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DISCOVERABILITY OF AN INSURED'S POST-ACCIDENT STATEMENT TO INSURER IN WASHINGTON—Heidebrink v. Moriwaki, 104 Wn. 2d 392, 706 P.2d 212 (1985)

In Heidebrink v. Moriwaki the Washington Supreme Court held that a recorded statement made by an insured party to his or her liability insurance carrier following an accident is protected from discovery by the work product rule. Because the defendant's statement satisfied the other threshold requirements for work product protection, the determinative issue in Heidebrink was whether the statement had been prepared in "anticipation of litigation." The court answered this question affirmatively with a rationale based on policy considerations derived not from work product doctrine but from common law privilege doctrine. Because this privilege rationale focused on the preexisting relationship between insured and insurer, the Heidebrink court failed to reach the underlying factors directly relevant to the question of what constitutes anticipation of litigation in a post-accident insurance investigation.

Courts have struggled, under both a privilege theory and pure work product doctrine analysis, with the difficulties of reconciling a broad discovery policy with the needs of an insured for confidentiality. Facing this difficulty, the Heidebrink court blurred the distinctions between privilege

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2. Id. at 401, 706 P.2d at 217. Washington's work product rule is codified in Civil Rule 26(b)(3), which reads in part:
   (3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule [subdivision (b)(4) deals with experts], a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (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 his 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 his case and that he 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.
   WASH. CIV. R. 26(b)(3). See also FED. R. CIV. P. 26(b)(3). The second paragraph of the rule deals with the ability of any person or party to obtain a copy of their own statement.
3. Heidebrink, 104 Wn. 2d at 396, 706 P.2d at 215. Although an adverse party can compel disclosure of protected "ordinary" work product through a proper showing of substantial need, see infra notes 19–21, the party seeking discovery in Heidebrink was unable to make such a showing. 104 Wn. 2d at 402, 706 P.2d at 218. Ordinary or "factual" work product encompasses materials of purely factual nature prepared by or for an attorney for use in litigation. "Opinion" work product includes materials containing an attorney's mental impressions, opinions, conclusions or legal theories. 4 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 26.64[2], at 361–62 (4th ed. 1984); see also Wolfson, Opinion Work Product—Solving the Dilemma of Compelled Disclosure, 64 NEB. L. REV. 248, 250 (1985). This Note addresses only the discoverability of ordinary work product.
4. See infra notes 81–106 and accompanying text.
and work product immunity, potentially impeding the application of either. The Heidebrink court could have focused on the events triggering the insurance investigation, rather than on the insured-insurer relationship. This focus would provide meaningful guidance to lower courts, and would avoid undesirable consequences stemming from integration of privilege considerations with work product analysis.

I. THE INDEPENDENT DOCTRINES OF WORK PRODUCT AND PRIVILEGE

A. Modern Work Product Doctrine

Contrary to the common law, which allowed little discovery, the Federal Rules of Civil Procedure, adopted in 1938, provided for discovery in federal courts of "any matter . . . relevant to the subject matter" that was not privileged. Federal courts, however, encountered difficulty in determining the extent to which a lawyer's "work product" was discoverable within this framework. The Supreme Court introduced modern work product doctrine in Hickman v. Taylor. In Hickman, the Court held that statements of nonparty witnesses taken by an attorney several days after an accident, though not privileged, were conditionally immune from discovery. Although the Court called for broad and liberal treatment of the discovery rules, it limited intrusion into an attorney's files in order to prevent "inefficiency,

5. Prior to the nineteenth century, pretrial discovery devices were essentially nonexistent except for letters or deeds relied upon in the pleadings. 6 J. WIGMORE, EVIDENCE § 1858, at 568 (J. Chadbourn rev. 1976).
7. The term "work product of the lawyer" first appeared in the opinion by the circuit court of appeals in Hickman v. Taylor and was defined as "intangible things, the result of the lawyer's use of his tongue, his pen, and his head, for his client." 153 F.2d 212, 223 (3d Cir. 1945), aff'd, 329 U.S. 495 (1947). Prior to the Supreme Court ruling in Hickman, see infra text accompanying notes 8–13, various lower federal courts rendered over 60 conflicting decisions on this issue. 4 J. MOORE, supra note 3, ¶ 26.63[4], at 312. Courts frequently denied discovery of "work product" materials. See, e.g., Poppino v. Jones Stone Co., 1 F.R.D. 215 (W.D. Mo. 1940); McCarthy v. Palmer, 29 F. Supp. 585 (E.D.N.Y. 1939), aff'd, 113 F.2d 721 (2d Cir. 1940), cert. denied, 311 U.S. 680 (1940); Kenealy v. Texas Co., 29 F. Supp. 502 (S.D.N.Y. 1939).
10. Id. at 514 (though discovery could be had in proper circumstances, the Court declined to permit discovery as a matter of unqualified right).
11. Id. at 507.
unfairness, and sharp practices” within the legal profession.\textsuperscript{12} Discovery of work product would be permitted only for “good cause.”\textsuperscript{13}

In 1970 the Supreme Court adopted Federal Civil Rule 26(b)(3)\textsuperscript{14} to clarify confusion that had arisen subsequent to \textit{Hickman} regarding discovery of trial preparation materials.\textsuperscript{15} Rule 26(b)(3) codifies the principles of work product doctrine established under \textit{Hickman}.\textsuperscript{16} In 1972, Washington adopted Federal Civil Rule 26(b)(3) verbatim to govern work product discovery in its courts.\textsuperscript{17} A party seeking to invoke work product immunity under Rule 26(b)(3) must meet three criteria. The materials must: (1) be documents or other tangible things; (2) be prepared in anticipation of litigation or trial; and (3) be prepared by or for the party seeking protection or by or for that party’s representative.\textsuperscript{18}

Rule 26(b)(3) codifies the good cause requirement announced in \textit{Hickman}\textsuperscript{19} as a two part test to determine when protected work product is

\textsuperscript{12} Id. at 511.

\textsuperscript{13} Id. at 512. The Court stated that a burden rests on that party who seeks to compel production of protected materials. The magnitude of that burden is “implicit in the rules as now constituted.” \textit{Id}. The Court hinted at which “rules” it considered applicable in a footnote referring to FEDERAL CIVIL RULE 34 and the “good cause” requirement therein. \textit{Id}. at 512 n.10. Because the Court declined to make the burden explicit, the good cause requirement of \textit{Hickman} resulted in three different burdens under the label of “good cause,” depending on what type of materials were sought: (1) proof of good cause as mere relevance under Rule 34 (as then constituted) to discover nonprivileged, nonwork product materials; (2) proof of good cause as hardship or necessity to discover ordinary or factual work product, \textit{see supra} note 3; or (3) proof of good cause consisting of some measure of extreme need that rarely, if ever, would be met, to discover an attorney’s mental impressions. \textit{See Comment, Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney’s Work Product, 17 WAYNE L. REV. 1145, 1156–57 (1971).}

\textsuperscript{14} \textit{See supra} note 2.

