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**HOW TO MINIMIZE UNNECESSARY AND MISLEADING  
DISCOVERY DISCLOSURES:  
THE ATTORNEY-CLIENT PRIVILEGE**

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# **HOW TO MINIMIZE UNNECESSARY AND MISLEADING DISCOVERY DISCLOSURES: THE ATTORNEY-CLIENT PRIVILEGE**

## **I. INTRODUCTION**

The attorney-client privilege has existed for centuries and remains a vital safeguard for confidential communications between a lawyer and client. In the surety and fidelity context, however, the plaintiff may at times attempt to overcome the assertion of the privilege in an effort to obtain discovery of communications between a company and its counsel during the investigation of the claim. Those challenges are frequently launched -- and potentially most problematic -- where the plaintiff has asserted a "bad faith" claim against the company.

Commonly, the investigation of a claim against a surety bond or fidelity policy entails both the gathering of facts and analysis of the law. As a result, in some cases, the company's claims representative will retain the services of outside counsel to assist in the evaluation of the claim. In the event such a claim is ultimately denied by the company and litigation ensues, the plaintiff usually seeks discovery of the company's entire claim file. It is at that point that disputes may arise concerning the assertion of the attorney-client privilege with respect to communications between the company and its counsel. While such disputes do not occur until litigation is pending, the outcome will often depend upon the manner in which the subject communications were handled during the investigation stage. As such, it is important for the claims representative to always be conscious of the rules governing the creation and waiver of the attorney-client privilege in order to best protect confidential communications from discovery in potential litigation. This paper will review the basic elements of the attorney-client privilege and the rules governing a waiver of that privilege, as well as considerations in creating and preserving the privilege in the typical surety or fidelity claim investigation.

## **II. THE ATTORNEY-CLIENT PRIVILEGE**

The attorney-client privilege is a rule of evidence that protects against the discovery of confidential communications between a lawyer and a client. Generally, litigants are entitled to broad discovery, which extends beyond admissible evidence to all matters that might reasonably lead to the discovery of admissible evidence. The discovery rules in most jurisdictions are similar to Federal Rule of Civil Procedure 26 which describes the scope and limits of discovery in civil litigation as follows:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of the persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26 plainly excludes privileged matters from discovery. The Federal Rules of Evidence provide that attorney-client privilege issues shall be governed in federal question cases by principles of federal common law; but, in diversity actions, where the claim or

defense is determined by state law, any privilege issues shall be determined in accordance with that state's law.<sup>1</sup> As a consequence, the rules governing the creation, application, and waiver of attorney-client privilege are dependent upon the forum and the jurisdiction of the lawsuit and can therefore vary from case to case.

In addressing privilege issues under federal common law, the courts will often look to Supreme Court Standard 503 (sometimes referred to as "Proposed Rule of Evidence 503"), which -- while never formally adopted -- is widely viewed as a useful guide to the federal common law.<sup>2</sup> Standard 503(b) states the general attorney-client rule as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and his lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

The seminal case regarding the application of the attorney-client privilege to confidential communications between counsel and corporate employees is *Upjohn v. United States*, where the Court explained the need for protecting attorney-client communications as follows:

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 interest 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 lawyers being fully informed by the client. ...'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 ... the purpose of the privilege to be 'to encourage clients to make full disclosure to their attorneys.' ... Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation.<sup>3</sup>

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<sup>1</sup> See Federal Rule of Evidence 501; compare *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 141 (2d Cir.), cert. denied, 481 U.S. 1015 (1987) (applying federal common law) and *Baker v. General Motors Corp.*, 209 F.3d 1051, 1053 (8th Cir. 2000) (applying state law).

<sup>2</sup> See 3 Jack B. Weinstein & Margaret Berger, *Weinstein's Federal Evidence*, § 503[02] (Joseph M. McLaughlin ed., Bender 2007) ("Supreme Court Standard 503 restates, rather than modifies, the common-law lawyer-client privilege. Thus, it has considerable utility as a guide to the federal common law referred to in Rule 501"); see also *United States v. Spector*, 793 F.2d 932, 938 (8th Cir.1986) cert. denied, 479 U.S. 1031 (1987). ("courts have relied upon [Standard 503] as an accurate definition of the federal common law of attorney-client privilege.... 'Consequently, despite the failure of Congress to enact a detailed article on privileges, Standard 503 should be referred to by the Courts.'").

<sup>3</sup> *Upjohn v. United States*, 449 U.S. 383, 389 (1981)(citations omitted).

In *Upjohn*, the Supreme Court rejected the “control group” test<sup>4</sup> and held that the privilege applies to communications between a lawyer and a corporate employee, regardless of the employee’s position in the company, as long as the communications concern matters within the scope of the employee’s corporate duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation.<sup>5</sup> Importantly, the privilege protects not only the attorney’s giving of professional advice to those employees, but also protects the information provided to the attorney in seeking advice.<sup>6</sup> The *Upjohn* Court rejected the “control group” test because it “frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to the attorneys” and noted that the “attorney’s advice will also frequently be more significant to non-control group members than to those who officially sanction the advice.”<sup>7</sup>

The Court in *Upjohn* declined to establish a “bright line” test for application of the attorney-client privilege to communications with corporate employees. Rather, the Court held that the applicability of the privilege must be determined on a case-by-case basis.<sup>8</sup> The Third Circuit has identified the following elements which must each be established by a party to successfully assert the privilege: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.<sup>9</sup> The party claiming the attorney-client privilege has the initial burden of showing that the documents or communications withheld fall within the claimed privilege and must show each element of the privilege.<sup>10</sup> Notably, it is not enough for the communication to be between a client and a lawyer -- the communication must be related directly to the giving of legal advice, as opposed to conducting normal business operations.<sup>11</sup>

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<sup>4</sup> *Id.* at 392. Courts creating and adopting the “control group” test had limited application of the attorney-client privilege to communications between the corporation’s lawyer and members of upper management – i.e., the “control group.” See, e.g., *Philadelphia v. Westinghouse Electric Corp.*, 210 F.Supp. 483, 485 (E.D. Pa.), *petition for mandamus and prohibition denied sub nom. General Electric Co. v. Kirkpatrick*, 312 F.2d 742 (3d. Cir. 1962), cert. denied, 372 U.S. 943 (1963),

<sup>5</sup> See *Upjohn*, 449 U.S. at 390-92.

