# In the Missouri Court of Appeals
# Eastern District

**WRIT DIVISION TWO**

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| STATE OF MISSOURI ex rel. KILROY WAS HERE, LLC, et al., | ) | No. ED109351 |
| Relators, | ) | Writ of Mandamus |
| vs. | ) | Circuit Court of the City of St. Louis Cause No. 1822-CC11663-01 |
| THE HONORABLE JOAN L. MORIARTY, CIRCUIT JUDGE, TWENTY-SECOND CIRCUIT COURT OF SAINT LOUIS MISSOURI, | ) | |
| Respondent. | ) | Filed: August 31, 2021 |

James M. Dowd, P.J., Angela T. Quigless, J., and Robin Ransom, S.J.

**OPINION**

This discovery-related writ petition concerns the attorney-client privilege and work product doctrine and requires our examination of (1) the nature of communications between an attorney and a client that are within the scope of the representation, and therefore within the attorney-client privilege, and those that are not, (2) the discoverability of attorney work product and attorney mental impressions that are beyond the scope of the potential litigation for which the attorney was retained, and (3) the treatment to be given to attorney-client communications and attorney work product when those have strayed from the scope of the representation. We

entered a preliminary order in prohibition, and a timely answer and suggestions in opposition were filed.

The underlying litigation here is the latest episode in an unfortunate saga that began on April 28, 2012, when a large tent, which Kilroy Was Here had installed for its bar patrons near Busch Stadium in downtown St. Louis, came unmoored during a storm killing one and seriously injuring seven others. After the victims filed a petition for damages alleging Kilroy was negligent in connection with the set up and maintenance of the tent, they offered to settle for $720,100 all claims against Kilroy and Kilroy's insurer Starr Indemnity and Liability Company, which was providing the defense through attorney Brian McBrearty.

Two days later, Kilroy, through separate counsel, demanded that Starr settle the claims for the amount the underlying plaintiffs had offered, which was within the $1 million policy limits, and advised that the failure to do so would expose Starr to liability for bad faith refusal to settle. As a result, on April 28, 2015, Starr retained attorney Keith Phoenix of the Sandberg, Phoenix, and von Gontard law firm (SPvG) to advise Starr with respect to its potential liability exposure for bad faith refusal to settle.

On May 15, 2015, Starr, through Mr. Phoenix and on behalf of Kilroy, communicated its rejection of the underlying plaintiffs' settlement demand by making a counteroffer of $249,999.99. No settlement was ultimately reached.

According to the record before us, Mr. Phoenix's involvement in the underlying case commenced shortly after he was retained. On May 18, 2015, Starr's claims diary noted that "STARR made 250K offer per Mr. Phoenix." Starr admitted that any offer to settle the underlying case was made on behalf of its insured, Kilroy. Later in the litigation, Mr. Phoenix

made multiple attempts on behalf of Kilroy to settle the case, including with opposing counsel during trial.

Around the same time, Phoenix also became involved in the factual and legal issues pending in the case. For instance, he prepared a legal memorandum summarizing his legal research relating to Kilroy's "duty to monitor weather." In addition, Phoenix assisted at Starr's request in preparing motions to be filed in the underlying case. On February 4, 2016, a Starr representative emailed McBrearty and Phoenix requesting "monitoring counsel, Sandberg Phoenix, ... review the motion [for summary judgment] and provide feedback before it's filed." On February 9, 2016, a Starr employee emailed McBrearty certain case law Phoenix had provided relevant to the summary judgment motion addressing the expectations of a prudent person as to sudden weather changes. On February 29, 2016, Phoenix attended court for the hearing on Kilroy's motion for summary judgment.

On March 1, 2016, Phoenix requested McBrearty update him on the scheduling of the pretrial conference and on the status of the trial court's ruling on the motion for summary judgment. Phoenix was referred to as "monitoring counsel" and was kept updated on trial preparation matters, including the preparation of witnesses and he was copied on emails regarding trial strategy and witness testimony. Further, Phoenix reviewed the jury instructions that McBrearty intended to submit to the court on behalf of Kilroy.

