REL: April 5, 2019

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170804

Ex parte Alfa Insurance Corporation et al.

PETITION FOR WRIT OF MANDAMUS

(In re: R.G. "Bubba" Howell, Jr., and M. Stuart "Chip" Jones

v.

Alfa Insurance Corporation, Alfa Mutual General Insurance Corporation, Alfa Life Insurance Corporation, and Alfa Specialty Insurance Corporation)

(Montgomery Circuit Court, CV-14-901893)

PER CURIAM.

Alfa Insurance Corporation, Alfa Mutual General Insurance Corporation, Alfa Life Insurance Corporation, and Alfa Specialty Insurance Corporation (hereinafter referred to collectively as "Alfa") petition this Court for a writ of mandamus requiring the Montgomery Circuit Court to vacate its May 23, 2018, orders (1) denying Alfa's motion for a protective order as to materials Alfa contends are protected by the attorney-client privilege and (2) compelling Alfa to produce such materials for in camera inspection and for discovery. We grant the petition and issue the writ.

I. Facts and Procedural History

The parties recently were before this Court regarding an earlier discovery order. In Ex parte Alfa Insurance Corp., [Ms. 1170077, April 6, 2018] ___ So. 3d ___ (Ala. 2018) ("Alfa I"), Alfa sought mandamus review of a December 18, 2015, discovery order entered during the pendency of Alfa's appeal from the trial court's denial of Alfa's motion to compel arbitration, in which the trial court's judgment was affirmed, without an opinion, Alfa Ins. Corp. v. Howell (No. 1150151, Sept. 29, 2017) ___ So. 3d ___ (Ala. 2017) (table).

In Alfa I we summarized the pertinent factual background as follows:

> "R.G. 'Bubba' Howell, Jr., and M. Stuart 'Chip' Jones were insurance agents for an Alfa insurance agency in Mississippi. Their agency agreements with Alfa included an arbitration provision, as well as a provision requiring Howell and Jones to purchase 'errors and omissions' insurance coverage.
>
> "Howell and Jones purchased errors and omissions insurance policies from Alfa Mutual General Insurance Corporation ('the E&O policies'). The certificate of insurance for the E&O policies provided that Alfa, as the insurer, would
>
> > "'pay on behalf of the Individual Insured all sums in excess of deductible amount for which Individual Insured is legally obligated to pay as damages as a result of CLAIMS FIRST MADE AGAINST INDIVIDUAL INSURED DURING THE COVERAGE PERIOD by reason of acts, errors, or omissions in the performance of Professional Services by the Individual Insured, provided that such acts, errors, or omissions occurred (i) when acting on behalf of [Alfa] or with the specific consent of [Alfa], and (ii) during the Coverage Period.'
>
> "(Capitalization in original.) The certificate also sets forth three 'key exclusions' to coverage under the E&O policies: '(1) Intentional, dishonest, fraudulent, etc., acts; (2) Commingling of funds; (3) Suits/claims by business enterprises owned by Individual Insured and not named on declarations.'
>
> "In 2012, Alfa accused Howell and Jones of selling competing products in contravention of their agency agreements; Howell and Jones, however, alleged that their actions had been approved by

Alfa. Regardless, Alfa forced Howell to resign his position as an Alfa agent on December 31, 2012, and discharged Jones on January 1, 2013.

"Procedural History

"A. The First Arbitration Proceeding

"On March 27, 2013, Howell and Jones invoked the arbitration provision in their agency agreements by initiating separate arbitration proceedings against Alfa, seeking post-separation benefits and damages. On June 19, 2013, Alfa answered the complaints in arbitration and filed counterclaims against Howell and Jones alleging breach of contract, breach of fiduciary duty, fraudulent misrepresentation, suppression, and intentional interference with business relations.

"....

"On May 23, 2014, Howell and Jones submitted insurance claims under the E&O policies demanding that Alfa defend and/or indemnify costs to combat Alfa's counterclaims against them. On June 4, 2014, Alfa denied Howell's and Jones's insurance claims on the basis that[, among other reasons, Howell and Jones's conduct fell within the exclusions from coverage under their respective E&O policies]. On July 9, 2014, Alfa voluntarily dismissed its counterclaims against Howell and Jones without prejudice.[1]

"B. The State-Court Proceedings

"On November 13, 2014, Howell and Jones filed a complaint in the Montgomery Circuit Court asserting claims of breach of contract, bad faith, abuse of process, the tort of outrage, and conspiracy against

[1]The arbitrators eventually awarded Howell and Jones post-separation benefits and arbitration fees.

Alfa. Howell and Jones alleged, among other things, that Alfa breached the E&O policies by refusing to provide them defense and/or indemnity coverage on the counterclaims and that Alfa had filed the counterclaims, which it knew were not covered under the E&O policies, in the arbitration proceedings for the purpose of causing Howell and Jones to incur thousands of dollars in unnecessary legal expenses.

"Along with their complaint, which they subsequently amended, Howell and Jones propounded discovery requests, including a request for admissions and a request for production of documents. ... They also submitted a notice of depositions, including a request for the depositions of Angela Cooner, Thomas Treadwell, Tom David, and Charles Elmore, all of whom were legal counsel for Alfa, as well as for '[o]utside legal counsel of [Alfa] who participated in or contributed to the drafting and filing of the counterclaims against [Howell and Jones] as dated June 19, 2013.'

"On December 9, 2014, Alfa filed a 'Response to Requests to Admit' in which it denied most of the requested admissions, but it also repeatedly stated that '[d]iscovery is ongoing and will be supplemented as permitted under the Alabama Rules of Civil Procedure, and any request for additional information not contemplated by Rule 36 will be responded to within the bounds of the Alabama Rules of Civil Procedure.'

"On May 6, 2015, Howell and Jones filed a motion to compel Alfa to answer and to respond to the first discovery requests filed on November 13, 2014. That same afternoon, Alfa filed its response and objection to the motion to compel discovery, as well as a motion for a protective order. Alfa argued that the matters, documents, and depositions requested by Howell and Jones were all protected by the attorney-client privilege. ...

> "On August 13, 2015, the circuit court granted Howell and Jones's motion to compel discovery, giving Alfa three weeks (until September 3, 2015) to respond. ...
>
> "....
>
> "On September 3, 2015, Alfa filed a 'Motion to Compel Arbitration, Dismiss, and Stay Proceedings.' The motion to compel was based upon the arbitration provision in the agency agreements. Simultaneously, Alfa filed its answer to the complaint in which it noted that it was 'specifically reserving the right to arbitrate these matters pursuant to the requirements of the Independent Exclusive Agency Agreement in effect between the parties in accordance with the Motion to Compel Arbitration filed prior to this initial Answer.' On the same date, Alfa also filed an 'Objection to Discovery Request and Notice of Service of Discovery Documents' along with a privilege log listing items Alfa identified as protected by the attorney-client privilege and the work-product doctrine."

___ So. 3d at ___. Alfa's privilege log asserted that Alfa was providing, "in accordance with the Alabama Rules of Civil Procedure," "a description of the nature of the documents, communications, or things not produced sufficient to enable the Plaintiffs to ascertain the need, or absence thereof, to contest the claim of privilege or protection." See Rule 26(b)(6)(A), Ala. R. Civ. P. The privilege log provides the pertinent Bates stamp for various documents being withheld and some description of those documents (for example, the

document bearing Bates stamp "0001-0003" is described as a "[l]etter transmitting Coverage Opinion from outside counsel, concerning coverage of ... Jones, Policy Certificate No. EO-104-57"). The privilege log also includes various general descriptions such as "[a]ny and all communications, of any kind whatsoever, by or between Alfa in-house counsel and any other outside counsel representing Alfa in this or related matters, pertaining in any way to the subject matter of the Plaintiffs' Complaint or Plaintiffs' First Amended Complaint, filed in this case."