<sup>6</sup> *Id.* at 390.

<sup>7</sup> *Id.* at 392.

<sup>8</sup> *Id.* at 396-97.

<sup>9</sup> *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 861-62 (3d Cir. 1994); see also *Wachtel v. Guardian Life Ins. Co.*, 2006 WL 1286188, \*1 (D.N.J. 2006); *In re Grand Jury Investigation*, 599 F.3d. 1224, 1233 (3d Cir. 1979) (citing *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950); *Montgomery County v. MicroVote Corp.*, 175 F.3d 296, 301 (3d Cir.1999).

<sup>10</sup> See *United States v. White*, 970 F.2d 328, 333 (7th Cir. 1992); *United States v. Davis*, 636 F.2d 1028 (5th Cir. 1981); *Burns v. Image Films Entertainment*, 164 F.R.D. 589, 593 (W.D.N.Y. 1996).

<sup>11</sup> See *Hawkins v. District Court*, 638 P.2d 1372, 1377 (Colo. 1982) (“Rule 26(b)(3) is not intended to protect materials prepared in the ordinary course of business from general discovery.”); see also Notes of Advisory Committee on 1970 Amendments to Federal Rules of Civil Procedure, 48 F.R.D. 487-501 (1970).

### III. APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE IN THE SURETY AND FIDELITY CONTEXT

#### A. In-House Counsel

In some cases, the claims representative assigned to a surety or fidelity claim will be an attorney whose duties may include serving as “in-house” counsel to the company. For purposes of the attorney-client privilege, an attorney need not be admitted to practice in the jurisdiction where the claim arose, where the advice was created and/or given, or where the lawsuit against the insurer is venued; the requirement is simply that the attorney be licensed and permitted by law to render legal advice.<sup>12</sup> In determining whether communications between counsel and members of the company are privileged, the issue is whether the attorney was acting as confidential counsel to the company, irrespective of whether the lawyer was employed by the company or retained as outside counsel.<sup>13</sup>

While precise rules may vary by jurisdiction, communications involving in-house counsel are generally privileged as long as the employee is not acting primarily as a business adviser, but rather is acting as a lawyer.<sup>14</sup> For instance, in *In Re Spalding Sports Worldwide, Inc.*,<sup>15</sup> Spalding was sued for patent violations and asserted the attorney-client privilege with respect to an internal “invention record.” The court held that the attorney-client privilege applied to the invention record which had been prepared for in-house counsel, because the invention record constituted a communication to an attorney for the purpose of obtaining legal advice.<sup>16</sup>

When in-house counsel need to communicate the analysis of a surety or fidelity claim to others in the company, an important consideration is whether that communication might be discoverable in any subsequent litigation. While it may not be possible to ensure that such communications will be deemed privileged, in-house counsel should be mindful that the privilege determination may turn upon whether the communication had an “ordinary business purpose” or was given in the context of “seeking and giving legal advice” on a claim or matter. Drawing a distinction between “business” and “legal” communications is inherently difficult with regard to in-house counsel, who routinely communicate with others in the company on a variety of issues with both legal and business aspects and consequences. As a result, when it

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<sup>12</sup> See *Garrison v. General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963); *Georgia Pacific Plywood Co. v. United States Plywood Corp.*, 18 F.R.D. 463 (S.D.N.Y. 1956); *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442 (D. Del. 1982).

<sup>13</sup> See *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 592 (N.Y. 1989) (“for purposes of the attorney-client privilege, there is no distinction to be drawn between a corporation’s communications with in-house counsel and outside counsel”); see also *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 632-633 (M.D.Pa., 1997); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 522 (D. Conn. 1976); *Gorgia Pacific Plywood Co. v. United States Plywood Corp.*, 18 F.R.D. 463 (S.D.N.Y. 1956).

<sup>14</sup> See *O’Brien v. Board of Education*, 86 F.R.D. 548 (S.D.N.Y. 1980) (“fact that the document was authored by in-house counsel rather than by an independent attorney is of no significance. The relevant inquiry is whether the attorney, regardless of his place of employment, was acting as confidential counsel to the party asserting the privilege.”).

<sup>15</sup> 203 F.3d 800 (Fed. Cir. 2000).

<sup>16</sup> *Id.* at 805; see also *STI Outdoor v. Superior Court*, 91 Cal. App. 4th 334 (Cal. Ct. App. 2001) (attorney-client privilege is not limited to litigation-related communications but also includes legal communications for consultation).

is appropriate, in-house counsel should preface communications with a clear and conspicuous indication that counsel is conveying legal advice or strategy with respect to a claim. While such language will not be determinative, it may aid both in identifying potentially privileged communications and in providing support for the assertion of the attorney-client privilege as to that communication.