The case proceeded to a jury trial in the Circuit Court of the City of St. Louis that resulted in a March 14, 2016, verdict in favor of the underlying plaintiffs and against Kilroy in

the total amount of $5.2 million.[1] We affirmed the judgment entered on the verdict in *Martinez v. Kilroy Was Here LLC,* 551 S.W.3d 491 (Mo. App. E.D. 2018).

On April 5, 2016, the underlying plaintiffs and Kilroy entered into an assignment-of-claims agreement under section 537.065,[2] by which the underlying plaintiffs agreed to execute on the judgment solely to the extent of Kilroy's insurance coverage and to forgo execution against Kilroy's assets. In exchange, Kilroy partially assigned to the plaintiffs its claim against Starr for bad faith refusal to settle.[3]

The present lawsuit brought by the underlying plaintiffs and Kilroy (collectively "Relators") asserts claims for bad faith refusal to settle against Starr, and professional negligence and breach of fiduciary duty against McBrearty. The parties have conducted written discovery and deposed numerous witnesses including employees of Starr and Specialty Insurance Agency (SIA), the third-party administrator that handled Starr's day-to-day claims' processing. Relators have obtained those portions of Starr's and SIA's files relating to the underlying claims which Starr has characterized as non-privileged. Other portions have been withheld pursuant to relevancy and privilege objections.

The dispute giving rise to this writ petition centers on a subpoena duces tecum directed to SPvG which requests "[t]he entire file, including correspondence, billing records, and any other documents, either received or generated, for the Kilroy litigation, or more specifically related to

[1] The amount was later reduced to $3.4 million after deducting as credits the amounts plaintiffs received in settlement with other defendants.
[2] All statutory references are to the Revised Statutes of Missouri (2012).
[3] According to the agreement, the underlying plaintiffs are to receive in this case 100% of any recovery up to the amount necessary to fully satisfy the judgment and 80% of any recovery in excess of that amount with the remaining 20% to Kilroy.

*Martinez, et al., v. Kilroy was Here, LLC*, 1222-CC02394." The subpoena also requested testimony relating to those matters.

Starr objected and moved to quash arguing the subpoena sought documents and information that were irrelevant and protected by the attorney-client privilege. The matter was briefed and heard on April 26, 2020 and on September 4, 2020, the Honorable Respondent sustained Starr's objections and quashed the subpoena finding that Relators failed to demonstrate any applicable exception or waiver of the attorney-client privilege.

Relators then filed this writ petition arguing Respondent acted in excess of her authority by granting Starr's motion to quash because the ruling is based on an erroneous conclusion of law. Relators assert the attorney-client privilege does not apply to the entire client file because in multiple instances on this record, Phoenix's conduct went beyond the scope of his representation of Starr in that at times he acted as a claims adjuster and at other times acted as Kilroy's de facto co-counsel by participating in Kilroy's defense in the underlying litigation.[4]

We find that the documents and testimony sought by Relators from the SPvG law firm may be discoverable to the extent: (1) Phoenix acted outside the scope of his representation of Starr which was purportedly to assess Starr's exposure for its alleged bad faith refusal to settle; (2) Phoenix acted as de facto co-counsel along with McBrearty in Kilroy's defense to the underlying wrongful death and personal injury suit; (3) Phoenix participated in claims adjustment activities or acted as a claims adjuster; and (4) that any other exception to the attorney-client privilege applies such as communications made in the presence of a third party.

[4] We acknowledge that the subpoena at issue here was directed to Mr. Phoenix's firm, SPvG. Inasmuch as Mr. Phoenix acted on behalf of the law firm at all relevant times and we find no legal distinction between the two for purposes of this opinion, we will employ Mr. Phoenix's name throughout for ease of understanding.