This Court's opinion in Alfa I continues as follows:

> "On October 30, 2015, the circuit court denied Alfa's motion to compel arbitration, to dismiss, and to stay the proceedings.
>
> "On November 2, 2015, Howell and Jones propounded their first set of interrogatories to Alfa. They also submitted their second set of requests for production of documents to Alfa, in which they sought the following:
>
> > "'1. ... [E]ach document in the custody or control of Alfa that it relied upon when it authorized the filing of counterclaims in arbitration against Chip Jones and Bubba Howell.
> >
> > "'2. ... [E]ach piece of correspondence and/or memo in the custody or control of Alfa that touches upon or concerns the

> counterclaims in arbitration against Chip Jones and Bubba Howell.
>
> "'3. ... [E]ach document provided to Dennis Bailey[, an attorney with the law firm Rushton, Stakely, Johnston & Garrett, P.A.,] by Alfa as part of the coverage opinion sought from Dennis Bailey regarding the claims for defense and indemnity asserted by Chip Jones and Bubba Howell pursuant to the Alfa policies issued to them.
>
> "'4. ... [E]ach piece of correspondence between Alfa and Dennis Bailey or the law office of Rushton Stakely concerning the claims for defense and indemnity asserted by Chip Jones and Bubba Howell pursuant to the Alfa policies issued to them. ...'[2]

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[2]Howell and Jones's second request for production also stated: "ANY DOCUMENT WHICH HAS BEEN WITHHELD ON THE BASIS OF ATTORNEY-CLIENT PRIVILEGE, ATTORNEY WORK PRODUCT AND/OR WHICH HAS BEEN DEEMED UNDISCOVERABLE BY THIS DEFENDANT SHOULD BE SPECIFICALLY DESIGNATED BY DATE, AUTHOR, ADDRESSEE, AND GENERAL SUBJECT MATTER, SO THAT THE COURT MAY RULE ON ITS ADMISSIBILITY." (Capitalization in original.) We note, however, that during the proceedings to compel the production of the materials at issue, Howell and Jones made no argument to the trial court that Alfa's privilege log failed to provide them with sufficient information to contest the privilege claim, see Rule 26(b)(6)(A), Ala. R. Civ. P., or that the trial court should require Alfa to provide additional information to establish that the materials were privileged attorney-client communications. Instead, Howell and Jones argued that the materials at issue fell within an exception to the attorney-client privilege. See infra. Likewise, Howell and Jones make no argument in their response to Alfa's petition for a writ of mandamus that Alfa's privilege log was insufficient to establish that the materials were privileged attorney-client communications.

> "On November 3, 2015, Howell and Jones filed notices of intent to serve subpoenas on the law firms of Rushton, Stakely, Johnston & Garrett, P.A. ('Rushton Stakely'), and Jackson Lewis P.C. ('Jackson Lewis'). From Rushton Stakely, Howell and Jones sought '[a]ll file materials, correspondence, invoices, memorandum, and any document of any kind that concerns Chip Jones and/or Bubba Howell making a claim for coverage concerning a policy of insurance issued by Alfa. This includes any communication with Alfa, and/or the law office of Jackson Lewis and/or Gray & Associates, LLC.' From Jackson Lewis, Howell and Jones similarly sought '[a]ll file materials, correspondence, memorandum, and any document of any kind that concerns Chip Jones and/or Bubba Howell making a claim for coverage concerning a policy of insurance issued by Alfa. This includes any communication with Alfa, and/or Gray & Associates.' On November 6, 2015, Alfa filed motions to quash the nonparty subpoenas.
>
> "On November 9, 2015, Alfa filed a notice of appeal challenging the denial of its motion to compel arbitration. Alfa Ins. Corp. v. Howell (No. 1150151).
>
> "On November 11, 2015, Howell and Jones filed a second motion to compel production of the complete discovery files from Alfa, including the coverage-opinion letters received from Dennis Bailey, an attorney with Rushton Stakely, and all factual information provided to Bailey for coverage review. They also filed motions to compel issuance of the nonparty subpoenas to Rushton Stakely and Jackson Lewis."

Alfa I, ___ So. 3d at ___. Howell and Jones's second motion to compel states:

> "1. As this Court is aware, the plaintiffs have asserted claims of breach of contract and bad faith

against the Alfa defendants. Bubba Howell and Chip Jones each had a policy of insurance with Alfa. Plaintiffs Howell and Jones submitted claims for defense and indemnity to Alfa. The Alfa defendants denied the claims for defense and indemnity.

"2. The plaintiffs have sought from the Alfa defendants in discovery the complete claim files for both Bubba Howell and Chip Jones.

"3. The Alfa defendants withheld from their production coverage opinion letters[3] received from Montgomery attorney Dennis Bailey and all factual information provided to Mr. Bailey for his coverage review. The Alfa defendants contend this information is protected.

"4. These materials predated the coverage denial letters issued to Bubba Howell and Chip Jones.

"5. In a case asserting breach of contract and bad faith, coverage letters provided by an attorney to an insurance carrier are discoverable. See Ex parte Nationwide Mut. Ins. Co., 990 So. 2d 355 (Ala. 2008). This information is not protected.

"6. Additionally, factual information provided to an attorney as part of the coverage review is discoverable. See Ex parte Alfa Mutual Insurance Company, 631 So. 2d 858 (Ala. 1993). This information is not protected."

(Some emphasis omitted.)

[3]It is our understanding that there is only one coverage-opinion letter at issue, even though some filings by the parties and at least one order of the trial court refer to opinion letters.

"On November 12, 2015, Alfa filed in the circuit court a motion to stay all proceedings pending the appeal [in case no. 1150151, the no-opinion affirmance]. On December 8, 2015, the circuit court conducted oral argument on the motion to stay and the motions to compel discovery." Alfa I, ___ So. 3d at ___. At the December 8, 2015, oral argument, counsel for Alfa contended, in part:

> "The question then is do the matters that have been noticed for subpoena, do they request items that are attorney-client privileged, and that was why Alfa filed its objection. The general rule is that an attorney cannot disclose the advice that he's given to his client. Certainly, that would seem to include coverage opinions, which is one of the primary items that the plaintiffs are seeking here.
>
> "And, in fact, we've cited previously to Your Honor Ex parte Great American Surplus Lines Insurance Co., 540 So. 2d 1357 (Ala. 1989). It basically stands for the principle that even coverage opinions are considered attorney-client privilege.
>
> "The plaintiffs have cited ... Ex parte Nationwide [Mutual] Insurance Company, [990 So. 2d 355 (Ala. 2008),] which dealt in part with matters leading up to the denial of coverage by Nationwide Insurance Company. And part of the question there was whether communications by their internal counsel, general counsel for the company, were in any way attorney-client privileged. Nationwide had actually already provided the plaintiffs in that case with the opinion letters themselves. So there are several issues there that are distinguishable

> from what's actually going on here. We're talking about outside counsel who were retained to represent Alfa and the communications back and forth. And the subpoena that the plaintiffs have sought to issue deal specifically -- they actually specifically request communications between Alfa and their counsel.
>
> "So, you know, there's not a question here about whether or not they are seeking attorney-client privileged materials. The very issue, the very matters, they are seeking are by definition attorney-client privileged materials."