## **B. Outside Counsel**

Generally, the retention of outside counsel by a company is sufficient to establish that a lawyer-client relationship exists for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding -- thus satisfying those threshold elements for assertion of the privilege. However, even this basic proposition is subject to challenge in cases arising out of surety and fidelity claims, where plaintiffs may argue that an attorney retained to assist in the investigation of the claim is merely an extension of the internal claim investigation – and thus being used for a business purpose as opposed to serving as a legal advisor.<sup>17</sup>

In *Yurick v. Liberty Mutual Ins. Co.*,<sup>18</sup> the court held that *confidential* communications between outside counsel and the insurer's claims officers regarding the insurer's legal rights and options were privileged. The court in *Yurick* found, however, that certain communications between counsel and claim personnel were not privileged because the insurer had not made a sufficient showing that the communications were confidential. The line between what constitutes routine claim handling and providing legal advice is not clear. Certainly, the mere fact that the attorney's assigned duties are investigative in nature does not destroy the privilege. The “question is not whether [the attorney] was retained to conduct an investigation, but rather, whether this investigation was related to the rendition of legal services.”<sup>19</sup>

In *Residential Constructors, LLC v. Ace Property and Cas.*,<sup>20</sup> a Nevada federal court recently explained that, in determining whether the attorney-client privilege extends to an attorney's investigation of an insurance claim, courts generally look at the nature of the tasks performed:

When the attorney performs tasks that would normally be handled by an insurance adjuster or claim supervisor as an ordinary business function, the communications are not protected by the attorney-client privilege. For example,

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<sup>17</sup> See *Hickman v. Taylor*, 329 U.S. 495 (1947); *Connecticut Indemnity Co. v. Carrier Haulers, Inc.* 197 F.R.D. 564, 572 (W.D.N.C. 2000); see also *In re Grand Jury Subpoena*, 599 F.2d 504, 510-11 (2d Cir. 1979) (investigation by law firm retained to investigate and provide legal advice based on that investigation “trigger[s] the attorney-client privilege”); *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 671 (S.D.Ind. 1991) (“To the extent this attorney acted as a claims adjuster, claims process supervisor, or claim investigation monitor, and not as a legal advisor, the attorney-client privilege would not apply”); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 600-01 (N.D.Tex. 1981)(rejecting argument that attorney privilege should not apply when the attorneys involved performed an investigative rather than strictly legal function); *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D.Minn. 1986); *Continental Cas. Co. v. Marsh*, 2004 WL 42364 (N.D.Ill. 2004).

<sup>18</sup> 201 F.R.D. 465, 468-69 (D.Ariz. 2001).

<sup>19</sup> *Connecticut Indemnity Co.*, 197 F.R.D. at 572; see also *See also State Farm Fire & Cas. Co. v. Superior Court*, 216 Cal.App.3d 1222 (1989); *State ex. rel. Brison v.. Kaufman*, 584 S.E.2d 480 (W.Va. 2003).

<sup>20</sup> 2006 WL 3149362 (D.Nev. 2006.)(unreported decision)

when an insurer turns over its entire claim investigation to its attorneys, it is not fair to allow the insurer's action to create a blanket obstruction to discovery of the claim investigation. Some courts distinguish between purely factual investigation of a claim and the lawyer's legal analysis. Thus, although an attorney was found to be acting as an adjuster when he took an examination under oath of the insured, any legal analysis that he provided to the insurer was privileged. Other courts, applying a more expansive view of the privilege, have found that even factual investigations are protected when they facilitate providing legal advice. As one court observed, a factual investigation is 'the first step in the resolution of any legal problem.' Thus, the relevant question is not whether the attorney was retained to conduct a factual investigation but rather whether the investigation was related to providing legal services.<sup>21</sup>

As the Fifth Circuit in *Dunn v. State Farm Fire & Casualty Co.*<sup>22</sup> similarly recognized:

The [attorney-client] privilege extends to all communications between [the insurer] and the attorneys it retained for the purpose of ascertaining its legal obligations to the [insured]. The privilege is not waived if the attorneys perform investigative tasks provided that these investigative tasks are related to the rendition of legal services.<sup>23</sup>

The privilege "does not require the communication to contain purely legal analysis or advice to be privileged. Instead, if a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged."<sup>24</sup>

The decisional law on this issue varies by jurisdiction and is not entirely settled, often turning on fact-specific findings in a particular case. In most surety and fidelity cases, outside counsel is, in fact, retained for the primary purpose of providing a legal analysis of facts which have already been obtained from the insured or claimant. While counsel may obtain additional facts and documents as part of its legal analysis, the primary task of counsel is to probe and analyze the facts provided and determine whether the claim falls within the scope of coverage provided in the bond or policy. Care should be taken, whenever possible, to describe the retention of outside counsel in a fashion that will enhance the ability to assert the attorney-client privilege.

Another issue may arise when the company's "internal" investigation is being conducted, not by an employee of the company, but by a third-party administrator or outside claims investigator who, in turn, retains counsel to provide legal advice. For the most part, courts in the insurance context have permitted the insurer to assert the privilege with respect to confidential communications between such an outside claims investigator and counsel.<sup>25</sup>

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<sup>21</sup> *Id.* at \*13 (citations omitted).

<sup>22</sup> 927 F.2d 869 (5th Cir. 1991).

<sup>23</sup> *Id.* at 875.

