at 435-436.

17 Pursuant to Fed. R. Civ. P. 26(b)(3)¹², the following conditions must be satisfied in
18 order to establish work product protection: (1) the material must be a document or tangible
19 thing; (2) the material must be prepared in anticipation of litigation; and (3) the material must
20 be prepared by or for a party, or by or for its representative. Taylor v. Travelers Ins. Co., 183
21 F.R.D. 67, 69 (N.D.N.Y. 1998) (citing Compagnie Francaise d'Assurance Pour le Commerce
22 Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 41 (S.D.N.Y. 1984); In re Grand Jury

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24 Liberty Mutual's rights and responsibilities in the face of threatened legal action." (Borrego
25 Aff. ¶ 3.) This broad allegation, which attempts to sweep within its ambit all
26 communications between employees, does not meet the rigorous requirements of Admiral.
27 A blanket claim of the privilege is not sufficient. Admiral, 881 F.2d at 1492; Munoz, 233
28 F.3d at 1128. Specific protection of each communication must be established for the Court
to afford protection.

29 ¹² At the May 2001 hearing, Defendants requested the Court to evaluate the
documents in question in light of Brown v. Superior Ct. In and For Maricopa County, 670
P.2d 725 (Ariz. 1983). Brown involved the Arizona Supreme Court's analysis of Ariz. R.
Civ. P. 26(b)(3), which is relevant only because it is identical to Fed. R. Civ. P. 26(b)(3).
Because this is an action founded on diversity jurisdiction, the Court must apply the Federal
Rules of Civil Procedure. See Hanna v. Plumer, 380 U.S. 460, 465 (1965).

1 Subpoenas, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982)). “[T]here is no work product
2 immunity for documents prepared in the ordinary course of business prior to the
3 commencement of litigation.” Tayler, 183 F.R.D. at 70.

4 There are two types of work product recognized, ordinary work product and opinion
5 work product, and generally opinion work product, including mental impressions,
6 conclusions, opinions or legal theories, is entitled to nearly absolute protection. Holmgren
7 v. State Farm Mutual Auto. Ins. Co., 976 F.2d 573, 577 (9th Cir. 1992) (holding that opinion
8 work product is entitled to nearly absolute protection with some limited exceptions).
9 Ordinary work product, by contrast, is subject to disclosure upon a showing by the party
10 seeking discovery of substantial need and its inability to obtain the materials by other means.
11 See Upjohn, 449 U.S. 383 (declining to decide whether opinion work product is entitled to
12 absolute protection but recognizing that ordinary work product is discoverable upon a
13 showing of substantial need an inability to obtain materials without undue hardship).

14 The burden of establishing protection of alleged work product is on the proponent, and
15 it must be specifically raised and demonstrated rather than asserted in a blanket fashion. See
16 Shiner v. Am. Stock Exch., 28 F.R.D. 34, 35 (S.D.N.Y. 1961); Tayler, 183 F.R.D. at 69.

17 **A. Whether the Documents Constitute Work Product**

18 The Court finds that all of the purported work-product documents submitted to the
19 Court for review are entitled to work product protection because they were prepared by
20 Defendant or its agents in anticipation of potential litigation against Plaintiff. Holmgren, 976
21 F.2d at 576; Tayler, 183 F.R.D. at 70. Further, the documents created by Defendant’s agents
22 constitute work product, because they were prepared under the direction of Retained Counsel
23 and House Counsel in anticipation of litigation. See Thomas Organ Co. v. Jadranska
24 Slobodna Plovidba, 54 F.R.D. 367, 372 (N.D. Ill. 1972) (“[D]ocuments and investigative
25 reports compiled by a nonattorney for an attorney and/or under his general direction in
26 anticipation of litigation were protected from discovery absent the requisite showing of
27 need.”). (See also House Counsel Aff. ¶¶ 4-5 (stating that he instructed Borrego, Lenkowski,
28

1 and Pitts to gather information and investigate the facts regarding the threatened litigation
2 by Plaintiff and to keep such information confidential)).