Howell and Jones's counsel responded to Alfa's argument as follows:

> "When Alfa received [Howell and Jones's] claim, it was assigned to the head of the claims department. When we got the claim file, there was a letter produced to us by Dennis Bailey, a Montgomery attorney. And it was represented that Mr. Bailey had given Alfa .... Mr. Bailey was hired to give a coverage opinion. Well, [counsel for Alfa] contacted us and said we produced that letter to you inadvertently. We ask that you not read it.
>
> "I will say, Your Honor, I have not read that letter. I do know it's from Mr. Bailey because that was the subject that was discussed. But even today, I have not read that letter.
>
> "Alfa maintains that letter is protected by the attorney-client privilege and the work-product doctrine. We disagree with that.[4]

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[4]Rule 26(b)(6)(B), Ala. R. Civ. P., states:

> "If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the

> "Here's our basis. Okay. And, look, we know not to ask for attorney-client information. I mean, we've heard about that for a long time.
>
> "What happens when an insurance company hires a lawyer to give a coverage opinion, the facts that that lawyer receives to do the coverage opinion and then the coverage opinion itself, they are not subject to the attorney-client privilege. In this case, Alfa denied our clients' claims for defense and indemnification in part based upon the coverage opinion that was issued to it by Mr. Bailey. So we have three ... three Motions to Compel in this case, all that center on that subject.
>
> "First off, we filed, I think it's styled, the Second Motion to Compel against Alfa for that coverage opinion which they have withheld.
>
> "We've cited two cases, Judge, and we actually attached them to our Second Motion to Compel. One was Ex parte Alfa [Mutual Insurance Co., 631 So. 2d 858 (Ala. 1993)]. Alfa had tried very similarly to do this in the past, and the Supreme Court said that

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> claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. Either party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved."

Based on the materials before us, it does not appear that either party has submitted to the trial court, under seal, the coverage opinion inadvertently produced to Howell and Jones's counsel.

if a lawyer is given factual information or if the lawyer provides factual information, not advice, it's not protected.

"Well, in this case what information was provided to Mr. Bailey as part of his coverage opinion? Secondly, the Ex parte Nationwide [Mutual Insurance Co., 990 So. 2d 355 (Ala. 2008),] case, which we've provided, says that a coverage letter is not protected.

"....

"Judge, we're not asking for communications after the denial. We're asking for the information that led up to the denial, which would include the coverage opinion.

"....

"Now, independent of that, we have issue[s] -- or we have an issue. We filed two notices of intent to issue non-party subpoenas, one to Mr. Bailey at Rushton, Stakely wanting the factual information that was provided to him and correspondence and the coverage opinion concerning this claim for defense indemnification made by our clients. We've been specific that that's what we have limited it to.

"Secondly, we've also filed a notice of intent as to the Jackson, Lewis firm. Admittedly, Judge, the Jackson, Lewis firm did defend Alfa in the arbitration, but we've limited the non-party subpoena.

"What we're interested in is did Jackson, Lewis provide Alfa or Mr. Bailey as part of its investigation any factual information not concerning the arbitration, not concerning the advice about the arbitration, but facts concerning the claim for defense and indemnity.

> "For instance, if Jackson, Lewis had been contacted by Alfa or Mr. Bailey and said, hey, look, we've got a claim; we're investigating the claim; we need to know more about the allegations that have been made against our insureds; what can you tell us about those factual allegations, that's part of an investigation. It just so happens that Alfa was also being sued.
>
> "So, Judge, we've been very specific. We're not looking for anything about legal advice. We've looked at the caselaw, the Ex parte Alfa [Mutual Insurance Co.] and the Ex parte Nationwide cases, and we have framed our subpoenas in compliance with that.
>
> "I dare say [counsel for Alfa] will even acknowledge we're entitled to the coverage opinion. I mean, that's the law. We're entitled to the coverage opinion, and we're entitled to the factual information."

Counsel for Alfa responded:

> "It undoubtedly will not come as a shock to the Court that [counsel for Alfa] is not about to say that they're entitled to the coverage opinion.
>
> "First of all, no attorney, none, has the right to waive the attorney-client privilege. ...
>
> "This is the closely tailored request that [counsel for Howell and Jones] is referring to. All file materials, correspondence, memorandum, and any document of any kind that concerns Chip Jones and/or Bubba Howell making a claim for coverage concerning a policy of insurance issued by Alfa. This includes any communication with Alfa and/or [counsel for Alfa]. That is not closely tailored. That is asking for the communications.

"Now, Ex parte Alfa [Mutual Insurance Co., 631 So. 2d 858 (Ala. 1993)], ... involves Gordon Carter, who was an employee at Alfa. And, basically, all it says is the contents of the communication are not discoverable. That's what that case says.

"The facts on which he based or what he knew, any facts that he knew, are discoverable just like any other witness facts may be. Did he see the automobile run the traffic light? But his communication was not discoverable.

"....

"In addition to that, Ex parte Nationwide Insurance[, 990 So. 2d 355 (Ala. 2008),] ... doesn't stand for the proposition that you can get the opinion letter of the counsel on the coverage opinion.

"[In] Ex parte Nationwide, the defendants had an affirmative defense of advice of counsel. If I plead advice of counsel, then, by George, whatever that advice was is discoverable. We have not pled advice of counsel in this case.

"In addition, Kori Clement, who I know personally and was handling the case, voluntarily gave the coverage opinion to Alan Mortgage attorneys. So that's not the ruling of Judge Bolin in [Ex parte Nationwide] at all. And Judge Bolin basically is reciting what the situation was at that time .... Nationwide voluntarily gave it to them.

"And the issue that's involved here is what was communicated from Alfa to Dennis Bailey and what did Dennis Bailey communicate to Alfa. That's not discoverable. That's part of the attorney-client privilege; what did the attorneys say to Alfa and what did -- what did Alfa say to their attorneys.

> "Now, so neither of the cases address the real issue, and the law that still remains, and that is that coverage opinions ... are not discoverable."

On December 18, 2015, the trial court entered an order denying Alfa's motion to stay and granting Howell and Jones's second motion to compel production and their motions to compel issuance of nonparty subpoenas to Rushton, Stakely, Johnston & Garrett, P.A., and Jackson Lewis P.C. Alfa I, ___ So. 3d at ___.

> "On December 21, 2015, Alfa filed in this Court an emergency motion to stay the proceedings in the circuit court on the basis that the circuit court did not have jurisdiction to enter its December 18, 2015, order compelling discovery while the arbitration issue was pending on appeal. ... On December 28, 2015, this Court granted the emergency motion to stay the proceedings.
>
> "On September 29, 2017, this Court affirmed, without an opinion, the circuit court's October 30, 2015, order denying arbitration. (No. 1150151) ___ So. 3d ___ (Ala. 2017) (table). On October 10, 2017, in the circuit court, Alfa filed a motion to set aside the circuit court's December 18, 2015, order and filed a renewed motion for a protective order. On October 16, 2017, the circuit court denied the motion to set aside its December 18, 2015, order. On October 17, 2017, this Court entered its certificate of judgment in case no. 1150151.
>
> "On October 24, 2017, Alfa filed [a] petition for writ of mandamus and an emergency motion to stay the circuit-court proceedings. On December 8, 2017, this Court granted the emergency motion to stay."