\textsuperscript{15} \textit{See} Trautman, \textit{Discovery in Washington}, 47 WASH. L. REV. 409, 414 (1972); \textit{see also} Comment, \textit{supra} note 13, at 1158 (discussion of the major problems concerning discovery of trial preparation materials identified by the Advisory Committee).

\textsuperscript{16} Upjohn Co. v. United States, 449 U.S. 383, 398 (1981). The purposes and policies of \textit{Hickman}, therefore, are relevant to efforts to apply the rule. \textit{See infra} notes 35–37 and accompanying text.

\textsuperscript{17} WASH. CIV. R. 26(b)(3); \textit{see supra} note 2. Prior to adopting the federal rule in Washington, the Washington rules provided: “The court need not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial.” WASH. CIV. R. 26(b), 71 Wn. 2d lxvii (1967). Although never interpreted by the state supreme court, the rule left the issue to the discretion of the trial judge and required good cause before allowing discovery. \textit{Heidebrink}, 104 Wn. 2d at 396, 706 P.2d at 214.

\textsuperscript{18} FED. R. CIV. P. 26(b)(3); WASH. CIV. R. 26(b)(3); \textit{see supra} note 2. The Rule specifically includes insurance companies as permissible representatives of a party protected under the Rule. The Rule makes no distinction between attorney and nonattorney work product. \textit{Heidebrink}, 104 Wn. 2d at 396, 706 P.2d at 214–15.

\textsuperscript{19} \textit{See supra} note 13 for description of the good cause requirements under \textit{Hickman}. \textit{See also} Comment, \textit{supra} note 13, at 1160–61 (discussion of the problems associated with general guidelines for good cause under \textit{Hickman}).
discoverable. An adverse party must make a sufficient showing of substantial need for the materials, coupled with an inability to obtain the material’s substantial equivalent without undue hardship.

1. The Anticipation of Litigation Requirement

In the initial determination of whether the work product rule protects any given material from discovery, courts applying Rule 26(b)(3) have found the anticipation of litigation prong particularly troublesome. Courts have used a variety of standards to evaluate the requirement and, consequently, a large number of inconsistent rulings have emerged.

The anticipation of litigation question has also divided federal and state courts interpreting Federal Civil Rule 26(b)(3), or its state equivalent, in the narrower context of insurance investigations. Courts disagree over whether, in the absence of a specific pending claim, a liability insurer conducts its initial post-accident investigation in anticipation of litigation. Courts making such determinations have relied on a variety of factors,

20. Only ordinary work product is discoverable under Rule 26(b)(3). See supra note 3 for a definition of “ordinary” work product.
21. FED. R. CIV. P. 26(b)(3); WASH. CIV. R. 26(b)(3). Whether such a showing has been made is a wholly discretionary determination made by trial judge. 4 J. MOORE, supra note 3, ¶ 26.64[3-1], at 362. See, e.g., Locite Corp. v. Fel-Pro, Inc., 667 F.2d 577 (7th Cir. 1981) (sufficient showing where crucial information is in exclusive control of adverse party); Gay v. P.K. Lindsay Co., 666 F.2d 710 (1st Cir. 1981) (sufficient showing generally cannot be made where declarant is available for deposition); McDougall v. Dunn, 468 F.2d 468 (4th Cir. 1972) (statement contemporaneous with occurrence found to be unique, no substantial equivalent available); Rackers v. Siegfried, 54 F.R.D. 24 (W.D. Mo. 1971) (plaintiff had substantial need of documents since no sufficient alternative source existed from which he could obtain the same information); see also C. WRIGHT & A. MILLER, supra note 6, § 2025, at 211–28 (general discussion of what showing satisfies substantial need test).
22. See infra notes 24, 25, 28, 30, and 32 and accompanying text for examples of cases basing decisions on a variety of criteria. One commentator advocates that courts consider, in each determination, all factors upon which anticipation of litigation decisions have been based. Comment, Work Product Discovery: A Multifactor Approach to the Anticipation of Litigation Requirement on Federal Rule of Civil Procedure 26(b)(3), 66 IOWA L. REV. 1277, 1277–79 (1981). The author sets out five categories of factors: (1) the nature of the event; (2) inferences from contents; (3) who requested or prepared the materials; (4) routine preparation and purposes served thereby; and (5) time prepared. Id. at 1287.
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leading to different results in similar situations.24 Among these are courts that have based their decisions on the nature of the event stimulating investigation and the likelihood that it could result in litigation.25 However, many courts have used this mode of analysis to merely rephrase the question, rather than to focus on the precipitating event and surrounding circumstances that led to the investigation.26 As a result, these efforts have provided little guidance to subsequent courts.27

A number of courts have found other criteria to be dispositive in interpreting Rule 26(b)(3). Courts have held that materials prepared in the "ordinary course of business" of insurance investigation are outside the scope of materials protected by the Rule.28 Other courts and commentators strongly criticize the ordinary course of business exception to Rule

24. Compare, e.g., Henry Enters., Inc. v. Smith, 225 Kan. 615, 592 P.2d 915 (1979) (statement of defendant corporation's principal officer, taken by corporation's insurance carrier with knowledge of potential claims, was outside scope of work product rule because it was not requested by legal counsel and was made in the ordinary course of business), with Fireman's Fund Ins. Co. v. McAlpine, 120 R.I. 744, 391 A.2d 84 (1978) (post-accident statement of insured party found to be within scope of work product rule because when an insured reports an incident involving another party, the nature of the event gives rise to a reasonable anticipation of litigation). See also infra notes 25, 28, 30, and 32 and accompanying text for additional court treatment of the anticipation of litigation question.

25. Ashmead v. Harris, 336 N.W.2d 197 (Iowa 1983); Fireman's Fund Ins. Co. v. McAlpine, 120 R.I. 744, 391 A.2d 84 (1978). For analogous cases involving intracompany accident investigations see also In re Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979); Almgauer v. Chicago, R.I. & P. R.R., 55 F.R.D. 147, 149 (D. Neb. 1972). Professors Wright and Miller have proposed a test for any anticipation of litigation determination under Rule 26(b)(3) which factors in the nature of the events giving rise to the investigation. They ask: "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." C. WRIGHT & A. MILLER, supra note 6, § 2024, at 198.

26. See, e.g., In re Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979) ("some possibility" of litigation); Home Ins. Co. v. Ballenger Corp., 74 F.R.D. 93, 101 (N.D. Ga. 1977) ("substantial probability" of "imminent litigation"); see also Comment, supra note 22, at 1277-79 (asserting that this tautology adds little substance to the analysis).


26(b)(3) immunity. Courts have also required prior involvement by an attorney before allowing work product immunity for investigation materials. This, however, adds requirements not found in the plain language of the Rule. Finally, at least one court has required that specific legal claims exist before investigative materials are protected. However, in a case before the Supreme Court, materials prepared prior to the existence of any specific claims received work product immunity. Reliance by courts on such a variety of standards when making anticipation of litigation determinations under Rule 26(b)(3) has resulted in confused application of the Rule.