Therefore, consistent with the principles and holdings set forth in this opinion, we make our preliminary order in prohibition permanent and remand this matter to the Respondent with directions to conduct (or to assign such task to a special master appointed pursuant to Rule 68.01) an *in camera* review of all the documents responsive to the subpoena at issue which have not already been produced with the purpose of determining which documents are discoverable and which are not. Moreover, Respondent shall permit the deposition pursuant to the subpoena duces tecum to proceed under the supervision of a special master with directions to likewise apply the principles and holdings set forth in this opinion when ruling on objections to deposition questions on the grounds of the attorney-client privilege or work product privilege.[5]

**Standard of Review**

A writ of prohibition is appropriate where the trial court lacks authority or acts in excess of its authority. *State ex rel. Cullen v. Harrell*, 567 S.W.3d 633, 637 (Mo. banc 2019). "[I]f the trial court's discovery order is based on an erroneous conclusion of law, then the order is subject to reversal." *State ex rel. Dewey & Leboeuf, LLP v. Crane*, 332 S.W.3d 224, 231 (Mo. App. W.D. 2010). Whether matters are privileged and therefore protected from discovery presents a question of law. *State ex rel. McBride v. Dalton,* 834 S.W.2d 890, 891 (Mo. App. E.D. 1992).

When the matters in dispute are neither work product nor privileged, mandamus is appropriate to review a trial court's sustention of objections to discovery because a trial court has

[5] "In evaluating the merits of the asserted privilege or any claim of waiver or undue hardship, the trial court may order an *in camera* review of the disputed documents." *Westbrooke*, 151 S.W.3d at 368 (citing *State ex rel. Lester E. Cox Med. Ctr. v. Keet*, 678 S.W.2d 813, 815 (Mo. banc 1984); *State ex rel. Friedman v. Provaznik*, 668 S.W.2d 76, 80 (Mo. banc 1984)). An *in camera* review of records sought in discovery that may contain privileged information is appropriate in order to protect one who may be subjected to harm or humiliation upon unwarranted invasion by another who is seeking information; the task may be undertaken by the trial judge or by a master appointed for that purpose. *State ex rel. Chance v. Sweeney,* 70 S.W.3d 664 (Mo. App. S.D. 2002). *See* Rule 68.01.

no discretion to deny discovery of matters which are relevant to the suit or are reasonably calculated to lead to the discovery of admissible evidence. *State ex rel. Swyers v. Romines,* 858 S.W.2d 862, 863-64 (Mo. App. E.D. 1993).

**Discussion**

**1. General principles applicable to this writ petition.**

**a. Rule 56.01**

Our analysis starts with the general rule of discovery: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action...". Rule 56.01(b)(1). And since here at least some of the discovery sought consists of materials including documents, we also look to Rule 56.01(b)(3) which provides that "a party may obtain discovery of documents and tangible things otherwise discoverable under Rule 56.01(b)(1) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative, including an 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 that the adverse party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

**b. The attorney-client privilege and attorney work product.**

Confidential communications between an attorney and his client concerning the representation of the client are protected by the attorney-client privilege. *Diehl v. Fred Weber, Inc.*, 309 S.W.3d 309, 323 (Mo. App. E.D. 2010) citing *In re Marriage of Hershewe*, 931 S.W.2d

198, 202 (Mo. App. S.D. 1996). Privileged material is any professionally-oriented communication between attorney and client regardless of whether it is made in anticipation of litigation or for preparation for trial. *Id*. To be privileged, the communication must be made in order to secure legal advice. *State ex rel. Tillman v. Copeland*, 271 S.W.3d 42, 45 (Mo. App. S.D. 2008) citing *St. Louis Little Rock Hosp., Inc. v. Gaertner*, 682 S.W.2d 146, 150 (Mo. App. E.D. 1984). Absent a waiver, such privileged communications are immune from discovery. *Id*.

In contrast to Rule 56.01(b)(1)'s absolute immunity from discovery for privileged material, Rule 56.01(b)(3) grants a *qualified* immunity for attorney work product. *May Dep't Stores Co. v. Ryan*, 699 S.W.2d 134, 136 (Mo. App. E.D. 1985). Although privileged materials do not have to be prepared in anticipation of litigation to qualify as privileged, in order for materials to qualify as work product, they must be prepared in anticipation of litigation. *State ex rel. Tillman*, at 45-56. The term "work product" includes two types of work product - "tangible work product (consisting of trial preparation documents such as written statements, briefs, and attorney memoranda) and intangible work product (consisting of an attorney's mental impressions, conclusions, opinions, and legal theories - sometimes called opinion work product)." *State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550, 552 (Mo. banc 1995).