Alfa I, ___ So. 3d at ___.

In Alfa I, we directed the trial court to vacate its December 18, 2015, order on the ground that the trial court had no jurisdiction to enter that order because it was issued during the pendency of Alfa's appeal of the denial of the motion to compel arbitration. We held that the trial court "clearly exceeded its discretion by entering orders allowing discovery to proceed before this Court resolved the issue whether Howell and Jones must arbitrate their claims against Alfa." ___ So. 3d at ___.

After our decision in Alfa I, Howell and Jones filed a motion "reassert[ing] their second motion to compel" discovery, but adding that the trial court could order an in camera inspection of "what is known as the 'coverage letter,'" and

> "an inclusive inspection of all documents and things it ordered produced on December 18, 2015, as long as the same are produced to the Court in full compliance with said order. Thereafter, there would be no question that the Court personally reviewed the documents and found them -- if it did so -- to be producible as it did in December 2015. Then, if the documents, including those produced by the non-parties, are to be produced in the manner, scope, and fashion of the 2015 order, the Court may enter an order detailing its own inspection, grant Plaintiffs' motions to compel, and simply deliver

> the documents itself to Plaintiffs in accordance with same."

The motion continues:

> "6. No matter the option chosen, however, Plaintiffs move the Court to grant [their] motions to compel and order the following in respect to outstanding discovery:
>
> > "(a) Plaintiffs' second motion to compel is GRANTED. Alfa is ordered to produce the coverage opinion letters as well as all correspondence and factual information exchanged with coverage counsel. Alfa is not required to produce any correspondence exchanged after the dates coverage was denied. Alfa is ordered to produce this information within ten (10) days from the date of this Order.
> >
> > "(b) Plaintiffs' motion to compel the issuance of non-party subpoena to Rushton, Stakely, Johnston, & Garrett is GRANTED. The subpoena is to be modified to require only the production of the coverage opinion letters, invoices, and any factual information provided to Rushton, Stakely, Johnston & Garrett as part of the coverage review.
> >
> > "(c) Plaintiffs' motion to compel the issuance of non-party subpoena to Jackson Lewis, P.C. is GRANTED. The subpoena is to be modified to require only the production of any information provided by Jackson Lewis, P.C. to the Alfa claims department as part of the claim review process for claims of defense and indemnity asserted by Plaintiffs Bubba Howell and Chip Jones. Jackson Lewis is not required to produce

> any information for the time period after the dates of denial."

(Emphasis omitted; emphasis added; capitalization in original.)

Alfa filed a response in opposition to the reasserted second motion to compel, again requesting that the trial court enter a protective order as to the communications between Alfa and its counsel. Alfa noted that it did not object to the production of factual materials provided to its counsel and asserted that it had already produced all factual material in its possession and related to the case. Alfa argued, however, that the coverage-opinion letter and other communications with its counsel were unquestionably communications protected by the attorney-client privilege and that Alfa had not waived its privilege. As to the latter, Alfa specifically noted that it had not raised advice-of-counsel as a defense to Howell's and Jones's claims. Further, Alfa contended, because the coverage letter and other attorney-client communications were subject to the privilege and the privilege had not been waived, "no in camera inspection is necessary or warranted."

On May 23, 2018, the trial court entered an order denying Alfa's request for a protective order and an order requiring

Alfa to produce the coverage letter and other attorney-client communications for in camera inspection. The latter order states:

> "It is Hereby ORDERED that an in-camera inspection of what is known as the 'Coverage Letter' and all documents and things Ordered produced herein are to be produced to this Court within ten (10) days of the date of this Order.
>
> "Plaintiffs' Second Motion to Compel is GRANTED. Alfa is Ordered to produce the Coverage Opinion Letters as well as all correspondence and factual information exchanged with Coverage Counsel. Alfa is not required to produce any correspondence exchanged after the dates coverage was denied. Alfa is Ordered to produce this information within ten (10) days from the date of this Order.
>
> "Further, Plaintiffs' Motion to Compel the issuance of non-party subpoena to Rushton, Stakely, Johnston, & Garrett is GRANTED. The subpoena is to be modified to require only the production of the coverage opinion letters, invoices, and any factual information provided to Rushton, Stakely, Johnson & Garrett as part of the coverage review.
>
> "Plaintiffs' Motion to Compel the issuance of non-party subpoena to Jackson Lewis, P.C. is GRANTED. The subpoena is to be modified to require only the production of any information provided by Jackson Lewis, P.C. to the Alfa claims department as part of the claim review process for claims of defense and indemnity asserted by Plaintiffs Bubba Howell and Chip Jones. Jackson Lewis is not required to produce any information for the time period after the dates of denial."

(Emphasis added; capitalization in original.)

On May 29, 2018, Alfa filed a motion seeking clarification as to the May 2018 order requiring that it submit the coverage letter and attorney-client communications for an in camera inspection:

> "The Order entered by the Court requires an in-camera inspection of what all parties agree is attorney client privileged materials, doing so within ten (10) days. But the Court then orders Alfa to produce the same attorney client privileged materials to the Plaintiffs. It is not clear what purpose would be served in an in-camera inspection if the parties agree that the materials are privileged communications between attorney and client. Second, what purpose is an in-camera inspection if this Court has already also ordered production of the documents to be inspected. ... Alfa respectfully requests that the Court clarify its order of May 23, 2018."

It does not appear that the trial court responded to the motion seeking clarification.

On June 1, 2018, Alfa filed this petition for the writ of mandamus, followed on June 6, 2018, by an emergency motion to stay the proceedings in the trial court. On June 11, 2018, this Court granted Alfa's motion to stay.

II. Standard of Review

> "Mandamus is an extraordinary remedy and will be granted only where there is '(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of

> another adequate remedy; and (4) properly invoked jurisdiction of the court.' Ex parte Alfab, Inc., 586 So. 2d 889, 891 (Ala. 1991). This Court will not issue the writ of mandamus where the petitioner has '"full and adequate relief"' by appeal. State v. Cobb, 288 Ala. 675, 678, 264 So. 2d 523, 526 (1972) (quoting State v. Williams, 69 Ala. 311, 316 (1881)).
>
> "... [M]andamus will issue to reverse a trial court's ruling on a discovery issue only (1) where there is a showing that the trial court clearly exceeded its discretion, and (2) where the aggrieved party does not have an adequate remedy by ordinary appeal. The petitioner has an affirmative burden to prove the existence of each of these conditions.
>
> "Generally, an appeal of a discovery order is an adequate remedy, notwithstanding the fact that that procedure may delay an appellate court's review of a petitioner's grievance or impose on the petitioner additional expense. ... In certain exceptional cases, however, review by appeal of a discovery order may be inadequate, for example, ... when a privilege is disregarded ...."

Ex parte Ocwen Fed. Bank, FSB, 872 So. 2d 810, 813-14 (Ala. 2003) (footnote omitted).

The order challenged in this case is reviewable because it allegedly disregards the attorney-client privilege. See, e.g., Ex parte Meadowbrook Ins. Grp., Inc., 987 So. 2d 540, 547 (Ala. 2007). Further, we note that "[t]he parameters of an evidentiary privilege and, in particular, whether the law recognizes contended-for exceptions to that privilege" are

questions of law, and, as such, are subject to de novo review. Ex parte Northwest Alabama Mental Health Ctr., 68 So. 3d 792, 796 (Ala. 2011).