2. Policies and Scope of Work Product Doctrine

The Hickman Court sought to protect the integrity of the trial process and thereby the adversarial system of justice through work product doctrine.

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29. See Carver v. Allstate Ins. Co., 94 F.R.D. 131, 134 (S.D. Ga. 1982) (a hard and fast rule is contrary to the goals of modern discovery); Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89, 92 (E.D. Mo. 1980) (ordinary course of business exception "twists the language of the Rule so as not to bestow upon insurance companies an allegedly undeserved benefit"); Spaulding v. Denton, 68 F.R.D. 342, 345–46 (D. Del. 1975) (any rule of thumb approach is contrary to drafter's intent); Comment, supra note 23, at 165 (routine accident investigation is often prompted by a justifiable anticipation of future litigation); Comment, supra note 28, at 848, 853–55 (1983) (asserting that the ordinary course of business exception jeopardizes the goals of work product doctrine and that courts should instead follow the Rule 26(b)(3) framework); Comment, supra note 22, at 1294 (ordinary course of business exception overlooks possibility that routine practices may result from a desire to be adequately prepared for litigation).


31. See supra notes 2 and 18; see also 4 J. MOORE & J. LUCAS, supra note 3, § 26.64(2), at 358–60 (involvement by an attorney is not a prerequisite to protection under Rule 26(b)(3)).


33. Upjohn v. United States, 449 U.S. 383 (1981). The materials protected were prepared during an investigation made before the adversary party was even aware of the circumstances that led to litigation. Id. at 386–87, 397. In Upjohn, the government had conceded that the materials in question were within the scope of Rule 26(b)(3), and instead the government asserted it had made a sufficient showing of need to overcome the immunity. Id. at 399.

34. See Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir.) ("[Anticipation of litigation] is a phrase that must be interpreted with caution, and the case law affords relatively little guidance."); cert. denied, 429 U.S. 920 (1976); Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89, 91 (E.D. Mo. 1980) ("Confusion has reigned... as to what exactly is meant by that phrase."); see also Comment, supra note 22, at 1277–78.

35. Proper preparation of a client's case demands that [the attorney] assemble information, sift what he considers to be the relevant from irrelevant facts, prepare his legal theories and plan his
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The Court asserted that unrestricted discovery of trial preparation materials would promote inefficient trial preparation.\textsuperscript{36} Attorneys would hesitate to commit materials to written form, and lack of privacy would demoralize attorneys.\textsuperscript{37} Modern courts also reiterate that work product doctrine serves to protect the adversary role of the attorney, through preserving the privacy of trial preparation materials.\textsuperscript{38}

Work product protection serves interests of both attorney and client; therefore, it may be asserted independently by either.\textsuperscript{39} Those interests, however, will not always outweigh the need of adverse parties for disclosure of relevant material unobtainable elsewhere.\textsuperscript{40} Courts have labeled work product protection a "qualified immunity," rather than a form of "privilege."\textsuperscript{41}

B. Attorney-Client Privilege and Insured-Insurer Communications

Although work product doctrine and attorney-client privilege both function to protect materials from discovery, the two concepts are separate and
1. Policies and Scope of Attorney-Client Privilege

Society’s interest in safeguarding certain confidential relationships provides the justification for the use of privileges. The attorney-client privilege encourages full disclosure by clients, allowing their representatives to better serve their interests. Certain limits, however, qualify use of the privilege. Because attorney-client privilege benefits only the client, only the client may assert it. The materials which are privileged receive absolute protection. However, the privilege protects only communications between attorney and client which are intended to be confidential. Although well established, attorney-client privilege has been criticized by legal scholars. Courts tend to construe the privilege narrowly, and to

42. Handguards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976); see also, Wolfson, supra note 3, at 253.


45. J. WIGMORE, supra note 44, § 2231, at 629. Under the original theory of attorney-client privilege, protection was found in the attorney, not the client. This is no longer the case. Id. Numerous courts have held that attorney-client privilege belongs to the client alone. E.g., Moody v. IRS, 654 F.2d 795, 801 (D.C. Cir. 1981); In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 801 (3d Cir. 1979); Martin v. Shean, 22 Wn. 2d 505, 511, 156 P.2d 681, 684 (1945) (privilege is personal to client).

46. See International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 180 (M.D. Fla. 1973); Kirkland v. Morton Salt Co., 46 F.R.D. 28, 30 (N.D. Ga. 1968); Comment, supra note 40, at 864–66. The federal rule explicitly excludes privileged materials from the scope of permissible discovery. See supra note 6 and accompanying text. The privilege may be waived, such as when privileged matter is disclosed to an unnecessary third party. These determinations, however, do not involve the discretionary weighing of interests used to compel discovery of work product. See supra notes 19–21 and accompanying text.

47. J. WIGMORE, supra note 44, § 2292, at 554. See Ramsey v. Mading, 36 Wn. 2d 303, 311–12, 217 P.2d 1041, 1046, (1950); see also infra note 54 (agency and confidential communications).


49. See J. WIGMORE, supra note 44, § 2291, at 554. Wigmore, though defending the privilege, stated: “[I]t is not all indirect and speculative; it is not plain and concrete.” Id. See also MCCORMICK, supra note 43, ¶ 72, at 172 (“[E]ven if the importance of given interests and relationships
deny protection where the benefits are slight, or costs are unusually high.\footnote{see, e.g., Dike v. Dike, 75 Wn. 2d 1, 10-11, 448 P.2d 490, 496 (1968) ("[T]he privilege . . . must be strictly limited to the purpose for which it exists."); Foster v. Hall, 29 Mass. 89, 97 (1831) ("The rule of privilege, having a tendency to prevent full disclosure of the truth, ought to be construed strictly."); see also J. WIGMORE, supra note 44, § 2291, at 554 (advocating strict construction of the privilege); Comment, Discovery of an Insured's Statement to the Agent of His Insurer in an Accident Report Situation, 11 Val. U.L. Rev. 91, 93-94 (1976).}

2. \textit{Extension of Attorney-Client Privilege to Insured-Insurer Communications}

A split of authority has arisen regarding the applicability of attorney-client privilege to post-accident insured-insurer communications. Federal courts have refused to extend attorney-client privilege to an insured's statement made to the insurer in an accident investigation.\footnote{e.g., Fort Howard Paper Co. v. Affiliated F.M. Ins. Co., 64 F.R.D. 694 (E.D. Wis. 1974); Jackson v. Kroblin Refrigerated Xpress, Inc., 49 F.R.D. 134 (N.D. W.Va. 1970); Gottlieb v. Brestler, 24 F.R.D. 371 (D.C. 1959). See also Comment, supra note 47, at 104 n.85 for additional cases, and at 104-06 for critique of the federal court's position.} A majority of state courts, however, have granted the privilege, barring discovery of post-accident insured-insurer statements, through an agency theory.\footnote{e.g., People v. Ryan, 30 Ill. 2d 456, 458, 197 N.E.2d 15, 17 (1964) (insured properly has an expectation that communication with the insurer is for the dominant purpose of transmission to an attorney to protect the insured's interests); Hollien v. Kaye, 194 Misc. 821, 87 N.Y.S.2d 782 (1949). See Comment, supra note 50, at 106 n.92 for additional cases.} Courts doing so have been influenced by the insured's expectation of confidentiality and his or her contractual obligation to disclose fully all facts to the insurer.\footnote{See, e.g., People v. Ryan, 30 Ill. 2d 456, 457, 197 N.E.2d 15, 17 (1964); Brakhage v. Graff, 190 Neb. 53, 206 N.W.2d 45 (1973); Hollien v. Kaye, 194 Misc. 821, 87 N.Y.S.2d 782, 784-85 (1949) (insured is bound by contract to make a complete report to the carrier and should not be discouraged from doing so by fear of unauthorized disclosure); see also, Comment, supra note 50, at 109 (courts have found the intent and reasonable expectations of the insured to be interests worth protecting).}

