

Dillon v. Brown, Discovery Commissioner Opinion #3  
(August, 1988)

**ATTORNEY/CLIENT PRIVILEGE AND STATEMENTS**  
**MADE BY AN INSURED TO HIS INSURER**

**FACTS**

This opinion is the final in a series of three opinions, dealing with the production of witness statements. Moyns v. Creviston, Discovery Commissioner opinion #1 (June, 1988) and Grassinger v. Trudel, Discovery Commissioner opinion #2 (August, 1988), along with this case all deal with the production of the statements of witnesses or parties when either the attorney/client privilege or work product immunity is raised. The instant case deals with a common set of circumstances; a statement was given by an insured to his insurer and the question is whether or not said statement is protected from discovery by the attorney/client privilege. It has already been decided that such statements are not protected by the work product privilege. Moyns v. Creviston, *supra*.

This litigation arises from an automobile accident which occurred on March 29, 1986. Two days subsequent to the accident a claims adjuster for the Defendant's insurance company took Defendant Brown's statement. Approximately one week later the Defendant and his insurance company received a letter of representation from Plaintiff's attorney. Suit was not filed until January of 1988. Plaintiff now requests production of the statement. The issue is a narrow one, but it

is one that occurs with great frequency.

As in many discovery areas, the decisions are in conflict, but the Supreme Court of the State of Alaska sums up the situation pretty well as follows:

A shrinking majority of states prohibit discovery of statements made by an insured to his insurer. Most of these Courts base their decisions on provisions in the insurance policy which require the insurer to defend the insured and the insured to cooperate in the investigation. (citations omitted) . . . .

A substantial and growing minority of state courts, on the other hand, have concluded that statements made to an insurer by the insured are generally not protected by the attorney/client privilege. [Langdon v. Champion, 752 P.2d 999, 1002 (Alaska 1988)]

To deny discovery of concededly relevant information on the basis of a privilege is a very serious step, as Nevada is committed to a policy of liberal pretrial discovery and any restriction of those rights must be carefully delineated. The attorney/client privilege in Nevada is set forth in NRS 49.035 to 49.115. The critical provisions are these:

**49.045 "Client" defined.** "Client" means a person, including a public officer, corporation, association or other organization or entity, either

public or private, who is rendered professional legal services

by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

**49.055 "Confidential" defined.** A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonable necessary for the transmission of the communication.

**49.065 "Lawyer" defined.** "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

**49.075 "Representative of the client" defined.** "Representative of the client" means a person having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

**49.085 "Representative of the lawyer" defined.** "Representative of the lawyer" means a person employed by the lawyer to assist in the rendition of professional legal services.

**49.095 General rule of privilege.** A client has a

privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:

1. Between himself or his representative and his lawyer or his lawyer's representative.

2. Between his lawyer and the lawyer's representative.

3. Made for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest.

How does the insurer-insured relationship fit into this statutory scheme? It is clear the insurer is neither the attorney nor the client, but is the insurer either a representative of the client or a representative of the lawyer within the above definitions? As discussed in the Grassinger case, the intent of NRS 49.075 (Representative of the client) was to include in the rules a means by which the "control group" test, governing assertion of the attorney/client privilege by corporate clients, could be addressed. Just as the attorney/client privilege was not expanded to protect witness statements of corporate employees outside the "control group" of the corporation in Grassinger, neither is there an indication the definition was intended to extend the protection of the privilege to communications made to third persons such as insurers. If a privilege for such insurers were intended,

it would have been included by the legislature just as privileges for doctors, accountants, teachers and others have been included.

Can the insurer be construed as a representative of the lawyer, (49.085) because the insured has delegated the selection of an attorney in the conduct of the defense of any civil litigation to the insurer? Once again, an affirmative answer would in effect be creating a new privilege and it is simply not correct to say a communication from insured to insurer is the same as a communication from client to attorney. Dicenzo v. Azawa, 723 P.2d 171 (Hawaii 1986); Jacobi v. Podevels, 127 N.W.2d 73 (Wis. 1964); Conely v. Graybeal, 315 A.2d 609 (Del.Super. 1974).

Perhaps the most telling point in this regard concerns the use to which the insurance company may put the statement taken from the insured. Unlike an attorney, it may use the policy holder's statement for purposes inimical to the insured's interests. As one Court stated:

The insurance carrier is more than a mere agent transmitting the policy holder's statement to the attorney hired to defend the insured.

The insurance carrier has the right to review and consider the statement submitted by the insured for any legitimate purpose connected with the business of the company. Coverage, cooperation, and renewal are a few of the matters, in addition to

consideration of the potential claim, for which the insurer may use the statement of the insured. The use of the statement for a purpose adverse to the interest of the insured is certainly inconsistent with the claim of privilege upon his behalf. [Butler v. Doyle, 544 P.2d 204, 207 (Ariz. 1975) (emphasis added)]

Another consideration in examining the communication from insured to insurer deals with the requirement of the insured under most policies to not only notify the insurer of an occurrence, but also to cooperate with the insurer. This requirement of disclosure does not comport with the confidential nature of the attorney/client privilege. To call the relationship between the insured and the insurer a privileged one requires a very elastic imagination indeed. The very principle behind the attorney/client privilege is to promote the freedom of consultation of legal advisers by clients by removing the apprehension of compelled disclosure by those same legal advisers. United Services Automobile Association v. Werley, 526 P.2d 28 (Alaska 1974); Moyns v. Creviston, supra. The compelled disclosure by the insurance company is the antithesis of the right of non-disclosure embodied by the privilege.

Finally, where it can be demonstrably shown the adjuster

took the statement of the insured at the express direction of counsel for the insured, whether independent counsel or insurance company counsel, the attorney/client privilege would apply. Kay Laboratories, Inc., v. District Court, 653 P.2d 721 (Colo. 1982); Langdon v. Champion, supra. Obviously, no such showing can be made in the instant case.

IT IS THEREFORE RECOMMENDED that Defendant produce the statement of Richard Lee Brown on or before September 9, 1988.