III. Analysis

Alfa contends that the May 2018 orders denying its motion for a protective order and ordering the production of the materials at issue are due to be vacated. According to Alfa, the trial court exceeded its discretion by compelling the production of materials it says are protected by the attorney-client privilege. We note that parties disagree as to whether the May 2018 order compelling production of the materials at issue requires production of attorney-client communications only for purposes of an in camera inspection by the trial court or whether it also ordered the production of the materials to Howell and Jones. The May 2018 order begins by stating: "It is Hereby ORDERED that an in-camera inspection of what is known as the 'Coverage Letter' and all documents and things Ordered produced herein are to be produced to his Court within ten (10) days of the date of this Order." (Emphasis added; capitalization in original.) The May 2018 order continues, however, by granting Howell and Jones's

reasserted second motion to compel production of the materials at issue and to compel the issuance of subpoenas to Alfa's attorneys noted above. Alfa also notes that, after the entry of the May 2018 order compelling production, it sought clarification of that order, to no avail.

Alfa argues in its petition that "the trial court has not compelled the discovery of anything other than communication between attorney and client. Indeed, this is the very reason that no in-camera inspection is necessary or warranted." Petition at 10. Alfa further argues:

> "There is no precedent for requiring Alfa to disclose any information it sent to its coverage counsel where there has been no waiver of privilege. There is certainly no precedent for requiring Alfa to disclose communications with its litigation counsel from the underlying arbitrations. ...
>
> "No disclosure of coverage opinions, nor any other communication between attorney and client should be made where the defense of counsel was never raised. Moreover, the privacy of privileged communications between Alfa and its coverage counsel and litigation counsel should not be whittled away. The trial court must be instructed to vacate its orders of May 23, 2018 so that Alfa is not required to disclose any privileged communications with its coverage and litigation counsel."

Petition at 16-17.

In light of the ambiguity in the May 2018 order compelling production of the materials at issue, and the lack of clarification from the trial court as to whether it was ordering production of those materials only for purposes of an in camera inspection, we read Alfa's petition as arguing that a trial court exceeds its discretion in ordering production of materials, even for purposes of an in camera inspection, where the party asserting the attorney-client privilege has established a basis for concluding that the materials are privileged communications -- in the present case, by filing a privilege log describing the privileged nature of the pertinent materials and the basis for withholding those materials -- and the party seeking discovery has not established (1) that some evidence or testimony supports the assertion that the materials may not satisfy the requirements for privileged, attorney-client communications, (2) that the materials fall within an applicable exception to the attorney-client privilege, or (3) that the attorney-client privilege has been waived. We agree.

Rule 26(b)(1), Ala. R. Civ. P., states: "Parties may obtain discovery regarding any matter, not privileged, which

is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party ...." For purposes of the Alabama Rules of Civil Procedure, "the term 'not privileged,' ... refers to 'privileges' as that term is understood in the law of evidence." United States v. Reynolds, 345 U.S. 1, 6 (1953); Alabama Fed. Sav. & Loan Ass'n v. Howard, 534 So. 2d 609, 614 (Ala. 1988)(discussing the presumption that "cases construing the federal rules are authority for construing the Alabama rules"). As to the attorney-client privilege, Rule 502(b), Ala. R. Evid., states:

> "A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or a representative of the client and the client's attorney or a representative of the attorney, or (2) between the attorney and a representative of the attorney, (3) by the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party concerning a matter of common interest, (4) between representatives of the client and between the client and a representative of the client resulting from the specific request of, or at the express direction of, an attorney, or (5) among

> attorneys and their representatives representing the same client."

It is well settled that, absent some exception to the attorney-client privilege, "[t]he contents of a confidential communication between an attorney and his client are privileged and, thus, are not discoverable from either the attorney or his client unless the privilege is waived by the client." Ex parte Alfa Mut. Ins. Co., 631 So. 2d 858, 859-60 (Ala. 1993); see also, e.g., Ex parte Great American Surplus Lines Ins. Co., 540 So. 2d 1357, 1358 (Ala. 1989)("The general rule is that an attorney cannot disclose the advice he gave to his client about matters concerning which he was consulted professionally, nor can the client be required to divulge the advice that his attorney gave him."); Cooper v. Mann, 273 Ala. 620, 622, 143 So. 2d 637, 638-39 (1962)("It is generally held, in absence of statute, that communications between attorney and client are privileged and neither attorney nor client can be compelled to testify as to the contents of such communications.").

The Advisory Committee's Notes to Rule 502(b), Ala. R. Evid., state that

> "[t]he drafters intend that the same expansive interpretation that has been applied under prior Alabama case law be given to the term 'communication,' so as to include within that term any knowledge that the attorney acquires from the client and any advice or counsel given to the client. See Cooper v. Mann, 273 Ala. 620, 143 So. 2d 637 (1962) (privilege held to apply to all knowledge acquired by an attorney even if acquired through sight alone); Ala. Code 1975, § 12-21-161 (including within the attorney-client privilege testimony as to 'any matter or thing, knowledge of which may have been acquired from the client, or as to advice or counsel to the client')."[5]

(Emphasis added.) As this Court explained in Ex parte Alfa Mutual Insurance Co., 631 So. 2d 858 (Ala. 1993):

> "A communication within the protection of the attorney-client privilege is any act by which information is conveyed. ... By definition then, the attorney-client privilege protects only against the disclosure of the contents of the communication itself between an attorney and the attorney's client; it does not protect against the disclosure of the underlying facts by the person who has personal knowledge of those facts, even though that person may have consulted with an attorney. See Upjohn Co. v. United States, [449 U.S. 383 (1981)], wherein the Court noted:
>
> > "'The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

[5]Rule 502 supersedes § 12-21-161, Ala. Code 1975. See Advisory Committee's Notes to Rule 502.

> "'"[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962).
>
> "'....'
>
> "449 U.S. at 395-96, 101 S. Ct. at 685-86. (Emphasis in original.)"

631 So. 2d at 860 (some emphasis added); see also, e.g., Birmingham Ry. & Elec. Co. v. Wildman, 119 Ala. 547, 552, 24 So. 548, 549 (1898)("While a party who offers himself as a witness cannot refuse to answer pertinent questions on the ground that he had communicated to his attorney the matters inquired about, yet he cannot be compelled to state whether or not he had communicated certain facts to his attorney, or given him certain instructions.").

Rule 26(b)(6)(A), Ala. R. Civ. P., states: "When a party withholds information otherwise discoverable under these rules on a claim that it is privileged ..., the claim shall be made expressly and, upon written request by any other party, shall be supported by a description of the nature of the documents, communications, or things not produced sufficient to enable the demanding party to contest the claim." As noted above, Alfa filed a privilege log describing the materials it was withholding and the bases for its contention that the materials withheld, particularly the coverage-opinion letter, were attorney-client communications and thus not subject to disclosure. Alfa's position was consistent with this Court's decision in Ex parte Great American Surplus Lines Insurance Co., supra. In Ex parte Great American, a trial court ordered "the production of ... the 'opinion letter' written by Great American's legal counsel relating to the denial of coverage." 540 So. 2d at 1358. After noting that "[t]he purpose of the privilege is to encourage candid 'communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice.' Upjohn Co. v. United States, 449 U.S. 383, 389, 101

S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981)," 540 So. 2d at 1358, this Court stated:

> "With respect to the facts before us, we find that the [coverage] 'opinion letter' represents a communication from the attorney to the client, and that it is, therefore, a privileged communication. Any further discussion of this issue is unnecessary.
>
> "The general rule is that an attorney cannot disclose the advice he gave to his client about matters concerning which he was consulted professionally, nor can the client be required to divulge the advice that his attorney gave him."