An agency theory extending attorney-client privilege to insured-insurer communications regards the insurance company as a party necessary for transmitting the information from the client to the selected attorney.\footnote{See, e.g., People v. Ryan, 30 Ill. 2d 456, 197 N.E.2d 15, 17 (1964); Brakhage v. Graff, 190 Neb. 53, 206 N.W.2d 45, 48 (1973); Hollien v. Kaye, 194 Misc. 821, 87 N.Y.S.2d 782, 785-86 (1949). Privileged communications may be handled only by those agents reasonably necessary for transmission to the attorney. See Hawes v. State, 88 Ala. 37, 7 So. 302, 313 (1889); Davenport Co. v. Pennsylvania R.R., 166 Pa. 480, 31 A. 245, 246 (1895). Note also that under the agency theory, it is necessary to show that the statement was recorded for the purpose of communication to an attorney. Communications arising independently of that purpose are "preexisting" papers, and not privileged even if later entrusted to an attorney. Edison Elec. Light Co. v. United States Elec. Lighting Co., 44 F. 294, 298 (C.C.N.Y. 1890); Parkhurst v. City of Cleveland, 77 N.E. 2d 735, 737 (Ohio C.P. 1947); see also Comment, supra note 50, at 95-101.} The
privilege applies even though the particular attorney who will represent the insured has not been ascertained.55 Courts refusing to extend the privilege have criticized the agency theory on several grounds. These courts have asserted that the absence of privilege would not cause the defendant to withhold or alter his or her statement.56 Thus, the benefit of the privilege, in terms of encouraging disclosure, is minimal. In addition, courts have reasoned that, in this instance, the costs of withholding materials, measured in terms of information potentially lost to the truth-finding process, are exceedingly high.57 Courts have also asserted that the right of the insurance company to use the statement for purposes adverse to the client’s interest is inconsistent with a claim of privilege on his or her behalf.58

This conflict and confusion, then, surrounded the two doctrines when the Washington Supreme Court considered the discoverability of insured-insurer communications for the first time in Heidebrink v. Moriwaki.

II. HEIDEBRINK V. MORIWAKI: THE COURT’S DECISION

Defendant Moriwaki had been burning grain stubble on his farm, next to the state highway near Moses Lake, Washington.59 Plaintiff Heidebrink was involved in an automobile collision, which she alleged was caused by thick smoke from Moriwaki’s field.60 Two days later, Moriwaki’s insurer tape-recorded Moriwaki’s statement regarding the matter.61 Plaintiff subsequently sought this statement through discovery.62

The trial court ruled that the statement was not discoverable, but plaintiff was granted discretionary review of the determination.63 The Court of

55. See, e.g., State ex rel. Cain v. Barker, 540 S.W.2d 50, 56 (Mo. 1976); Brakhage v. Graff, 190 Neb. 53, 206 N.W.2d 45, 48 (1973); see also, Comment, supra note 50, at 98 (a statement taken for eventual transmission to an attorney may contain the type of information the privilege seeks to protect, even though the attorney-client relationship does not yet exist).

56. See, e.g., Jacobi v. Podevels, 23 Wis. 2d 152, 127 N.W.2d 73, 76 (1964) (since insured parties are contractually obligated to cooperate, if they give false information, or otherwise refuse to cooperate, they may forfeit their benefits under insurance contracts).

57. An eyewitness account recorded shortly after an accident has been called a “catalyst of unique value in the development of the truth through the judicial process.” De Bruce v. Pennsylvanin R.R., 6 F.R.D. 403, 406 (E.D. Pa. 1947).

58. E.g., Butler v. Doyle, 112 Ariz. 522, 544 P.2d 204, 207 (1975) (determinations regarding coverage, renewal of insured’s policy, and whether insured has fulfilled the obligation to cooperate may result in use of the statement in a manner adverse to the client’s interest); Jacobi v. Podevels, 23 Wis. 2d 152, 127 N.W.2d 73, 76 (1964) (insurer may use statement against insured).


60. Id.

61. Id. at 394, 706 P.2d at 213.

62. Id.

Appeals ordered production of the statement. In a 6-3 decision, the Washington Supreme Court reversed and held that the statement was protected under the work product immunity rule. The majority opinion did not address the attorney-client privilege issue. The dissent argued against protection on any basis.

Analyzing the case under Washington’s work product rule, the Heidebrink court recognized that no distinction exists between attorney and non-attorney work product. The court stated it would look to the specific expectations of the involved parties in seeking the answer to the anticipation of litigation question. The character of the contractual relationship between the insured and insurer strongly influenced the court in defining those expectations.

The court asserted that because insured persons are contractually obligated to cooperate with their insurance companies, they reasonably expect that statements made to an insurer, following an accident, will not be revealed to opposing parties. Because the contract between the parties calls for the insurer to select and retain an attorney to defend against any claims, the court stated, the insurer acts as the agent of the insured, and is expected to transmit the statement, in confidence, to the attorney so selected. The court noted that, without an expectation of confidentiality, the insured might hesitate to disclose everything known, possibly hindering representation by the selected attorney.

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64. Heidebrink, 104 Wn. 2d at 393, 706 P.2d at 213.
65. Id. at 393, 706 P.2d at 213.
66. Id. at 402, 706 P.2d at 218.
67. Id. at 403, 706 P.2d at 218 (Goodloe, J., dissenting). The majority omitted discussion of the attorney-client privilege issue in spite of the fact that amicus briefs had directed the court’s attention to this question. See infra note 114 and accompanying text. Although the majority initially stated the issue as “whether the statement of an insured to his or her insurance company is protected by the attorney-client privilege or the work product immunity rule,” the majority opinion made no further reference to attorney-client privilege. Heidebrink, 104 Wn. 2d at 393, 706 P.2d at 213.

68. The dissent argued that attorney-client privilege should not apply unless the insured believes that in making the statement he or she is either directly or indirectly consulting with an attorney for the purpose of obtaining legal advice. Heidebrink, 104 Wn. 2d at 407–8, 706 P.2d at 220 (Goodloe, J., dissenting). Moriwaki, the dissent asserted, had no such belief. Id. The dissent further argued that the initial inquiry by the insurance company regarding a potential claim against the insured is not made in anticipation of litigation for Rule 26(b)(3) purposes. Id. at 411, 706 P.2d at 222.