Tangible work product may be discoverable if the party seeking discovery has shown a substantial need for the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Rule 56.01(b)(3); *O'Malley*, 898 S.W.2d at 552. But Rule 56.01(b)(3) does not permit the discovery of *intangible* work product even if the party seeking it has a substantial need for it. *O'Malley*, 898 S.W.2d at 552–553. Moreover, Rule 56.01(b)(1) still excludes privileged

material from discovery even if the requirements of the exception to the work product protection are satisfied. *May*, 699 S.W.2d at 136–37. Attorney work product, both tangible and intangible, also is privileged. *Id*. The trial court shall apply the work product doctrine to protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories, both tangible and intangible, created or commissioned by counsel in preparation for possible litigation. Rule 56.01(b)(3); *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. banc 2004); *O'Malley*, 898 S.W.2d at 553, 555 n. 2.

The party seeking discovery has the burden of establishing the relevance of the sought-after materials. Rule 56.01(b)(1); *Westbrooke*, 151 S.W.3d at 367. If relevance has been established or is uncontested and the opposing party asserts that a privilege precludes disclosure, the opposing party bears the burden of showing the privilege applies. *Westbrooke*, 151 S.W.3d at 367. To invoke the protection of the work product doctrine, the party opposing discovery must establish, through competent evidence, that the materials sought to be protected are documents or tangible things prepared in anticipation of litigation or for trial and were prepared by or for a party or a representative of that party. *Id*.

Blanket assertions of work product are insufficient to invoke protection. *State ex rel. Faith Hosp. v. Enright*, 706 S.W.2d 852, 856 (Mo. banc 1986). In order to invoke work product protection, the party opposing discovery "must establish, via competent evidence, that the materials sought to be protected (1) are documents or tangible things, (2) were prepared in anticipation of litigation or for trial, and (3) were prepared by or for a party or a representative of that party." *Raytheon Aircraft Co. v. United States Army Corps of Eng'rs*, 183 F.Supp.2d 1280, 1287–88 (D. Kan. 2001); *see*, *e.g.*, *O'Malley*, 898 S.W.2d at 554 (party challenging privilege must have "sufficient information to assess whether the claimed privilege is applicable").

"Competent evidence" may include a privilege log and affidavits from counsel. *Westbrooke*, 151 S.W.3d at 367 (quoting *Rabushka ex rel. United States*, 122 F.3d 559, 565 (8th Cir. 1997)). The privilege log may identify documents individually or by categories if that provides sufficient clarity for the court to rule on the asserted privilege claim. *Id.* at 368. Limited discovery by deposition or otherwise regarding work product may be necessary. *Id*. Through this process, the parties develop a factual record from which the trial court can render an informed decision. *Id*.

**c. Exceptions to the attorney-client privilege.**

Not all communications between an attorney and client are privileged. *State v. Smith,* 979 S.W.2d 215, 220 (Mo. App. S.D. 1998) ("[A] party may not claim the privilege where the dealing and communication between a non-lawyer and a lawyer concern non-legal matters."). For example, "it is generally accepted that where the attorney acts as a collection agent, the communications between him and his client are not protected by the privilege." *Cain*, 383 S.W.3d at 120; *see also State ex rel. Shelter Mut. Ins. Co. v. Wagner*, 575 S.W.3d 476, 483 (Mo. App. W.D. 2018) (recognizing when an "attorney acted as a claims adjuster, claims process supervisor, or claims investigation monitor, and not as a legal advisor, the attorney-client privilege would not apply.").

Moreover, a party cannot claim attorney-client privilege over communications when a third person representing an adverse party was present. *State Farm Mutual Auto Insurance Co., v. Allen*, 744 S.W.2d 782, 787 (Mo. banc 1988). Additionally, "the great weight of authority on the subject recognizes that with rare exception, the mere fact of the existence of a relationship between an attorney and a client, and the nature of the fee arrangements between the attorney and a client are not attorney-client privileged communications." *State ex rel. Koster v. Cain*, 383 S.W.3d 105, 119 (Mo. App. W.D. 2012).