<sup>24</sup> *Id.*

<sup>25</sup> *Residential Constructors*, 2006 WL 3149362 at \*15 ("Court sees no rational distinction between applying the attorney-client privilege to confidential communications between the insurer's counsel and its claims employee, ... but refusing to apply the privilege to counsel's confidential communications with an independent insurance adjuster who performs the same functions as an 'in-house' claims employee.") (internal citations omitted);

## IV. WAIVER ISSUES IN SURETY AND FIDELITY CONTEXT

### A. General Principles

Courts generally find that a waiver occurs where otherwise attorney-client privileged materials are shared with outsiders unnecessarily.<sup>26</sup> In fact, courts have held that a voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed, but also to all communications between the same attorney and the same client on the same subject.<sup>27</sup>

There are, however, notable exceptions. For instance, agents and subordinates working under the direct supervision and control of the attorney are included within the scope of the attorney-client privilege.<sup>28</sup> Also, the “common interest privilege” allows for two parties to discuss their affairs with a lawyer, protected by the attorney-client privilege, provided that they have an “identical (or nearly identical) legal interest as opposed to a merely similar interest.”<sup>29</sup>

### B. Disclosure of Attorney-Client Communications to Consultants Retained to Assist in the Investigation of a Claim

An important exception also exists where the disclosure is to a consultant who has been engaged to assist or consult with counsel.<sup>30</sup> Commonly, the surety or fidelity claims representative will retain consultants to assist in the investigation of the claim or loss. Those consultants may have expertise in construction or accounting in the case of a performance bond claim or may be private investigators or forensic accountants in the case of a fidelity claim. The purpose behind the retention is to utilize their expertise and assistance in both obtaining information and analyzing that information in formulating a response to the surety or fidelity claim.

Candid communications between the consultant and counsel are necessary to assist the attorney to better understand the facts of the case in order to provide a legal opinion to the client. Indeed, the primary purpose of the retention of a consultant is to distill facts which might not be readily understandable by someone without the expertise of that consultant. The

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*Safeguard Lighting Sys., Inc. v. N. Am. Specialty Ins. Co.*, 2004 WL 3037947 at \*2 (E.D.Pa. 2004); *Markwest Hydrocarbon, Inc. v. Liberty Mutual Ins. Co.*, 2007 WL 1106105 at \*3 (D.Colo. 2007).

<sup>26</sup> *Samuels v. Mitchell*, 155 F.R.D. 195, 199 (N.D. Cal. 1994); see, e.g., *Delta Fin. Corp. v. Morrison*, 820 N.Y.S.2d 745 (N.Y. Sup. Ct. 2006)(documents shared with accountant); *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 756 N.Y.S.2d 367 (N.Y. Sup. Ct. 2003) (documents shared with investment banks); *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, 2003 WL 21998674 (S.D.N.Y. 2003) (documents shared with public relations consultant).

<sup>27</sup> See, e.g., *United States v. Rockwell International*, 897 F.2d 1255, 1265 (3d Cir.1990), (“under traditional waiver doctrine a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else”).

<sup>28</sup> See 8 JOHN HENRY WIGMORE, EVIDENCE, § 2031 (McNaughton ed. 1961)(“It has never been questioned that the privilege protects communications to the attorney’s clerks and his other agents for rendering his services).

<sup>29</sup> *F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir.2000); see also *United States v. Doe*, 429 F.3d 450, 452-53 (3d. Cir. 2005); *Delta Fin. Corp. v. Morrison*, 820 N.Y.S.2d 745 (N.Y. Sup. Ct. 2006); *Exxon Corp. v. St. Paul Fire & Marine Ins.*, 903 F.Supp. 1007, 1011(E.D.La. 1995)(communication of a privileged document to an excess insurer does not waive the insurance company’s privilege).

<sup>30</sup> *Samuels*, 155 F.R.D. at 198-99.

Second Circuit in *United States v. Kovel*<sup>31</sup> recognized that a derivative privilege attaches to experts who are necessary for the rendering of legal advice, holding that the attorney-client privilege extends to communications made by a client to an accountant in its attorney's employ incident to the client's obtaining legal advice from the attorney.<sup>32</sup> Of course, the communications must be made in confidence for the purpose of obtaining legal advice from the lawyer,<sup>33</sup> but most communications relevant to the claim should logically fall within that scope.

In *In re Bieter Co.*,<sup>34</sup> the Eighth Circuit applied the *Upjohn* principles to a claim of attorney-client privilege with respect to a consultant who had been retained by a real estate development company and held that the consultant's confidential communications to the company's attorneys were protected by the attorney-client privilege. The court held that there was no reason to distinguish between persons on the corporation's payroll and the consultant.<sup>35</sup>

Courts applying the *Upjohn* and *Bieter* tests have held that confidential communications among a party, its counsel and a *non-testifying* expert or consultant with regard to the matter in litigation are protected by the attorney-client privilege.<sup>36</sup> If the consultant is designated as an expert trial witness, however, the adverse party is entitled to discovery of any materials, including attorney-client communications, shared with such experts.<sup>37</sup>

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<sup>31</sup> 296 F.2d 918 (2d Cir. 1961).

<sup>32</sup> *Id.* at 922.

<sup>33</sup> *Id.*; see also *Olender v. United States*, 210 F.2d 795 (9th Cir. 1954); *Seal v. United States*, 947 F.2d 1188 (4th Cir. 1991)(conversations between a client who was a potential target of a grand jury investigation and an accountant were protected under an extension of the attorney-client privilege when those conversations took place in the course of a trip to the attorney's office; however, conversations that took place between the client and the accountant prior to that time were not protected).