69. Wash. Civ. R. 26(b)(3); see supra note 2.
70. Heidebrink, 104 Wn. 2d at 396, 706 P.2d at 214–15.
71. Id. at 400, 706 P.2d at 216.
72. Id. at 400, 706 P.2d at 217.
73. Id.
74. Id.
cause the insured to bear the burdens of the insurance contract without reaping its benefits. The court asserted that if the statement had been made directly to the selected attorney, it "obviously" would have been made in anticipation of litigation, and thereby would be protected under Rule 26(b)(3). The court concluded that, therefore, the contractual relationship between insured and insurer "mandates" extension of this protection. The court thus determined that Moriwaki's statement was prepared in anticipation of litigation, and was therefore protected from discovery by Rule 26(b)(3). The court refused to order production of the statement, because plaintiff Heidebrink failed to meet the "substantial need" test, as required to overcome protection under the work product rule.

III. THE HEIDEBRINK COURT'S MISPLACED RELIANCE ON PRIVILEGE CONSIDERATIONS IN WORK PRODUCT DOCTRINE ANALYSIS

A. The Heidebrink Court Did Not Reach the Anticipation of Litigation Question

The Heidebrink court purported to analyze the discoverability of insured-insurer communications under work product doctrine. Instead the court slipped imperceptibly into attorney-client privilege analysis. As a result, the court did not in fact reach the substance of the crucial anticipation of litigation question.

To come within the scope of work product protection, a sought-after statement must be prepared in anticipation of litigation. In determining whether Moriwaki's statement was prepared in anticipation of litigation, the Heidebrink court announced that it would look to the expectations of the

75. Id.
76. Id.
77. Id.
78. Id. at 400–01, 706 P.2d at 217.
79. See supra note 21 and accompanying text for an explanation of the substantial need test. The court reinstated the ruling of the trial court. Heidebrink, 104 Wn. 2d at 402, 706 P.2d at 217. The court found that although the statement was taken two days after the accident, the passage of time alone was an insufficient showing to compel discovery. Id. In this respect, Washington has placed itself in opposition to courts such as Pennsylvania's in De Bruce v. Pennsylvania R.R., 6 F.R.D. 403, 406 (E.D. Pa. 1947), which held that the value arising from the immediacy of a statement outweighs the harm to attorney and client from disclosure. The Heidebrink court also indicated that the mere possibility the document might reveal impeaching matter was insufficient to compel disclosure. 104 Wn. 2d at 402, 706 P.2d at 218.
80. Heidebrink, 104 Wn. 2d at 399, 706 P.2d at 216 ("The specific issue at hand is whether an insured's statement to his insurance carrier is protected from discovery by [the work product rule].").
81. See supra text accompanying note 18.
involved parties.\textsuperscript{82} In doing so, however, the court chose to focus on expectations arising from the preexisting contractual relationship between Moriwaki and his insurer.\textsuperscript{83} The court then focused on the most legally sensitive aspect of the relationship: the insured's interest in preserving confidentiality. The court failed to address whether either the insured or insurer expected that, because of the nature of the accident and surrounding circumstances, the insured's statement might eventually be used for litigation purposes. Instead the \textit{Heidebrink} court made the result dependent on the identity of the declarant and the declarant's relationship to the insurer.\textsuperscript{84}

The phrase "anticipation of litigation" itself suggests that the dispositive factor in the anticipation of litigation inquiry will be the motive for gathering the materials in question.\textsuperscript{85} The identity of the maker of a statement, therefore, is relevant only to the extent that it demonstrates the motive for recording the statement.\textsuperscript{86} The anticipation of litigation inquiry necessarily depends on the facts and circumstances giving rise to the investigation which would shape the motives of those preparing the materials in question.\textsuperscript{87}

The \textit{Heidebrink} court's analysis did not look to motive, or the events stimulating the investigation, but instead made a generalized analysis of the insured-insurer relationship.\textsuperscript{88} The court's rationale relied solely on an

\begin{itemize}
\item \textsuperscript{82} \textit{Heidebrink}, 104 Wn. 2d at 400, 706 P.2d at 216.
\item \textsuperscript{83} See supra notes 72–78 and accompanying text.
\item \textsuperscript{84} Insurance investigators might take statements from nonparty witnesses who have no connection with the insurer. Such witnesses would have no expectation of confidentiality.
\item \textsuperscript{85} Logic dictates that in seeking to determine if a document was prepared in anticipation of litigation, the inquiry must be whether anticipation of litigation, anticipation of some other event, or some entirely different motivation caused the document to be brought into existence. However, a number of motives may combine as the underlying impetus for the work product's inception. So long as trial preparation constitutes one of these motives, the doctrine applies. See GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 50–51 (S.D.N.Y. 1979) (documents prepared for use by government attorneys in a separate civil investigation determined to have also been prepared in anticipation of litigation for Rule 26(b)(3) purposes).
\item \textsuperscript{86} Although the Rule provides protection for materials prepared by parties, or by their insurers, the underlying inquiry remains constant. Normally, the motive of whoever prepared the materials, or directed their preparation, is at issue (the Rule requires materials be "prepared" in anticipation of litigation, see supra note 2). However, when the insured party plays a role in the preparation of work product materials by making the statement in question, the court may look to the insured's motivation in making the statement, in addition to that of the insurance company in recording it. In spite of the foregoing, the party resisting discovery still must show that the anticipation of litigation motivation existed, in either the insured or the insurer, when the materials were prepared, see supra text accompanying note 18. The \textit{Heidebrink} court erred not in where it looked to find anticipation of litigation, but rather in deciding what mental state satisfied the requirement. As a practical matter, however, the required motivation will likely be found first, if at all, in the insurance company, because of the insurer's greater experience in matters that result in litigation.
\item \textsuperscript{87} See Carver v. Allstate Ins. Co., 94 F.R.D. 131, 134 (S.D. Ga. 1982) (anticipation of litigation inquiry necessarily turns on the facts of each case); see also Comment, supra note 28, at 852.
\item \textsuperscript{88} See supra text accompanying notes 72–77.
\end{itemize}
expectation of confidentiality in the insured, arising from the contractual
obligation to cooperate with the insurance company. The court asserted
that failure to protect that expectation would endanger the insured's benefits
under the insurance contract. This is because of the conflict between the
insured's desire to keep damaging information from adverse parties, and
the effect not disclosing all known facts to the insurer might have on the
insured. While it is possible that the insured's expectation of privacy
arises because of a consciousness of impending litigation, such a theory
was not articulated by the court. Because the court never determined the
motive for the preparation of the statement, it never substantively reached
the anticipation of litigation question. Instead, the court took a path that
completely ignored the underlying policy of work product doctrine: safe-
guarding the trial preparation process.