**d. To warrant Rule 56.01 protection, the communication and work product must pertain to the subject matter of the representation.**

"The elements of attorney-client privilege are: (1) the existence of an attorney-client relationship at the time the communication was made or advice was given; and (2) the attorney-client relationship existed with respect to the subject matter of the communication or advice." *State ex rel. Great American Insurance Co. v. Smith*, 574 S.W.2d 379, 386-87 (Mo. 1978). "[T]he determinative issue [is] whether the relationship of attorney and client existed between the parties at the time of the communication with reference to the subject matter of the communication." *Id*.

**2. The subject matter of Phoenix's representation of Starr was Starr's bad faith exposure to Kilroy.**

Inasmuch as Starr hired SPvG to provide legal advice with respect to Kilroy's potential bad faith claim against Starr, a review of the elements and nature of such a claim will help define the parameters and scope of SPvG's representation. It is through this lens that Respondent upon remand should evaluate each of SPvG's actions and file contents at issue to determine whether it was within the scope of its representation of Starr, and therefore retained its privileged character, or not.

**a. Bad faith refusal to settle.**

A claim for bad faith refusal to settle will lie when a liability insurer: (1) reserves the exclusive right to contest or settle any claim; (2) prohibits the insured from voluntarily assuming any liability or settling any claims without consent; and (3) is guilty of fraud or bad faith in refusing to settle a claim within the limits of the policy. *Scottsdale Insurance Company v. Addison Insurance Company*, 448 S.W.3d 818, 827 (Mo. banc 2014). The first two elements do

not appear to be at issue here. So, the third element - whether Starr was guilty of fraud or bad faith in refusing to settle these claims within the policy limits - largely defines the scope of SPvG's representation of Starr in this case.

The Missouri Supreme Court has described bad faith as "the intentional disregard of the financial interest of [the] insured in the hope of escaping the responsibility imposed upon [the insurer] by its policy." *Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750, 754 (1950). The insurer's duty is to protect the insured's financial interests, which are impacted by an insurer's breach of duty *whether or not* the breach results in an excess judgment. *Scottsdale*, 448 S.W.3d at 828 (emphasis added). An insurer's obligation to act in good faith when settling a third-party claim is part of what the insured pays for with its premiums. *Truck Ins. Exch. v. Prairie Framing, LLC*, 162 S.W.3d 64, 93 (Mo. App. W.D. 2005). "When the insurer refuses to settle, the insured loses the benefit of an important obligation owed by the insurer." *Id*. An insurer "may be liable over and above its policy limits if it acts in bad faith ... in refusing to settle the claim against its insured within its policy limits *when it has a chance to do so*." *Landie v. Century Indemnity Company*, 390 S.W.2d 558, 563 (Mo. App. 1965) (emphasis added).

In *Johnson v. Allstate Ins. Co.*, 262 S.W.3d 655, 662 (Mo. App. W.D. 2008), the court observed that "[c]ircumstances that indicate an insurer's bad faith in refusing to settle include the insurer's not fully investigating and evaluating a third-party claimant's injuries, not recognizing the severity of a third-party claimant's injuries and the probability that a verdict would exceed policy limits, and refusing to consider a settlement offer."

**3. Respondent's task upon remand is to determine to what extent the materials and topics encompassed by the subpoena along with Mr. Phoenix's actions, communications, and mental impressions exceeded the scope of his representation of Starr for its potential exposure for bad faith refusal to settle.**

According to the foregoing authorities, the critical point(s) in time for an insurer's liability exposure for the alleged bad faith refusal to settle is when the insurer "ha[d] a chance to do so." *Landie,* 390 S.W.2d at 563. On the limited record before us, the chance to settle on the part of Starr appears to have occurred in April 2015.[6] At that point, the plaintiffs had made their demand to settle all claims, the wrongful death claim along with the seven personal injury claims, for $720,100 which was within the $1 million policy limit. That figure was echoed two days later when the personal attorney for Kilroy made an independent demand upon Starr to settle the claim for the plaintiffs' demand and also notified Starr that its failure to do so would constitute the bad faith refusal to settle.