<sup>34</sup> 16 F.3d 929 (8th Cir.1994)

<sup>35</sup> *Id.* at 937. See *In re Grand Jury Subpoenas Dated January 20, 1998*, 995 F.Supp. 332, 340 (E.D.N.Y. 1998) (court's concern is with identifying those representatives who can fairly be equated with the 'client' for purposes of the privilege"); *McCaugherty v. Siffermann*, 132 F.R.D. 234, 239 (N.D.Cal. 1990) (under *Upjohn*, there is no basis for distinguishing consultant's communications with attorneys and corporate employee's communications with attorneys when each acted in the scope of their employment); *Western Resources v. Union Pacific Railroad Co.*, 2002 WL 181494 (D.Kan. 2002) (expert consultant retained in anticipation of litigation was corporate representative within scope of attorney-client privilege); cf. *Occidental Chemical Corp. v. OHM Remediation Services, Corp.*, 175 F.R.D. 431, 436-37 (W.D.N.Y.1997) (no privilege attaching to communications from consultant who was not hired to assist in the rendition of legal services).

<sup>36</sup> See *Western Resources v. Union Pacific Railroad Co.*, 2002 WL 181494 (D.Kan. 2002); *Fru-Con Const. Corp. v. Sacramento Mun. Utility Dist.*, 2006 WL 2255538 (E.D.Cal. 2006); *In re Grand Jury Subpoena Dated March 9, 2001*, 179 F.Supp.2d 270, 283 (S.D.N.Y. 2001). See also *State v. Riddle*, 964 P.2d 1056, 1062 (Or. App. 1998); *Calvin Klein Trademark Trust v. Wachner*, 124 F.Supp.2d 207 (S.D.N.Y. 2000) (joint discussions among client, its attorney, and its investment banker were privileged where investment banker's role involved providing advice useful to the attorney in rendering a legal opinion); *Allianz Underwriters, Inc. v. Rusty Jones, Inc.*, 1986 WL 6950 (N.D.Ill. 1986) (communications between attorney, client, and insurance broker were privileged where it was sent to the broker with the understanding that the broker would communicate necessary facts to the attorney); *Muro v. Target Corp.*, 2006 WL 3422181 at \*4 (N.D.Ill. 2006) (lack of participation in a communication by attorney does not necessarily obviate privilege; communication is privileged if it reveals "directly or indirectly, the substance of a confidential attorney-client communication").

<sup>37</sup> See, e.g., *United States Fidelity & Guar. Co. v. Braspetro Oil Servs. Co.*, 2002 WL 15652 at \*9 (S.D.N.Y. 2002) (surety which had made documents on privilege log available for testifying experts had to produce documents to defendants); see also *Synthes Spine Co., L.P. v. Walden*, 232 F.R.D. 460, 463-464 (E.D.Pa. 2005); *American Fidelity Assurane Co. v. Boyer*, 225 F.R.D. 520, 521-22 (D.S.C. 2004) ("it is essential during pretrial discovery that

Essentially, under *Upjohn*, courts take a functional and pragmatic approach to this issue, looking to the role of the consultant and whether the consultant is effectively an extension of the client who plays a necessary role in the formulation of the attorney's ultimate legal advice to the client. For example, in *FTC v. Glaxosmithkline*,<sup>38</sup> the D.C. Circuit found that the attorney-client privilege applied to independent contractors assisting a prescription drug manufacturer. The manufacturer withheld as privileged documents that were distributed to public relations and government affairs consultants hired by the client who worked with the client's attorneys in the same manner as the full time employees and "became integral members of the team assigned to deal" with the litigation.<sup>39</sup> The court reiterated the logic that "there is no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice."<sup>40</sup> Other courts have recognized the "functional equivalent doctrine" outlined in *Beiter*, but have been unwilling to expand upon *Beiter* without convincing evidence that the consultant was, in fact, a *de facto* employee.<sup>41</sup>

The question of whether the disclosure of attorney-client communications to consultants waives the privilege that otherwise attaches to those communications is a fact driven issue. Ideally, whenever possible, such consultants should be retained by counsel rather than by the company in order to bolster the argument that the consultant is providing assistance to counsel and that their communications are therefore protected by the attorney-client privilege.

### **C. Disclosure to Brokers or Other Parties**

During the investigation of a surety or fidelity claim, the claims representative or outside counsel may need to communicate with, and seek information from, the broker or other parties outside the employ of the client. During these communications, it may be necessary -- in order to obtain effective assistance of the third-party -- to share information which would otherwise be protected by the attorney-client privilege. As discussed above, as a general rule, such disclosures would ordinarily result in a waiver of that privilege. However, it may be possible to protect the privilege if the disclosure was for the accomplishment of the purpose for which counsel was consulted and there was a common interest among the parties at the time of disclosure that is adverse to that of the party seeking discovery. Because privileges are not favored, the "common interest" extension of the privilege is construed narrowly, rather than expansively.<sup>42</sup> As a result, even where it appears that the broker or other party shares an interest in the outcome of the dispute or lawsuit, careful consideration should be given to the potential that a disclosure could result in the waiver of the privilege and the possible consequences of such a waiver.

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the parties be able to discover not only what an opposing expert's opinions are, but also the manner in which they were arrived at, what was considered in doing so, and whether this was done as a result of an objective consideration of the facts, or directed by an attorney advocating a particular position.")

<sup>38</sup> 294 F.3d 141 (D.C.Cir. 2002)

<sup>39</sup> *Id.* at 148.

<sup>40</sup> *Id.* (quoting *Copper Market*, 200 F.R.D. at 219.)

<sup>41</sup> See, e.g., *Export-Import Bank of the United States*, 232 F.R.D. 103, 113 (S.D.N.Y. 2005);

<sup>42</sup> *Cigna Ins. Co. v. Cooper Tires & Rubber, Inc.*, 2001 U.S. Dist. LEXIS 7546 (N.D. Ohio 2001) (unpublished opinion); *DuPlan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974); *Libbey Glass v. Ondida Ltd.*, 197 F.R.D. 342, 348 (N.D. Ohio 1999).