The Heidebrink court's solution conceptually rested on the very core of
privilege doctrine. Encouraging full client disclosure by protecting con-
fidentiality is the primary purpose of attorney-client privilege. The court
labeled the insurer as the agent of the insured who will eventually transmit
the statement to the selected attorney. State courts extending attorney-
client privilege to insured-insurer statements offer the same rationale.
The Heidebrink court asserted that if the statement were made directly to
the selected attorney, it would have "obviously" been made in anticipation
of litigation. The only "obvious" point, however, is that such a statement
would have satisfied the insurer's desire to keep damaging information
from adverse parties, and the effect not disclosing all known facts to the
insurer might have on the insured.

89 Id.
90 Id.
91 The court stated that nondisclosure could hinder later representation by the attorney. Heidebrink, 104 Wn. 2d at 400, 706 P.2d at 217. The court was also motivated by the fact that insured parties must disclose everything they know to the insurance company, or else possibly forfeit all benefits under the contract. Id. at 400, 706 P.2d at 216. Without assurance that their statements will be protected from discovery, insured parties may be forced to an uncomfortable choice. They must either reveal information potentially adverse to their own interest, which will then be freely available to adverse parties, or risk losing coverage under the insurance contract and policy cancellation. In some cases, the insured may be contractually bound to disclose to the insurer information that might be used against him or her in a subsequent criminal proceeding. See, e.g., People v. Ryan, 25 Ill. 2d 233, 184 N.E.2d 853, 854 (1962), rev'd, People v. Ryan, 30 Ill. 2d 456, 458, 197 N.E.2d 15, 17 (1964) (Prosecutor in county court sought defendant's statement to insurer which had been turned over to her criminal defense attorney. The Illinois Supreme Court asserted that the privilege against self-incrimination was inapplicable to such materials.).
92 See supra text accompanying notes 69-78.
93 Id.
94 See supra notes 35-38 and accompanying text. The court's failure to observe the underlying policies of the Rule causes concern because policy articulation and application are the means by which lower courts are able to take prior cases and apply doctrine to new fact situations.
95 See supra note 44 and accompanying text.
96 Heidebrink, 104 Wn. 2d at 400, 706 P.2d at 217.
97 See supra notes 52-55 and accompanying text.
98 Heidebrink, 104 Wn. 2d at 400, 706 P.2d at 217.
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would come within the attorney-client privilege,99 and this certainty more logically comports with the court's discussion of expectation of confidentiality. Although the court halted its reasoning process after articulating the policies of attorney-client privilege,100 the court nevertheless concluded that statements made by insured parties to their liability carriers following an accident are protected work product.101

B. Effect of the Court's Fusion of Privilege and Work Product Doctrines

The reasoning and conclusion reached in Heidebrink result in a peculiar fusion of two distinct doctrines. The decision potentially impedes the application of work product doctrine because lower courts relying on the opinion will encounter difficulty in attempting to reconcile the Heidebrink rationale with standard work product doctrine analysis. The decision also has negative effects on privilege doctrine because the protected interest in Heidebrink received only limited immunity from discovery, yet the court characterized that interest as qualitatively equivalent to interests protected absolutely by privilege.

1. Application of Heidebrink to Work Product Doctrine

Lower courts in Washington will now know that statements made by insured parties to their liability carriers following an accident are protected from discovery by Washington Civil Rule 26(b)(3).102 The Heidebrink decision is inapplicable beyond the context of insured-insurer communications, however, because the court's analysis did not articulate what constitutes anticipation of litigation in a post-accident insurance investigation.103 Nevertheless, the Heidebrink court declared that its decision rested on the anticipation of litigation question.104 As a result, lower courts will look to the decision for guidance when faced with the need to make anticipation of litigation determinations in contexts other than post-accident communications between insured and insurer.

99. While many of the client's reasons for speaking to an attorney come under the umbrella of seeking legal advice, such reasons are not restricted to anticipation of litigation. The client may seek advice, for example, regarding contractual obligations. Such an inquiry is not necessarily related to preparing for litigation.
100. See supra notes 43–44 and accompanying text for the policies of attorney-client privilege.
101. Heidebrink, 104 Wn. 2d at 401, 706 P.2d at 217.
102. Id.
103. See supra text accompanying notes 80–94.
104. See supra note 80 and accompanying text.
Lower courts will find attempts to apply the *Heidebrink* decision confusing and awkward, even when faced with only a few dissimilar facts within an insurance investigation. Courts may need to make determinations regarding nonparty witness statements in circumstances essentially analogous to *Heidebrink*. The *Heidebrink* court articulated an expectation of confidentiality stemming from the insured's contractual relationship with the insurance company as the policy justification and rationale for determining that work product protection applied to defendant Moriwaki's statement.  

The decision implies that work product protection should not extend to nonparty witness statements because no expectation of confidentiality arises, even though Rule 26(b)(3) provides no basis for such an assertion. Lower courts must now either attempt to apply a rationale based on policy grounds that do not comport with standard work product doctrine analysis, or conclude that the *Heidebrink* decision offers no guidance on the anticipation of litigation issue.

The *Heidebrink* court's rationale and conclusion also lead to an analytical anomaly. The privilege for attorney-client communications can only be asserted by the client, or on the client's behalf, because the benefit of protecting a confidential relationship runs to the client alone. The court chose to protect the insured's statement as work product. As a result, either the insured or the attorney may assert the immunity.

The *Heidebrink* decision allows attorneys to withhold materials in their own right, yet the court's rationale offers no policy justification for attorneys doing so. This further illustrates the court's misplaced reliance on expectation of confidentiality in work product analysis.

2. **Negative Impact of Heidebrink on Privilege Doctrine**

The fusion of privilege and work product doctrine created by the *Heidebrink* court engenders an argument that the confidential relationships

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105. See supra notes 95–101 and accompanying text.
106. See supra note 2 and text accompanying note 18. It may be that the court took great pain specifically to prevent initial post-accident insurance investigations from coming within the scope of work product protection unless a need for confidentiality is present. See infra text accompanying notes 132–34. The court, in so doing, has grafted a requirement onto the Rule that does not exist in its plain meaning.
107. See supra note 45 and accompanying text.
108. See supra note 39 and accompanying text.
109. Because one of the goals of work product doctrine is to free the attorney from intrusions into the trial preparation process, see supra notes 35–38 and accompanying text, the attorney benefits from the protection. Yet the *Heidebrink* court's analysis identified no interest of the attorney. See supra notes 72–78 and accompanying text. The most disturbing aspect of the attorney's right to assert the immunity is that allowing the attorney to do so flies in the face of the court's announced reason for allowing the protection to apply: the needs of the client.
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protected by common law privileges may now deserve no more than qualified immunity from discovery. Under the court's analysis, the protected interests identified in Heidebrink are no different in character from those protected absolutely by attorney-client privilege doctrine. Yet the court granted the "confidential relationship" in Heidebrink only qualified immunity from discovery. The court in Heidebrink may be interpreted to have signalled that absolute protection for attorney-client or other protected relationships is no longer warranted.