While Starr and Kilroy remained in an insurer-insured relationship governed by the policy pursuant to which Starr remained in charge of settlement and of the defense through Mr. McBrearty, an adversarial aspect had crept into their relationship. It bears noting here that "an insurer's duty to defend is distinct and different from its duty to settle a claim against its insured within its policy limits when it has a chance to do so." *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 556 (Mo. App. S.D. 1990). In fact, in Missouri "an insurer, who is entrusted to defend a claim on behalf of the insured, acts in a fiduciary capacity." *Pool v. Farm Bureau Town & Country Ins. Co. of Missouri*, 311 S.W.3d 895, 907 (Mo. App. S.D. 2010) (quoting

[6] There may have been subsequent points in time before or during trial when a settlement offer from the underlying plaintiffs was on the table but our limited record does not make that clear.

*Grewell v. State Farm Mut. Auto. Ins. Co.,* 162 S.W.3d 503, 509 (Mo. App. W.D. 2005)). In the situation where a third party is suing an insurer's policy holder, it is the insurance company's control over the claim that creates a fiduciary relationship between insurer and insured. *Id.*

So, Starr continued to provide and to control the defense through Mr. McBrearty and retained its right to control settlement negotiations and ultimately whether settlement occurred. But now that Kilroy had notified Starr that Kilroy believed that Starr's failure to settle established grounds for Kilroy to sue Starr for the bad faith refusal to settle in the event of an excess verdict, Kilroy and Starr, at least in this context, were now in an adversarial posture. *See, e.g.*, *State ex rel. Safeco Nat. Ins. Co. of America v. Rauch*, 849 S.W.2d 632, 634 (Mo. App. E.D. 1993); *Pool,* 311 S.W.3d at 907.

On April 28, 2015, in apparent recognition of this potential conflict, Starr retained Mr. Phoenix "to provide advice and counsel. . . in connection with allegations of bad faith refusal to settle the underlying lawsuit." Starr and Phoenix assert that his role was later expanded to assess coverage issues in the case as well. Understandably, Starr brought Mr. Phoenix in to advise it with respect to the potential bad faith claim that was lurking in the event of an excess judgment. And Phoenix owed Starr his undivided duty of loyalty. To carry out his duty, Starr was entitled to have Mr. Phoenix become familiar with the facts of the case in order to advise Starr regarding its bad faith exposure. Ideally, the retention of Mr. Phoenix would allow Starr to proceed on two separate tracks. Through Mr. McBrearty, whose undivided loyalty was owed to Kilroy, Starr could continue to fulfill its contractual duty to Kilroy to defend it in the underlying lawsuit. And through Mr. Phoenix, it could receive advice with respect to its potential bad faith exposure.

The record shows, however, that these two tracks converged.

**a. Phoenix appears to have acted as Kilroy's de facto co-counsel in the underlying litigation.**

On the record before us summarized above, Mr. Phoenix appears to have imbedded himself as McBrearty's co-counsel in Kilroy's defense to the underlying lawsuit. Phoenix extended settlement offers, attended motion hearings, provided legal research and local rule information to lead counsel, participated in witness preparation, reviewed motions prior to filing, negotiated settlement with opposing counsel, and reviewed jury instructions. The record supports that while Phoenix was retained as bad faith counsel for Starr, he also acted with Starr's knowledge and favor in Kilroy's legal defense.

While there is nothing in our record that Kilroy and Phoenix formally entered into an attorney-client relationship, "[a]n attorney-client relationship might be found to exist if there is evidence to support findings that the 'client' sought and received legal advice and assistance and the 'attorney' intended to undertake to give such advice and assistance on the 'client's' behalf." *World Res., Ltd. v. Utterback*, 943 S.W.2d 269, 270 (Mo. App. E.D. 1997).