Id. (emphasis added); see also Cooper v. Mann, 273 Ala. at 622, 143 So. 2d at 638–39 (noting that the attorney-client "privilege applies to all knowledge acquired in either instance, where acquisition is due to the attorney-client relation"). Likewise, Alfa's position is consistent with this Court's decision in Ex parte Meadowbrook Insurance Group, Inc., supra, in which a party sought to discover attorney-client communications in support of a tort-of-outrage claim filed against the insurer. This Court noted that "'[t]he general rule is that an attorney cannot disclose the advice he gave to his client about matters concerning which he was consulted professionally, nor can the client be required to divulge the advice that his attorney gave him.'" 987 So. 2d at

550 (quoting Ex parte Great American Surplus Lines Ins. Co., 540 So. 2d at 1358). The Ex parte Meadowbrook Court concluded, however, that the insurer had waived the attorney-client privilege because the evidence supported the conclusion that the insurer "affirmatively intend[ed] to assert the advice of counsel in defense of [the] tort-of-outrage claim." 540 So. 2d at 551; see also Ex parte State Farm Fire & Cas. Co., 794 So. 2d 368, 374-75 (Ala. 2001) (noting that waiver of the attorney-client privilege occurs "'where a party specifically pleads, as an element of the claim, his or her reliance on an attorney's advice, or voluntarily testifies regarding portions of the actual advice contained in the communication, or places in issue the nature of the attorney-client relationship during the course of the litigation'" (quoting Mortgage Guar. & Title Co. v. Cunha, 745 A.2d 156, 159-60 (R.I. 2000) (emphasis omitted))); Ex parte Malone Freight Lines, Inc., 492 So. 2d 1301, 1303 (Ala. 1986) (noting that attorney-client "'privilege may be waived if the privileged communication is injected as an issue in the case by the party which enjoys its protection'" (quoting Garfinkle

v. Arcata National Corp., 64 F.R.D. 688, 689 (S.D. N.Y. 1974))).

Unlike the insurer in Ex parte Meadowbrook, Alfa has not asserted an advice-of-counsel defense to Howell's and Jones's claims, and Howell and Jones did not argue to the trial court that Alfa waived the attorney-client privilege as to the materials at issue. Also, Howell and Jones did not establish before the trial court that the materials at issue may not be attorney-client communications as Alfa asserted in its privilege log.[6]

[6]See note 2, supra. On June 1, 2018, Howell and Jones filed a motion for sanctions against Alfa in the trial court. The motion for sanctions alleged that Alfa had "willfully refused" to "produce certain documents and things within 10 days of the date of the" May 2018 order compelling production. Also, Howell and Jones asserted that "[p]laintiffs suggest that the documents ordered produced to the court by in camera inspection are not, in fact, any matter or fashion of attorney work product protected by privilege." However, Howell and Jones's motion for sanctions included no evidentiary submissions and no specific allegation as to why the materials at issue might not qualify as privileged (for example, some evidence or deposition testimony indicating that the communications were between or had been distributed to persons to whom the privilege is inapplicable), as Alfa had claimed and had indicated in its privilege log. Further, the materials before us do not reflect a ruling from the trial court as to the motion for sanctions.

In their brief in response to Alfa's petition, Howell and Jones argue that an in camera inspection is warranted to determine the veracity of Alfa's assertions as to the nature

Instead, Howell and Jones argued that the attorney-client privilege did not apply to the communications between Alfa and its counsel because the materials at issue fell within purported exceptions to the attorney-client privilege. Howell

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of the materials at issue. However, the May 2018 order compelling production was not based on some doubt as to the veracity of the representations made by Alfa and its counsel, but on Howell and Jones's assertion that this Court's decisions in Ex parte Alfa Mutual Insurance Co., 631 So. 2d 858 (Ala. 1993), and Ex parte Nationwide Mutual Insurance Co., 990 So. 2d 355, 364 (Ala. 2008), established an exception to the attorney-client privilege as to coverage opinions and certain attorney-client communications made before the issuance of coverage opinions. Accordingly, the issue whether a trial court may order an in camera inspection of allegedly privileged documents, in the absence of an evidentiary basis for questioning whether the allegedly privileged materials qualify for privilege, is not before us. But we doubt whether such an inspection would be proper based merely on speculation that counsel might not be telling the truth in its privilege log. Cf. United States v. Zolin, 491 U.S. 554, 572 (1989) (holding that a court has discretion to conduct in camera review of attorney-client communications for purposes of determining the applicability of an exception to the privilege only if a showing has been made "'of a factual basis adequate to support a good faith belief by a reasonable person' ... that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies"). Such a broad rule would allow a trial judge to peruse counsel's files without any factual basis justifying the possible invasion of the client's legal rights. If there is some concern about the veracity of a claim of attorney-client privilege, it would appear that requiring a party to supplement its privilege log with additional necessary information or to provide redacted materials for in camera inspection generally would be sufficient to confirm the propriety of the privilege claim.

and Jones cited Ex parte Alfa Mutual Insurance Co., supra, and Ex parte Nationwide Mutual Insurance Co., 990 So. 2d 355 (Ala. 2008), in support of that argument. Neither of those cases, however, establishes an exception to the attorney-client privilege that would require the disclosure of attorney-client communications.

We have quoted from Ex parte Alfa Mutual Insurance Co., supra. That case does not establish an exception to the attorney-client privilege. Instead, Ex parte Alfa Mutual Insurance Co. confirms the applicability of the attorney-client privilege to attorney-client communications, even if those communications include a discussion of facts that are not otherwise protected from discovery. The attorney-client communications themselves are not discoverable. Discovery is allowed, however, as to the otherwise discoverable facts that may have been included in the communications: "By definition then, the attorney-client privilege protects only against the disclosure of the contents of the communication itself between an attorney and the attorney's client; it does not protect against the disclosure of the underlying facts by the person who has personal knowledge of those facts, even though that

person may have consulted with an attorney." 631 So. 2d at 860 (emphasis added).

Likewise, Ex parte Nationwide Mutual Insurance Co. does not establish an exception to the attorney-client privilege. In Ex parte Nationwide Mutual Insurance Co., this Court stated:

> "With regard to [respondent] Alan Mortgage's discovery request no. 4 for '[a]ll electronic mail or other electronic communication between [Nationwide] and its counsel of record in this case regarding the insurance coverage issues and the dispute made the basis of this lawsuit,' Nationwide states that it has provided Alan Mortgage with all communications between Nationwide and its counsel that occurred before Nationwide made its decision to deny coverage, including its no-coverage opinion letter. Nationwide maintains that any communications between Nationwide and its counsel that occurred after Nationwide denied coverage ... are protected from disclosure by the attorney-client privilege and the work-product doctrine -- exceptional circumstance (a) in Ex parte Ocwen Federal Bank, 872 So. 2d [810] at 813 [(Ala. 2003)], i.e., 'a privilege is disregarded.'"