A community of interest may exist among different persons or separate corporations:

where they have an identical legal interest with respect to the subject matter of the communication between an attorney and a client concerning legal advice. The third parties receiving copies of the communication and claiming a community of interest may be distinct legal entities from the client receiving the legal advice and may be [non-parties] to any anticipated or pending litigation. The key consideration is that the nature of the interest be identical, not similar and be legal, not solely commercial.<sup>43</sup>

Commonly, owners and employees of the principal, the principal's broker or others connected to the project will have relevant information or otherwise be able to assist the surety in its investigation of a performance or payment bond claim. In deciding whether communications between those parties and the attorney representing the company will be afforded the privilege, courts will examine whether the outside party and the company have an identical legal interest with respect to the subject matter of the communication.<sup>44</sup> In *Cigna Insurance Co. v. Cooper Tires & Rubber, Inc.*,<sup>45</sup> the defendant sent an investigative report prepared by an outside investigator to its insurance broker and its attorney. Defendant argued that it had a "common interest" with its broker in the defense of the lawsuit, and as such, the report should remain privileged despite its delivery to the broker.<sup>46</sup> The court stated that the common interest doctrine does not encompass a joint business strategy which happens to include as one of its elements a concern regarding litigation.<sup>47</sup> The court found that the defendant was not calling on its broker to assist in formulating a common defense strategy, and thus sending the report did not appear to further defendant's defense or assist its counsel in the litigation.<sup>48</sup> However, in *Exxon Corp. v. St. Paul Fire & Marine Ins.*,<sup>49</sup> the Louisiana district court held that the insurance broker was involved in the defense of the action giving rise to the bad faith claims at issue in the litigation such that communications involving counsel for St. Paul, its insured and the broker were privileged.

In *STI Outdoor v. Superior Court*,<sup>50</sup> the California Court of Appeals, in dealing with the disclosure of a legal memorandum to a contract bidder, ruled that the disclosure of the memorandum was "reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted and thus there was no waiver of the attorney-client privilege."<sup>51</sup> In rejecting the out of state cases holding otherwise, the court noted those cases did not interpret

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<sup>43</sup> *DuPlan Corp.*, 397 F. Supp. at 1172; see also *Insurance Co. of N. Am. v. Superior Court*, 108 Cal. App. 3d 758 (Cal. Ct. App. 1980).

<sup>44</sup> Often the surety and the principal will assert a joint defense privilege and enter into a joint defense agreement. That topic is discussed in another portion of this program.

<sup>45</sup> 2001 U.S. Dist. LEXIS 7546 (N.D. Ohio May 24, 2001) (unpublished opinion).

<sup>46</sup> *Id.* at \*4.

<sup>47</sup> See *Walsh v. Northrop Grumman Corp.*, 165 F.R.D. 16, 19 (E.D.N.Y. 1996).

<sup>48</sup> *Cigna Ins. Co.*, 2001 U.S. Dist. LEXIS 7546 at \*7.

<sup>49</sup> 903 F.Supp. 1007(E.D.La. 1995).

<sup>50</sup> 91 Cal. App. 4<sup>th</sup> 334 (2001).

<sup>51</sup> *Id.* at 339.

nor deal with the California Evidence Code. Given the strict reliance on the California Evidence Code, the *STI Outdoors* analysis is likely of limited use in other jurisdiction.

However, other courts have similarly extended the privilege to third parties. In *Royal Surplus Lines Insurance Co. v. Sofamor Danek Group, Inc.*,<sup>52</sup> the court found that an insurance broker for the insured, who consulted with the insured and its counsel regarding an insurance policy dispute, was a corporate representative of the insured for purposes of applying the attorney-client privilege. Thus, while an argument exists to protect communications with a broker, contractor, or other third party, the claims representative and outside counsel must be cautious in sharing confidential communications with such parties. If the holder of the privilege discloses such communications to an unnecessary third-party who does not have a “community of interest”, those disclosures arguably constitute a waiver of the attorney-client privilege. Any such communications must involve careful scrutiny of the relationship to ensure there is a common interest between the parties.

#### **D. Use of Independent Law Audit Services To Review Outside Counsel’s Bills**

A relatively new issue in this context involves the use of independent auditing firms to review and/or pay outside counsel’s invoices. Insurance companies have led the way in requiring itemization of invoices with complete descriptions of the work performed by the attorney. Often the client requires that the invoices describe in detail the nature of the issue, the precise topic of investigation, research undertaken, and sometimes the advice given. To the extent invoices contain sufficient detail to reveal the nature of the services provided by the attorney, those invoices may constitute protected attorney-client communications or reflective of protected attorney work product.<sup>53</sup> The question thus arises as to whether disclosure of these itemized billings to an independent law audit service constitute a waiver of the privilege that would allow discovery of these bills and potentially related items with respect to the invoices. Arguably, providing these bills to a third-party auditor is a waiver of the privilege unless the independent law audit service is deemed to be a representative of the company in connection with the rendering of legal advice in the matter or is deemed to have a common interest in the outcome of the matter.<sup>54</sup> In fact, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued a formal opinion raising concerns that disclosures to independent auditors by submission of outside counsel’s bills for review may be a waiver of the attorney-client privilege.<sup>55</sup> If a company uses independent auditors in surety or fidelity claims, company personnel should be aware that the invoices may be discoverable.