The convergence of these two tracks - what McBrearty was doing in defense of Kilroy, and what Phoenix was attempting to do on behalf of Starr in connection with its bad faith exposure - is troubling but not surprising because the interests of Kilroy and Starr might at times have seemed to overlap. In other words, actions taken to defend Kilroy might also work to Starr's benefit in connection with its bad faith exposure. Certainly, a robust and successful defense of Kilroy resulting in a defendant's verdict, or at least a verdict within the policy limits, would benefit both Kilroy and Starr. Kilroy's assets would be unexposed and Starr's bad faith exposure in the face of a verdict within the policy limits would logically be far less than if a multi-million-dollar excess verdict resulted from the underlying litigation.

But, just because Kilroy's and Starr's interests might coincide on some level does not justify obliterating the lines between Starr's defense of Kilroy in the underlying case and Starr's own interests in connection with Kilroy's potential bad faith case in which its interests and those of Kilroy are definitely at odds.

And we reiterate that while Phoenix was participating as de facto co-counsel of Kilroy, his undivided loyalty belonged to Starr. Thus, it would appear that to the extent Phoenix was acting as Kilroy's lawyer, Kilroy should be entitled to the file generated in that connection because "[t]he client's files belong to the client, not to the attorney representing the client." *McVeigh v. Fleming*, 410 S.W.3d 287, 289 (Mo. App. E.D. 2013) (internal quotations omitted).[7] Moreover, Kilroy should be entitled to know what Phoenix did on Kilroy's behalf and why.

Again, we entrust to Respondent or her designated special master upon remand to make these determinations pursuant to the principles and holdings of this opinion.[8]

**Conclusion**

We conclude that Respondent erroneously quashed the subpoena at issue. The materials and testimony sought by the subpoena are discoverable to the extent they relate to Mr. Phoenix's actions that were outside the scope of his representation of Starr as their bad faith counsel.

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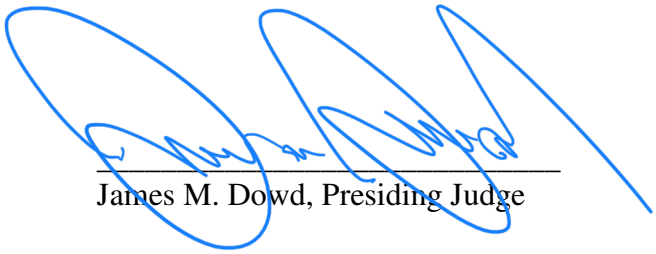
[7] "Privilege may also be waived when invoked in some fundamentally unfair way." *State ex rel. St. John's Reg'l Med. Ctr. v. Dally*, 90 S.W.3d 209, 215 (Mo. App. S.D. 2002).

[8] Relators claim Phoenix acted as a claims adjuster. Relators rely on *State ex rel. Shelter Mut. Ins. Co. v. Wagner*, where the court referenced the principle based on non-Missouri caselaw that, "[t]o the extent that the attorney acted as a claims adjuster, claims process supervisor, or claims investigation monitor, and not as a legal advisor, the attorney-client privilege would not apply." 575 S.W.3d 476, 483 (Mo. App. W.D. 2018) (quoting *Harper v. Auto Owner's Ins. Co.*, 138 F.R.D. 655, 671 (S.D. Ind. 1991)). We observe that this limitation to the attorney-client privilege contemplated in *Wagner* is little more than an application of the definition of the attorney-client privilege, discussed at length herein. That is, the privilege does not apply to non-legal communications or advice. *State v. Hooper*, 552 S.W.3d 123, 131 (Mo. App. S.D. 2018). Upon remand, Respondent may be asked to reconsider Relators' claims in this regard.

Specifically, we find discoverable all materials and testimony to the extent that (1) Phoenix acted as de facto co-counsel in Kilroy's defense, (2) communications claimed to be privileged were made in the presence of a third party, or (3) any other exception to the attorney-client privilege applies.

We therefore make our preliminary order in prohibition permanent. The Respondent, Honorable Joan L. Moriarty, is directed to set aside her order granting the motion to quash Relators' subpoena duces tecum and to review the discoverability of any materials and testimony sought by Relators' subpoena, including but not limited to an *in camera* review, in accordance with this opinion.



James M. Dowd, Presiding Judge

Angela T. Quigless, J., and
Robin Ransom, S.J., concur.