C. Reasons for the Heidebrink Court's Confidentiality Analysis

Amicus briefs in Heidebrink v. Moriwaki offered arguments both for and against protection from discovery for Moriwaki's statement. These briefs presented work product doctrine and extension of attorney-client privilege as separate and distinct concepts. The court failed to acknowledge those distinctions, instead combining the two doctrines in its analysis. It is apparent that the Heidebrink court found the insured's interest in maintaining the confidentiality of post-accident communications with the insurer worth protecting. The court might have protected that interest through alternative courses incorporating singular adherence to one doctrine or the other, or through creation of a new insured-insurer communication doctrine. However, each of these paths would have presented difficulties of its own to the court.

I. Extension of Attorney-Client Privilege to Insured-Insurer Communications

The Heidebrink court's emphasis on preserving the benefit of the insured's contractual relationship with the insurer, leading to the court's

110. The interest protected in Heidebrink is an "expectation of confidentiality," without which the insured may hesitate to disclose all relevant facts, hindering eventual representation by the selected attorney. Heidebrink, 104 Wn. 2d at 400, 706 P.2d at 216-17. This is identical to the interest underlying attorney-client privilege. See supra note 44 and accompanying text.

111. See supra notes 72-78 and accompanying text.

112. The substantial need test by which adverse parties can ask the court to compel disclosure of protected ordinary work product qualifies work product protection. See supra notes 3, 20, and accompanying text.

113. It seems unlikely that the court intended this result. However, the privilege doctrine may be destined to receive discretionary application utilizing a balancing approach, rather than blanket absolute protection upon recognition. McCormick, supra note 43, at 187. If the court sought this result it could have more effectively achieved it by direct action.

114. See Brief of Amicus Curiae, Washington State Trial Lawyers Ass'n (arguing against protection); Brief of Amicus Curiae, Washington Ass'n of Defense Counsel and Nat'l Ass'n of Independent Insurers (arguing for protection), Heidebrink v. Moriwaki, 104 Wn. 2d 392, 706 P.2d 212 (1985).

115. See supra text accompanying notes 80-101.
recognition of a protected confidential relationship, indicates that the court was persuaded to protect Moriwaki’s statement by arguments traditionally supporting privilege doctrine. The court might have protected the insured’s relationship with the insurer by recognizing an extension of attorney-client privilege, as a majority of other state courts have done. The scope of immunity afforded by the privilege, however, may be responsible for the court’s choice not to do so.

Protecting the insured’s statement to the liability carrier from discovery under the work product rule, rather than under attorney-client privilege, significantly affects the degree of protection provided. Disclosure of ordinary work product can be compelled by an adverse party who makes the proper showing of substantial need, a decision wholly within the discretion of the trial judge. Under attorney-client privilege, however, discovery is barred absolutely. While other courts have rejected extension of attorney-client privilege to insured-insurer communications on doctrinal grounds, concern with the scope of immunity may have presented the Heidebrink court with a more pragmatic reason for doing so.

Given the Heidebrink court’s preoccupation with attorney-client privilege considerations in its work product analysis, the court’s refusal to extend the privilege must have stemmed from a belief that the interests served did not warrant absolute protection from adverse parties. The court chose, therefore, to adhere to a liberal discovery policy because those materials, as protected work product, may be acquired by adverse parties under the proper circumstances.

Although bringing insured-insurer communications within the scope of attorney-client privilege presents analytical difficulties, such an analysis is not as strained as that ultimately offered by the court. However, only a radically modified privilege theory could have achieved a result analogous to that in Heidebrink.

116. See supra text accompanying notes 72–78.
117. Two rationales identified by the Heidebrink court, the insured’s expectation of confidentiality and contractual obligation to disclose all known facts, have influenced other courts to extend attorney-client privilege to post-accident insured-insurer communications. See supra note 53 and accompanying text.
118. See supra notes 52–55 and accompanying text.
119. See supra notes 19–20 and accompanying text.
120. See supra note 46 and accompanying text. In addition, protection under attorney-client privilege has evidentiary impact beyond the discovery stage that work product protection does not. See C. WRIGHT & A. MILLER, supra note 6, § 2017, at 132–33.
121. See supra text accompanying notes 56–58.
123. See supra notes 56–58 and accompanying text.
124. See supra notes 80–101 and accompanying text.
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2. Recognition of an Independent, Modified Privilege

The Heidebrink court might have solved the perceived degree-of-protection problem by recognizing a separate modified privilege apart from that of attorney-client. This privilege could be based on the modern relationship between insurer and insured, granting only qualified immunity similar to that afforded by the work product rule. However, recognition by the court of such a qualified privilege would have been nearly without precedent.

Establishing an insured-insurer modified privilege presents the possibility of considerable drawbacks. The court might open the door to claims for recognition of similar interests under the doctrine. Other "confidential" relationships currently not recognized at common law, such as accountant-client, might be equally deserving of protection. The court would eventually be forced to announce the limits of a modified privilege doctrine, potentially a question of considerable difficulty. Recognition of limited privileges might also tend to dilute the force of existing absolute privileges. An insured-insurer modified privilege theory is a far from ideal solution. Not surprisingly, the court did not articulate such a theory even though it conceptually most closely comports with the rationale and result ultimately offered.

Given the court's position that both an absolute or a modified privilege analysis would have undesirable consequences, the court turned to work product doctrine and, inevitably, the anticipation of litigation requirement.

125. Essentially, the court achieved this practical result under the label of work product doctrine. See supra text accompanying notes 100-01 and infra text accompanying note 134.
126. Jackson v. Kroblin Refrigerated Xpress, Inc., 49 F.R.D. 134, 136-37 (N.D. W.Va. 1970); Gottlieb v. Bresler, 24 F.R.D. 371, 372 (D.D.C. 1959) (no privilege exists for insured-insurer communications). But see Brakhage v. Graff, 190 Neb. 53, 206 N.W.2d 45, 47 (1973) (An insured's statement to insurer was held to be within attorney-client privilege for the sole purpose of the Nebraska discovery statute which, as stated by the court, allowed the following: "Upon motion of any party showing good cause therefor the court may order production of any document not privileged.").
127. Wigmore asserted that the common law required four fundamental conditions be met to find a privileged relationship: (1) communications must originate in a confidence that they will not be disclosed; (2) confidentiality must be essential to maintaining a satisfactory relationship between the parties; (3) the relationship must be one that community opinion dictates should be sedulously fostered; and (4) the injury of disclosure must be greater than the benefits of same. J. Wigmore, supra note 44, § 2285, at 527. Failure to meet one or more of these requirements prevented finding a privilege at common law in such relationships as those between clients and accountants, sureties, bankers, journalists, and others. Id. § 2286, at 528-30.
128. Since the character of the insured's interest is the same as that protected by traditional common law privileges, it may be argued that common law privileges would not warrant a greater degree of protection than that offered under a modified privilege theory. For a similar line of reasoning presented by the Heidebrink decision, see supra text accompanying notes 110-12.
129. See supra text accompanying notes 100-01 and infra text accompanying note 134.
3. *Reasoned Analysis of the Events Triggering Investigation*

Work product doctrine afforded the *Heidebrink* court an opportunity to provide limited protection from discovery to the insured-insurer relationship. Because federal and other courts had analyzed the discoverability of statements made in the post-accident insurance investigation context under the auspices of work product doctrine, it was not unusual for the Washington court to do so.