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<sup>52</sup> 190 F.R.D. 463 (W.D.Tenn.1999)

<sup>53</sup> See, e.g., *Fidelity & Deposit Co. of Maryland v. McCulloch*, 168 F.R.D. 516, 523 (E.D.Pa. 1996) (holding that billing records are subject to attorney-client privilege to extent records reveal nature of services performed); *Real v. Continental Group, Inc.*, 116 F.R.D. 211, 213-14 (N.D.Cal. 1986) (holding that attorney bills that reveal the nature of legal services provided are privileged);

<sup>54</sup> See *In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P. 3d 806, 820-821 (Mont. 2000) (third-party auditor not within “community of interest”); see also *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997) (privilege waived by disclosure of attorney billing records to government auditing agency pursuant to defense contract).

<sup>55</sup> ABA Comm. On Ethics and Professional Responsibility, Formal Op. 01-421 (2001).

## E. State Insurance Department Investigations

Another potential waiver issue arises when state insurance regulators are granted access to the books and records of the surety or fidelity company or request a copy of its claim file in a particular matter. Indeed, regulatory activity concerning the claims handling of insurance companies has recently intensified. Insurance departments are increasingly making requests for a written response to a complaint filed by a consumer. States have differing rules with regard to the confidentiality of such submissions, but regardless of the state, before responding to any type of insurance department inquiry that seeks potentially privileged information, counsel should be consulted with regard to potential waiver issues. Care must be taken in responding to these complaints because the files are, in some states, considered to be public records, so that the sharing of privilege communications as part of the insurance department's investigation may waive the privilege.

The confidentiality of investigative files varies considerably among states. In many states, there is no express confidentiality for investigations conducted by the insurance department. In a few states, including Maine, Missouri, New Jersey, Oklahoma and Oregon, specific confidentiality laws protect consumer complaint files to varying degrees. In other states, only certain complaint files may be protected. Accordingly, it is necessary to be aware of the rule in the jurisdiction requesting the materials.<sup>56</sup>

## V. DISCOVERY IN BAD FAITH LITIGATION

In those jurisdictions which permit common law or statutory "bad faith" claims in connection with surety or fidelity claims, the assertion and prosecution of such claims is generally characterized by aggressive discovery disputes over requests for claim files, underwriting files, and reserve information, including potentially confidential or privileged materials. In such cases, plaintiffs will often seek to overcome the assertion of the attorney-client privilege with respect to communications between counsel and the company during the investigation on the theory that the communications fall within the crime-fraud exception or by arguing that the privilege is waived because the advice of counsel has been placed in issue by the defense to the bad faith allegations.

### A. The Crime-Fraud Exception

As a general proposition, the attorney-client privilege can be overcome where the communications are "intended to further continuing or future criminal or fraudulent activity."<sup>57</sup> In order to invoke the crime-fraud exception, the party challenging the privilege or doctrine must make a *prima facie* showing that the communications were in furtherance of a crime or fraud. Communications between the attorney and client made after the commission of a crime, fraud, or tort are protected by the attorney-client privilege; indeed, the very purpose for the

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<sup>56</sup> See generally, Jeffrey Thomas and Susan Stead, *Attorney-Client Privilege and Confidentiality Issues in Internal and External Investigations*, The Brief (Summer 2006, Vol. 35 No. 4, ABA).

<sup>57</sup> See, e.g., *In re Grand Jury Investigation*, 445 F.3d 266, 273-274 (3d. Cir. 2006); *In Re Grand Jury Proceedings*, 604 F.2d 798, 802 (3d Cir.1979).

creation of the privilege is to allow just such communications to be made in the interest of establishing a legal defense.<sup>58</sup> On the other hand, communications:

made before the fact of or during the commission of a crime, fraud, or tort between an attorney and persons within the control group of the corporate client are not protected by the attorney-client privilege. To allow the attorney-client privilege to attach to such communications would permit an attorney to be a principal or an accessory to a crime, fraud, or tort without fear of discovery and would permit clients to commit crimes, frauds, and torts with the aid of legal advice before hand. Consultation to carry out the wrongful conduct is a conspiracy. The attorney-client privilege was not meant to protect such communications intended to foster criminal, fraudulent, or tortious conduct.<sup>59</sup>

Against the backdrop of this general concept, the cases are extremely fact-sensitive and do not lend themselves to any general rule as to application of the exception. While the crime-fraud exception would appear to have no application in the context of an investigation of a surety or fidelity claim, creative litigators often seek to apply the exception to gain access to communications between counsel and the company leading up to the denial of the claim.

In *Freedom Trust v. Chubb Group*,<sup>60</sup> the plaintiff sued Chubb for bad faith denial of its claim. Following denial of Chubb's motion for summary judgment on that claim, plaintiff asserted that it had made a *prima facie* showing of bad faith sufficient to trigger the crime-fraud exception and brought a motion to compel disclosure of Chubb's communications with its attorneys concerning the claim. Aware of a split among other states,<sup>61</sup> the court refused to find that the case fell within the crime-fraud exception such to vitiate the privilege under California law.<sup>62</sup> Drawing a fundamental difference between fraud and bad faith, the court stated:

While some courts have equated bad faith with civil fraud and therefore applied the exception to both, there is no persuasive reason to distinguish bad faith from other intentional torts. Bad faith denial of insurance coverage means simply that the insurer breached an implied contractual agreement to act faithfully to an agreed common purpose consistent with the reasonably justified expectations of the other party. This need not implicate false or misleading statements by the insurer. For example, an insurer may act in bad faith if it simply denies coverage without any explanation. The gravamen of fraud, however, is falsity. ... Thus, bad faith denial of insurance coverage is not inherently similar to fraud. If so,

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<sup>58</sup> See *DuPlan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974).

<sup>59</sup> *Id.* at 1172 (citations omitted).

<sup>60</sup> 38 F. Supp. 2d 1170 (C.D. Cal. 1999).