3 **B. Whether the Documents Constitute Protected Work Product**

4 A party may obtain discovery of an opposition's work product "only upon a showing
5 that the party seeking discovery has substantial need of the materials in the preparation of the
6 party's case and that the party is unable without undue hardship to obtain the substantial
7 equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3) (emphasis added).
8 Further, though mental impressions, conclusions, opinions, or legal theories are entitled to
9 nearly absolute protection, "opinion work product may be discovered and admitted when
10 mental impressions are at issue in a case and the need for the material is compelling."
11 Holmgren, 976 F.2d at 577 (emphasis added) (citations omitted). "In a bad faith insurance
12 claim settlement case, the 'strategy, mental impressions and opinion of [the insurer's] agents
13 concerning the handling of the claim are directly at issue.'" Id. (quoting Reavis v. Metro.
14 Prop. & Liability Ins. Co., 117 F.R.D. 160, 164 (S.D. Cal. 1987)); see also Brown, 670 P.2d
15 at 735 (stating that mental impressions, opinions, or legal theories of an attorney or other
16 representative of a party concerning litigation were discoverable because they were central
17 issues in the plaintiff's claim for bad faith and "[w]hen mental impressions and the like are
18 directly at issue in a case, courts have permitted an exception to the strict protection of Rule
19 26(b)(3) and allowed discovery.")¹³ (citations omitted).

20
21 ¹³ The Arizona Supreme Court stated the following regarding evidentiary issues in
22 bad faith actions:

23 [B]ad-faith actions against an insurer, like actions by client against attorney,
24 patient against doctor, can only be proved by showing exactly how the
25 company processed the claim, how thoroughly it was considered and why the
26 company took the action it did. The claims file is a unique,
27 contemporaneously prepared history of the company's handling of the claim;
28 in an action such as this the need for the information in the file is not only
substantial, but overwhelming. . . . The 'substantial equivalent' of this material
cannot be obtained through other means of discovery. The claims file 'diary'
is not only likely to lead to evidence, but to be very important evidence on the
issue of whether [the insurer] acted reasonably.

1 Similarly, the Court finds that though the documents in question constitute work
2 product, they may not be protected work product, because the strategy, mental impressions,
3 and opinion of Retained Counsel, House Counsel, and Defendant's agents concerned the
4 handling of the Yurick settlement, which in turn, are directly at issue in Plaintiff's bad faith
5 action. Holmgren, 976 F.2d at 577; Brown, 670 P.2d at 735. Thus, Defendant's argument
6 that the documents in question constitute protected work product may be unpersuasive if
7 Plaintiff establishes "substantial need" for the documents pursuant to Fed. R. Civ. P.
8 26(b)(3). Plaintiff must establish "substantial need" for the work product documents on or
9 before June 20, 2001, and if Plaintiff meets its burden, the Court will permit discovery of all
10 of the documents which are work product, but not the attorney-client communications which
11 the Court has ruled in this Order are entitled to protection.

12 **III. Subrogation and Privileged Documents**

13 Under Arizona law, "an excess carrier is subrogated to the rights of the insured and
14 has a cause of action against the primary insurer for bad faith failure to settle within policy
15 limits." Hartford Acc. & Indem. Co. v. Aetna Cas. & Sur. Co., 792 P.2d 749, 754 (Ariz.
16 1990). The excess insurer's rights, however, are no greater than the insured's rights. Id.
17 (citation omitted).

18 Courts have held that in bad faith actions by an excess carrier against a primary
19 insurance carrier, the attorney-client and work product privileges do not attach to
20 communications between the insurance company and its attorney because the duty owed to
21 the excess carrier by the primary carrier is identical to that owed to the insured. See Central
22 Nat'l Ins. Co. of Omaha v. Med. Protective Co. of Fort Wayne, 107 F.R.D. 393, 395 (E.D.
23 Mo. 1985); Zurich Ins. Co. v. State Farm Mut. Auto. Ins. Co., 137 A.D.2d 401, 203 (N.Y.
24 App. Div. 1988) ("Where it is alleged that the insurer has breached [its] duty to its insured,
25 the insurer may not use the attorney-client or work product privilege as a shield to prevent

26 _____
27 Brown, 670 P.2d at 734 (emphasis added) (citing APL Corp. v. Aetna Cas. & Sur. Co., 91
28 F.R.D. 10, 13-14 (D. Md. 1980)).