In deciding the anticipation of litigation issue, however, the *Heidebrink* court could have focused not on the preexisting insured-insurer relationship, but instead on a reasoned analysis of the events that led to the recording of Moriwaki’s statement by the investigator. That analysis would properly have been directed at the motive for recording the statement. However, had the court found that the accident and surrounding circumstances had provoked an investigation made in anticipation of litigation, it would have faced another dilemma. Logically, any materials gathered following a similar set of facts would likewise be prepared in anticipation of litigation. Future determinations in lower courts would then extend work product immunity to such routine investigations without considering the source of the materials sought. Protection would be granted whether that source was the insured party, another party, a nonparty witness, or a physical investigation by the insurer. The court indicated that this result was unacceptable by stating: “broad protection for all investigations conducted by an insurer . . . is . . . an unsatisfactory answer. . . .” Instead, again favoring a liberal discovery policy, the court offered an opinion focused on the insured which granted limited protection to post-accident insured-insurer communications, but could not be used to extend work product protection to insurance investigations in any other context. Thus, when faced with a slate of unacceptable doctrinal choices, the court refused to proceed wholly under any doctrine. This choice will prove to be the most objectionable of all, because of its confusing fusion of two distinct doctrines.

*The Heidebrink Court Could Have Focused on the Events Triggering Investigation*

Fear of extending broad discovery protection to insurance investigations

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130. See supra note 23 and accompanying text.
131. See supra notes 85–86 and accompanying text.
132. *Heidebrink*, 104 Wn. 2d at 399, 706 P.2d at 216.
133. See supra text accompanying note 122.
134. See supra text accompanying notes 105–06.
135. See supra notes 102–13 and accompanying text.
motivated the *Heidebrink* court to offer its constrained work product analysis. Numerous courts have recognized, as the *Heidebrink* court did, that the ordinary course of an insurance company’s business frequently entails litigation.\(^\text{136}\) A perceived need for open discovery has fostered reluctance by some courts to extend work product immunity to routine post-accident investigations.\(^\text{137}\) This consideration has contributed to a number of decisions subject to analytical criticism.\(^\text{138}\) However, a less convoluted solution for the dilemma exists which would have allowed the court to adopt the work product doctrine under a logical rationale.

Efforts by many courts to reconcile work product immunity with a broad discovery policy have focused on the anticipation of litigation requirement.\(^\text{139}\) Courts could instead look to the substantial need test, by which Rule 26(b)(3) immunity can be overcome,\(^\text{140}\) to mitigate any undue restraint on discovery which the Rule might otherwise cause.\(^\text{141}\) The only materials properly withheld from discovery under the Rule 26(b)(3) framework are those materials for which an adverse party cannot demonstrate substantial need, or those materials whose substantial equivalent can be obtained elsewhere by the adverse party without undue hardship.\(^\text{142}\) Therefore, Rule 26(b)(3) allows an adverse party to discover any materials that are actually needed for the preparation of his or her case. Proper exercise of the discretionary “substantial need” determination by trial judges would prevent Rule 26(b)(3) from insulating all documents in an insurance company’s files from discovery.

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\(^{138}\) See supra notes 28-34 and accompanying text.

\(^{139}\) The “ordinary course of business” exception, see supra notes 28-29 and accompanying text, is an example of such efforts. See Comment, supra note 28, at 852.

\(^{140}\) See supra text accompanying notes 20–21.

\(^{141}\) See Comment, supra note 28, at 853, suggesting that the practice of grafting additional factors onto Rule 26(b)(3) which function to deny initial work product protection, such as the ordinary course of business exception, see supra notes 28-29 and accompanying text, upsets the balance of the Rule. The Rule was was designed deliberately to impede discovery of trial preparation materials. The Comment concludes courts should abandon the exception and instead follow the framework of the Rule. Id. at 855.

\(^{142}\) See supra notes 19–21 and accompanying text.
would still be required to show that materials had been gathered in response to a fact pattern giving rise to anticipation of litigation. The trial judge would still retain discretion to order production of protected materials, if an adverse party made a proper showing.

The Heidebrink court could have looked to the substantial need component of Rule 26(b)(3) to reconcile difficulties raised by a perception that the Rule functions to limit discovery too severely. The court then would have been able to focus on the events leading up to the investigation, rather than on a privilege analysis. A reasoned analysis of the events triggering investigation would have provided lower courts in this state guidance for determining when insurance investigations are conducted in anticipation of litigation, as required for protection under the work product rule. The confused state of decisional law on this issue, coupled with the pervasiveness of liability insurance in our society, makes such guidance essential. At the very least, such an analysis would have placed the decision on proper analytical grounds, and maintained the distinctions between privileges and work product doctrine.

IV. CONCLUSION

The Heidebrink decision protects from discovery as work product statements made by insured parties to their liability insurance carriers following accidents. The court, however, extended this protection in order to preserve the insured’s confidential relationship with the insurer. Thus, the court’s rationale relied on policies and considerations derived from privilege doctrine, not those of work product. Seeking to serve a policy allowing broad discovery, the court was unwilling to extend the absolute protection from discovery afforded to privileged materials, and instead granted qualified immunity under the work product rule. The court’s fusion of two distinct legal concepts creates analytical anomalies, is detrimental to privilege doctrine, and raises inappropriate barriers to work product protection.

Analyzing the anticipation of litigation question by focusing on the nature of the events that stimulated the investigation would have placed the

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143. See supra text accompanying note 18.
144. See supra notes 19–21 and accompanying text.
145. See supra text accompanying note 18. The precise form that analysis would take would be determined by the court. The test proposed by Professors Wright and Miller would be an appropriate starting point. See C. Wright & A. Miller, supra note 6, § 2024, at 198.
146. See supra notes 23–34 and accompanying text.
147. See Behrns v. Burke, 89 S.D. 96, 229 N.W.2d 86, 95 (1975) (Dunn, C.J., dissenting). The extensive existence of liability insurance leads to a likelihood that lower courts will make such anticipation of litigation determinations.
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decision on appropriate grounds. Such an analysis would also have provided lower courts criteria for determining the anticipation of litigation question in any post-accident insurance investigation. Had the court made such an analysis, reaching the same result, its decision would have extended work product immunity to post-accident insurance investigations in general. The court chose not to do so, again favoring a broad discovery policy. However, any hardships created by granting work product protection to routine insurance investigations could be mitigated through the discretionary substantial need test for compelling discovery of ordinary work product. Because the court declined to follow the framework of Rule 26(b)(3), the decision offers no guidance to lower courts outside of the narrowest possible reading of the facts of the case. The undesirable ramifications which now flow from Heidebrink do not result from inevitable analysis, but from incomplete analysis.

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