

Protecting Attorney-Client Privilege In First-Party Insurance

By Todd M. Tippett and David B. Winter
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Still regarded as the most important privilege for confidential communications, the attorney-client privilege is integral to an attorney's need to be fully informed by the client. In light of the privilege's importance, it is imperative that clients and their counsel take proper steps to ensure the privilege is not waived.

Courts recognize both the express and implied waiver of the attorney-client privilege. Express waivers are fairly easy to recognize: They generally consist of a party knowingly disclosing confidential information to someone to whom the privilege does not apply.

Implied waivers are more difficult to identify. In the first-party insurance context, courts have found an implied waiver in two primary situations. First, the privilege can be waived by an insurance company if it relies on the advice of counsel as a defense to a bad faith claim. For example, Washington state courts have found that if an insurer references the "actual advice given by attorneys or refers to or attempts to put into evidence any suggestion that its adjusters sought, obtained or relied on coverage counsel's advice, that party waives the privilege." See *Lexington Ins. Co. v. Swanson*, 240 F.R.D. 662, 666 (W.D. Wash. 2007); see also *Bronsink v. Allied Prop. & Cas. Ins.*, Case No. 09-751 MJP, 2010 U.S. Dist. LEXIS 29166, *3 (W.D. Wash. 2010).

Second, an implied waiver of the privilege can be found when the lawyer is acting as a *de facto* adjuster, instead of a lawyer rendering legal advice. See e.g., *Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685 (D. S.D. 2011). Different standards have developed for determining when an implied waiver has occurred. For example, in Minnesota, the attorney must be acting in the role of legal counsel "with respect to the information in issue" for the privilege to attach. If the attorney is not, the privilege is likely waived. *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160 (D. Minn. 1986). Contrast that with West Virginia, where a fact-based standard was applied, considering: 1) whether the investigation was conducted to develop a legal opinion; 2) whether interviewees knew they were speaking to an attorney representing a client; 3) the time spent on investigation relative to legal analysis; and 4) whether legal issues drove the direction of the interviews. *In re Allen*, 106 F.3d 582, 603 (4th Cir. 1997). Finally, in California, a court upheld the privilege noting, "the retention of legal counsel to interpret the policy, investigate the details surrounding the damage and to determine whether the insurance company is bound for all or some of the damage is a classic example of a client seeking legal advice from an attorney." *Ins. Co. of the State of Pa. v. City of San Diego*, No. 02cv693 BEN, 2008 U.S. Dist. LEXIS 28280 (S.D. Cal. Apr. 4, 2008).

The biggest concern regarding waiver is not only that a specific communication might be waived, but also that the entire subject matter of the communication may become

discoverable. See *Bertelsen*, 796 N.W.2d at 689. Because jurisdictions vary on how broadly or narrowly the scope of a waiver may be, it is of the utmost importance to avoid waiving the privilege at the outset.

We offer the following five pointers for insurance companies and their counsel to help them avoid waiving the attorney-client privilege.

1. Know the Law In the Applicable Jurisdictions

As discussed above, jurisdictions can vary significantly in their willingness to find an implied waiver of the attorney-client privilege. For example, Washington and Arizona have significantly lowered the threshold for finding waiver. *Bronsink*, 2010 U.S. Dist. LEXIS 29166; *State Farm Mut. Auto. Ins. Co. v. Lee*, 13 P.3d 1169 (Ariz. 2000). Because of the variance among jurisdictions, it is important to be aware of the law of any jurisdiction(s) that may apply to the communication and where the litigation may be brought. With this knowledge, communications can be tailored to maximize your chances of maintaining the attorney-client privilege under the law of those respective jurisdictions.

2. Ensure That the Dominant Purpose of the Communication Is to Provide or Obtain Legal Advice

One important element of the attorney-client privilege is that the communication must be for the purpose of obtaining or rendering legal advice. Therefore, in any potentially privileged communication, the client should make it clear that the communication is to acquire legal advice on the matter. In response, an attorney's communication need not contain purely legal analysis, but it should be of a predominately legal character. When attorneys are simply engaged to gather facts, the attorney is walking a fine line that many courts continue to struggle with - whether to treat them as a lawyer or as a claims adjuster.

Inclusion of non-privileged information in an otherwise privileged communication does not necessarily destroy the privilege, but it could influence whether the document is protected in whole or in part. Thus, to optimally protect privileged communications, non-privileged matters should be discussed in separate communications to the extent possible. By separating privileged communications from non-privileged communications, an insurance company and their attorney enhance their ability to fend off arguments that a waiver of the privilege occurred with respect to the most important legal opinions and conclusions.

3. Consider Whether Written Communication Is Always Necessary

There are many instances when no written communication is required. Before an issue is reduced to writing, it is often best for the insurance company and its attorney to discuss the issue and make an informed decision before any communication is memorialized in a letter or email. This is especially true in the age of e-discovery as courts now require the production of electronic data that includes emails. So, while

emails are often easier than picking up the phone, this is not always the right method of communication.

4. Avoid Disclosure of Legal Advice In Correspondence With the Policyholder

An insurer should also be careful not to disclose coverage advice received from its attorney in later correspondence that it sends to a policyholder. Including this information could constitute an implied waiver of the attorney-client privilege. *State Farm Mut. Auto. Ins. Co. v. Gutierrez*, 844 N.E.2d 572, 584 (Ind. Ct. App. 2006). One court recently stated that when the insurance company “selectively disclosed a significant portion of the otherwise privileged communication and states that it is for th[o]se [disclosed] reasons that the insurance company denied the claim,” the insurer effectively waived its attorney-client privilege. *One River Place Condo. Ass’n, Inc. v. Axis Surplus Lines Ins. Co.*, No. 07-1305, 2008 U.S. Dist. LEXIS 44352, *6 (E.D. La. June 4, 2008). “. . . [H]aving already let the horse out, it is too late . . . to close the barn door.” *Id.* An insurance company should formulate its own opinion and denial of coverage after it considers counsel’s advice rather than basing the denial solely on the advice from counsel.

5. Limit the Number of People On the Distribution List

In some states, when legal advice is discussed or contained in a communication between employees, it is presumed privileged. Specifically, one court said that, “[a] communication reflecting a discussion of litigation strategy which expresses that the strategy is in response to advice of counsel would come within the privilege.” *Zurich-Am. Ins. Co. v. Superior Ct. of Cal.*, 66 Cal. Rptr. 3d 833, 844 (Cal. Ct. App. 2007). However, this rule requires that all parties involved in the communication be “necessary” to the attorney-client communications. *Id.* To avoid a debate over whether an individual is “necessary,” it is prudent to limit the number of individuals on the distribution list to those who are actively involved in each respective legal issue.

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Insurance professionals and their attorneys should be aware of the current trends related to the waiver of the attorney-client privilege in first-party insurance claims. More importantly, steps should be taken to protect privileged communications even before litigation is anticipated. By implementing the five practical pointers discussed above, the chance of waiving the privilege should be reduced.

Todd M. Tippett and David B. Winter are associates at Zelle Hofmann Voelbel & Mason LLP in the firm’s Dallas, Texas office. Zelle Hofmann is a national law firm representing clients in their most challenging insurance-related disputes, antitrust claims and other complex litigation. The views and opinions expressed herein are solely those of the authors and do not reflect the views or opinions of Zelle Hofmann or any of its clients. For additional information about Zelle Hofmann, please visit www.zelle.com.