1 disclosure which is relevant to the insured's bad faith action. . . . Thus, the same principle
2 obtains in a bad faith action between the excess insurer and the primary insurer."'). The
3 attorney-client and work product privileges do not apply to communications between the
4 insurance company and its attorney because the attorney is deemed to have represented both
5 the insured and the excess carrier as its clients in a matter of common interest.¹⁴ See Central
6 Nat'l, 107 F.R.D. at 394 (reasoning the attorney-client privilege does not attach to
7 communications between an attorney and an insurance company because that attorney
8 represented both the insured and the insurer).

9 Defendant distinguishes Central Nat'l and Zurich on their facts, arguing that Retained
10 Counsel and House Counsel represented Defendant only during the settlement negotiations,
11 and that Plaintiff and Tandy shared no common interest with regard to this representation.
12 The Court agrees with Defendant that Central Nat'l and Zurich appear to involve situations
13 where the insured was represented during actual litigation by independent counsel hired by
14 the insurance company, and that the affidavits filed by Retained Counsel and House Counsel
15 establish that they represented Liberty solely during the relevant time period, and not the
16 insured. There is nothing in all the documents reviewed by the Court which detracts from
17 or undermines Defendant's position that Retained Counsel and House Counsel represented
18 only Defendant during the relevant time period. Thus, the Court has no reason to find that
19 Defendant ever appointed Retained Counsel and House Counsel to represent Tandy. Without

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21 ¹⁴ In its Reply, Defendant argues that Central Nat'l and Zurich are not controlling and
22 that Am. Auto. Ins. Co. v. J.P. Noonan Transp., Inc., No. 970325, 2000 WL 33171004 (Mass.
23 Super. Nov. 16, 2000), is applicable which states that subrogation provides a shield for
attorney-client communications only if the communications were privileged before
subrogation occurred. (Reply at 4.)

24 Noonan, however, cites Central Nat'l with approval and does not question its holding
25 that the attorney-client and work product privileges do not attach to communications between
26 a primary insurance carrier and its attorney in an action by an excess carrier, because the duty
27 owed to the excess carrier by the primary carrier is identical to that owed to the insured. See
28 Noonan, 2000 WL 33171004 at *4. In fact, Noonan does not address this issue and explicitly
states that Central Nat'l "involved a significantly different situation" than the facts before the
court. Id.

1 clear authority requiring the Court to extend the holdings in Central Nat'l and Zurich to cases
2 where primary insurance carriers obtain independent counsel solely to represent the insurance
3 company, the Court refuses to make such an extension. Plaintiff's argument that the
4 documents are not protected because of subrogation therefore fails.¹⁵

5 Accordingly,

6 **IT IS ORDERED** that the communications in documents RH 177, RH 178, PCF 248,
7 LMRS 1, LMRS 7, and LMRS 38 (involving only the email communication from House
8 Counsel to Pitts on May 28, 1997) are protected under the attorney-client privilege, and that
9 all other communications alleged to be protected are not protected by the attorney-client
10 privilege.

11 **IT IS FURTHER ORDERED** that all of the documents claimed by Defendant to be
12 protected by the work product privilege are protected, but that Plaintiff has until June 22,
13 2001 to establish "substantial need" for the work product documents pursuant to Fed. R. Civ.
14 P. 26(b)(3). Defendant's Response must be filed on or before July 6, 2001, and Plaintiff's
15 Reply must be filed on or before July 20, 2001. The Court will rule on whether these work
16 product documents are protected after such briefing is complete.

17 DATED this 9 day of July, 2001

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Roslyn O. Silver
United States District Judge

15 This appears academic because of the Court's specific rulings previously set forth
in this Order, regarding the applicability of the work product and attorney-client privileges.