990 So. 2d 362-63 (emphasis added). Thus, based on the opinion in Ex parte Nationwide Mutual Insurance Co., whether the "no-coverage opinion letter" and other pre-denial-of-coverage communications between Nationwide and its counsel were privileged was not at issue in that case; the issue was the applicability of the attorney-client privilege "to any

communications between Nationwide and its counsel that occurred after Nationwide denied coverage." 990 So. 2d at 363. As to that issue, this Court followed the well settled law that such communications are protected by the attorney-client privilege unless the privilege has been waived. 990 So. 2d at 364 ("[A]ny communications between Nationwide and its counsel or any documents prepared after the date coverage was denied ... are privileged and not discoverable."). Although it is true that this Court also stated that "Alan Mortgage is entitled to discover the communications and documents created before Nationwide denied coverage on July 2, 2004," and that "[t]he only discoverable documents were created before or on the date that coverage was denied," 990 So. 2d at 364, those statements are clearly dicta in light of the argument made by Nationwide that this Court was addressing: whether the attorney-client privilege applied to communications made after the denial of coverage. Further, in making the foregoing statements, this Court appears to have been focused on the issue of waiver, not whether an exception to the privilege existed: "Nationwide's assertion of the advice-of-counsel defense and its production of privileged documents supporting that defense did not waive the

attorney-client privilege as to communications between Nationwide and its counsel occurring after Nationwide denied coverage, because those communications were not placed at issue by the assertion of the defense." Id. (emphasis added). The opinion provides no discussion or analysis of the distinct issue whether an exception to the attorney-client privilege exists as to coverage opinions or other attorney-client communications outside the context of a purported waiver.

Notwithstanding the fact that neither Ex parte Alfa Mutual Insurance. Co. nor Ex parte Nationwide Mutual Insurance Co. established an exception to the attorney-client privilege, this Court may affirm the trial court's May 2018 orders if, under Alabama law, such an exception exists and would apply in the present case. See, e.g., Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003) (assuming the absence of due-process constraints, this Court may "affirm the trial court on any valid legal ground presented by the record, whether that ground was considered, or even if it was rejected, by the trial court"). No such exception exists, however, and we decline to create one.

First, we note that the exceptions to the attorney-client privilege are listed in Rule 502(d), Ala. R. Evid., and Howell and Jones did not attempt to establish any of the stated exceptions, including the fraud exception in 502(d)(1), which would appear to be the only exception that would be even arguably pertinent.[7] We acknowledge that some sister courts

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[7]Rule 502(d)(1) states that the attorney-client privilege will not protect communications between an attorney and client "[i]f the services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." Where a fraud exception is asserted, as a preliminary matter,

> "[t]he party asserting fraud has the burden of satisfying the court that the client knew or reasonably should have known that what the client planned to commit was fraud. The client clearly may consult the attorney about conduct, the legality of which is debatable, and still be protected if it later proves to be criminal or fraudulent."

Advisory Committee Notes, Ala. R. Evid. 502(d)(1); see also, e.g., Ex parte Griffith, 278 Ala. 344, 350, 178 So. 2d 169, 176 (1965) ("As pointed out in Sawyer v. Stanley, 241 Ala. 39, [45,] 1 So. 2d 21[, 26] [(1941) (opinion on rehearing)], the perpetration of a fraud is outside the scope of professional duty of an attorney, and that the great majority of cases hold that the privilege 'protecting communications between attorney and client is lost if the relation is abused, as where the client seeks advice that will serve him in the commission of a fraud.'"). See Clark v. United States, 289 U.S. 1, 15-16 (1933) ("'[I]t would be absurd to say that the privilege could be got rid of merely by making a charge of fraud.' O'Rourke v. Darbishire, (1920) A.C. 581, 604. To drive the privilege away, there must be 'something to give colour to the charge';

have read the fraud exception creatively, including within the term "fraud" a number of other torts. See, e.g., Hutchison v. Farm Family Cas. Ins. Co., 273 Conn. 33, 41-42, 867 A.2d 1, 6-7 (2005) ("We conclude that, just as there is no justification for the attorney-client privilege when a communication was made for the purpose of committing fraud, there is no justification for the privilege when a communication was made for the purpose of evading a legal or contractual obligation to an insured without reasonable justification."). But see 273 Conn. at 47, 867 A.2d at 10 ("When the relationship between the insured and the insurer is adversarial at the inception of a claim, however, there is no such fiduciary relationship and the attorney-client privilege protects the insurer from disclosure of privileged materials created after the claim was made."). Sounder reasoning, however, and the plain language of Rule 502(d)(1) ("crime or fraud" not "crime or tort" or "crime or civil-law wrong") support the contrary conclusion. See Oil, Chem. & Atomic Workers Int'l Union v. Sinclair Oil Corp., 748 P.2d 283,

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there must be 'prima facie evidence that it has some foundation in fact.' O'Rourke v. Darbishire, loc. cit., supra.").

290-91 (Wyo. 1987) ("Appellants next contend that the attorney-client privilege does not apply to many of the communications at issue because they involved contemplated tortious acts. ... Although some jurisdictions have enlarged the crime or fraud exception to include contemplated torts, the wisdom of this expansion of the exception has been questioned. 'Broadening the exception in such ways might lead, at least initially, to greater disclosure (more evidence with which to get at the truth), but in the long run surely the effect would be to discourage clients from attempting to conform their conduct to legal requirements and to discourage lawyers from seeking information from clients in order to advise them effectively ....' 2 D. Louisell and C. Mueller, Federal Evidence § 213 at 823-824. We find this reasoning persuasive, and we decline to adopt an exception to the attorney-client privilege for contemplated tortious acts."); West Bend Mut. Ins. Co. v. Higgins, 9 So. 3d 655, 658 (Fla. Dist. Ct. App. 2009) ("A first-party [bad-faith] claim ... is subject to an objectively determinable test -- whether, if it acted fairly and honestly and with due regard for her or his interests, the insurer should have paid its insured more money. Proof of the claim does not depend on disclosure of

attorney-client communications, and even if it did, it would not justify eliminating the privilege. As with virtually any other dispute resulting in litigation, communications between an insurance company and its attorney might be revealing, or even probative, but that will not defeat the privilege because it has a broader purpose. Nor, seemingly, would it be prudent in the larger scheme, to create an environment in which an insurer is unable to engage in candid discussions with its counsel about the legal justification for its conduct."); Hartford Fin. Servs. Grp., Inc. v. Lake Cty. Park & Recreation Bd., 717 N.E.2d 1232, 1237-38 (Ind. Ct. App. 1999) ("[T]o establish a claim for bad faith, the facts, rather than the legal advice or opinions pertaining to the insurer's decisions, can be developed through depositions and other discovery of non-privileged information. A simple assertion that an insured cannot otherwise prove a case of bad faith does not automatically permit an insured to rummage through the insurers' claims file. Thus, we decline Lake County's invitation to limit the application of the attorney-client privilege in these circumstances." (footnote omitted)); see also, e.g., Palmer v. Farmers Ins. Exch., 261 Mont. 91, 108-09, 861 P.2d 895, 906 (1993) ("The attorney-client

privilege protects communications in first-party bad faith cases when the insurer's attorney did not represent the interests of the insured in the underlying case. ... Absent a voluntary waiver or an exception, the privilege applies to all communications from the client to the attorney and to all advice given to the client by the attorney in the course of the professional relationship."); State ex rel. Brison v. Kaufman, 213 W. Va. 624, 627, 584 S.E.2d 480, 483 (2003) (noting that, in subsequent bad-faith and unfair-trade-practices action, attorney-client privilege prohibited "the compelled production and disclosure of the [insurer's] litigation file and redacted portions of the [insurer's] claim file, both of which were created and maintained during an earlier wrongful death action involving a claim for underinsured motorist coverage").

Second, even were we to agree with the view that an exception to the attorney-client privilege should exist as to the communications at issue, we question whether it would be prudent to adopt such an exception via a judicial decision, which arises from a happenstance of facts and arguments necessarily limited by the immediate parties' objectives, rather than through the deliberative process of amending

Rule 502(d), Ala. R. Evid. As the United States Supreme Court noted in Upjohn Co. v. United States, 449 U.S. 383, 389 (1981):

> "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. ... Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in Trammel v. United States, 445 U.S. 40, 51 (1980): 'The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.' And in Fisher v. United States, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be 'to encourage clients to make full disclosure to their attorneys.' This rationale for the privilege has long been recognized by the Court, see Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (privilege 'is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure')."

The Supreme Court further remarked:

> "[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications

> by the courts, is little better than no privilege at all."

449 U.S. at 393. Adopting an exception to the attorney-client privilege by way of judicial decision would do anything but contribute to certainty as to the privilege.

IV. Conclusion

Based on the foregoing, Alfa has established that the trial court exceeded its discretion when it disregarded the attorney-client privilege and entered the May 2018 orders denying Alfa's motion for a protective order and compelling Alfa to produce the materials sought for in camera inspection or for discovery. Accordingly, we grant Alfa's petition for the writ of mandamus and direct the trial court to vacate the May 2018 orders denying Alfa's motion for a protective order and compelling Alfa to produce the materials at issue.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Wise, Bryan, and Mitchell, JJ., concur.

Mendheim, J., concurs in part and dissents in part.

Sellers and Stewart, JJ., dissent.

Shaw, J., recuses himself.

MENDHEIM, Justice (concurring in part and dissenting in part).

I agree with the conclusion in the main opinion that the coverage-opinion letter is protected by the attorney-client privilege. This Court has clearly held that an "'opinion letter' represents a communication from the attorney to the client, and that it is, therefore, a privileged communication. Any further discussion of the issue is unnecessary." Ex parte Great American Surplus Lines Ins. Co., 540 So. 2d 1357, 1358 (Ala. 1989). Although an exception or waiver may permit disclosure of a coverage-opinion letter, neither is presented in this case.[8] Accordingly, I agree that disclosure is not permitted and that an in camera inspection of the coverage-opinion letter would not be appropriate.

However, when a question involving a privilege is not so straightforward, it is important to keep in mind certain basic principles. "Discovery matters are within the trial court's sound discretion, and this Court will not reverse a trial

[8]The petitioners, Alfa Insurance Corporation and related entities, note that they have not, and are not, asserting an "advice-of-counsel" defense in this case and, therefore, have not waived their privilege. Moreover, the respondents, R.G. "Bubba" Howell, Jr., and M. Stuart "Chip" Jones, do not contend that any exceptions to the attorney-client privilege are applicable.

court's ruling on a discovery issue unless the trial court has clearly exceeded its discretion." Ex parte Ocwen Fed. Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003). Specifically with respect to the issue at hand, "'[w]hether a communication is privileged is a question of fact to be determined by the trial court from the evidence presented.'" Exxon Corp. v. Department of Conservation & Natural Res., 859 So. 2d 1096, 1103 (Ala. 2002) (quoting Ex parte DCH Reg'l Med. Ctr., 682 So. 2d 409, 412 (Ala. 1996)). See also Rule 104(a), Ala. R. Evid. Moreover, this Court has repeatedly recognized that an in camera inspection is a proper tool at the disposal of a trial judge when making a determination as to privilege. See, e.g., Boudreaux v. Pettaway, 108 So. 3d 486, 508-10 (Ala. 2012), overruled on other grounds by Gillis v. Frazier, 214 So. 3d 1127 (Ala. 2014); Ex parte McDuffie, 614 So. 2d 1063, 1064 (Ala. 1993); D.P. v. State, 850 So. 2d 370, 373-74 (Ala. Crim. App. 2002); and Rule 104, Ala. R. Evid., Advisory Committee's Notes ("There are occasions ... when the trial judge cannot adequately decide whether an asserted privilege applies without hearing, in camera, the matters alleged to be privileged."). The United States Supreme Court likewise has recognized that, in general, an in camera inspection is an

appropriate way for a trial court to review a claim of attorney-client privilege. See Kerr v. United States Dist. Court for Northern Dist. of California, 426 U.S. 394, 406 (1976) (concluding that "[i]n camera review is a highly appropriate and useful means of dealing with claims of ... privilege").

Alfa[9] filed a privilege log with the trial court that listed 36 documents,[10] which obviously encompasses more than just the coverage-opinion letter. Alfa's description of the documents in its privilege log is vague, presumably because it is self-defeating to claim a privilege and then disclose the communication in order to establish the claim.[11] Furthermore, as the main opinion recognizes, Ex parte Alfa Mutual Insurance Co., 631 So. 2d 858, 860 (Ala. 1993), holds that the attorney-

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[9]As does the main opinion, I use the name "Alfa" to refer collectively to Alfa Insurance Corporation, Alfa Mutual General Insurance Corporation, Alfa Life Insurance Corporation, and Alfa Specialty Insurance Corporation.

[10]I am uncertain if there are 36 separate documents or 36 separate pages of documents.

[11]A party should not be required to "disclose its confidential information to a discovering party in order to establish the need for a protective order to protect that confidential information." Ex parte Industrial Warehouse Servs., Inc., 262 So. 3d 1180, 1189-90 (Ala. 2018) (Mendheim, J., concurring in part and dissenting in part).

client privilege does not protect against underlying facts known to a person who may also consult with an attorney regarding those facts.

In my view, an in camera inspection of the documents included in the privilege log -- other than the coverage-opinion letter -- is an appropriate method in this kind of situation for determining the applicability of the attorney-client privilege to those documents.[12] "Again, it seems the simple solution, which protects the disclosing party but also allows for the full exercise of the opposing party's right to discovery, is for the trial court to conduct an in camera inspection ...." Ex parte Industrial Warehouse Servs., Inc., 262 So. 3d 1180, 1190 (Ala 2018) (Mendheim, J., concurring in part and dissenting in part).

In sum, I would permit an in camera inspection by the trial court of the documents listed in the privilege log, with the exception of the coverage-opinion letter. However, I am concerned that the trial court appeared to be prepared to turn over documents immediately to R.G. "Bubba" Howell, Jr., and

[12]I agree with the main opinion's explanation concerning the parameters of the attorney-client privilege, and I would instruct the trial court to conduct its in camera review consistent with those parameters.

M. Stuart "Chip" Jones if it determined during the in camera inspection that the privilege did not apply to those documents.[13] The trial court should not be permitted to turn privilege-log documents over to Howell and Jones without first allowing Alfa an opportunity to seek appellate review of the trial court's privilege determination. Accordingly, I would grant the petition in part -- with respect to the coverage-opinion letter -- and deny the petition in part with those specific instructions, which preserves Alfa's right to seek review of the trial court's discovery rulings with this Court.

[13]I agree with the main opinion's observation that the trial court's orders lack clarity and are ambiguous, especially regarding the issues addressed to this Court.