<sup>61</sup> See, e.g., *United States Auto Ass'n v. Werley*, 526 P.2d 28 (Alaska 1974) (*prima facie* evidence of bad faith triggers crime-fraud exception); *Gagne v. Ralph Pill Elec. Supply Co.*, 114 F.R.D. 22, 25 (D. Me. 1987) (*prima facie* evidence of fraud in bad faith case may trigger crime-fraud exception); *Riggs v. Schroering*, 822 S.W.2d 414, 415 (Ky. 1991) (attorney-client privilege not breached by mere allegation of bad faith); *Kujawa v. Manhattan Nat'l Life Ins. Co.*, 541 So.2d 1168 (Fla. 1989) (bad faith claim does not abolish privilege).

<sup>62</sup> *Freedom Trust*, 38 F. Supp. at 1173.

there is no persuasive reason to include bad faith in the fraud exception to the lawyer-client privilege.<sup>63</sup>

One must be aware of the arguments being raised by counsel in bad faith litigation in attempting to pierce the attorney-client privilege. While the reasoning in *Chubb* is sound, it does not entirely preclude the discovery of such communications if it can be shown fraud exists. It simply provides that a *prima facie* showing of bad faith does not trigger the exception.

## **B. Placing the Advice of Counsel “At Issue”**

The second common argument is that the company waives the attorney-client privilege by placing privileged matters at issue in its defense of a bad faith lawsuit. The policy underlying the "at issue" waiver rule is that a party should not be able to use its reliance on the advice of counsel as a sword while using the privilege as a shield to prevent full disclosure of that advice. While waiver generally requires a voluntary and intentional relinquishment of a known right, waiver of the attorney-client privilege in this context may be implicit, even if it is contrary to the party's actual intent.<sup>64</sup> As the Delaware Supreme Court noted:

Regard must be had to the double elements that are predicted in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his immunity shall cease whether he intended the result or not.<sup>65</sup>

Thus, plaintiffs will argue that the surety or fidelity company impliedly waives the attorney-client privilege in a bad faith action where it relies on a subjectively reasonable interpretation of the law as influenced by the advice of counsel. The advice of counsel defense “does not necessarily become an issue merely because the attorney’s advice might affect the client’s state of mind in a relevant manner. Rather, the client must take the affirmative step in the litigation to place the advice of the attorney in issue.”<sup>66</sup>

In *Tackett v. State Farm Fire & Casualty Co.*,<sup>67</sup> the insurer did not specifically state it relied on its counsel as a defense to the bad faith claim. Rather, it alleged facts that “implicitly relied upon communications with counsel” as justification for non-payment of the claim.<sup>68</sup> In the court’s view, this was an affirmative step placing counsel’s advice in issue, and as such, the court held the insurer could not shield itself from disclosure of the complete advice of counsel relevant to the handling of the claim.

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<sup>63</sup> *Id.* (citations omitted).

<sup>64</sup> *Tackett v. State Farm Fire & Cas. Co.*, 653 A.2d 254, 259 (Del. 1995) (quotations omitted).

<sup>65</sup> *Id.* (quotations omitted).

<sup>66</sup> *Robertson v. Allstate Ins. Co.*, Civ. No. 98-4909, 1999 U.S. Dist. LEXIS 2991, \*15 (E.D. Pa. March 10, 1999) (quotations omitted).

<sup>67</sup> 653 A.2d 254 (Del. 1995).

<sup>68</sup> *See id.* at 260.

In recent years, the Arizona Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Lee*<sup>69</sup> and the Ohio Supreme Court in *Boone v. Vanliner Insurance Co.*<sup>70</sup> have gone even further and required insurers in bad faith actions to produce attorney-client correspondence relating to the investigation of a claim even though the insurers were not asserting an “advice of counsel” defense. These two decisions follow a number of courts in holding that once a *prima facie* case for “bad faith” has been established, the attorney-client privilege between an insurance company and its attorneys is abrogated.<sup>71</sup>

Claims representatives must be especially mindful of the rules governing the attorney-client privilege in “bad faith” litigation, where the possibility of a finding that there has been a waiver -- and the stakes -- can be greater than in other cases. It may be beneficial -- or even necessary -- to affirmatively place an attorney’s advice in issue in a “bad faith” case, where that advice provides a sound basis for the denial of the claim and demonstrates the company’s good faith handling of the claim. However, careful consideration must be given in formulating a defense strategy in a “bad faith” action so as not to affirmatively place potentially problematic communications with counsel at issue where it is not necessary to do so.

The same analysis often arises in an indemnity action where the principal is challenging the basis for the surety’s payment of the claim or contending that the surety acted as a volunteer. In such cases, the surety may have to weigh the value of producing attorney-client privileged communications to support its claims decisions against the breadth of the otherwise privileged documents that might ultimately have to be produced if the privilege is waived. Depending upon the facts of the case, it may be advisable to simply produce the entire claims file, including otherwise privileged communications, to demonstrate the surety’s good faith handling of the claims and avoid time-consuming discovery disputes. On the other hand, the consequences of such a waiver of the privilege should be considered, including whether there are any potentially misleading or damaging privileged communications contained in those files.

## **VI. INADVERTENT DISCLOSURE**

Given the candid content of attorney-client privileged communications, inadvertent disclosures can have potentially disastrous results. In *In Re: Grand Jury Subpoena*,<sup>72</sup> a corporation inadvertently disclosed a legal memorandum prepared by its in-house counsel. After an *in camera* review of the documents, the district court found that the documents were protected by the attorney-client privilege, but held that the crime-fraud exception applied. Ultimately, because of the inadvertent production of counsel’s single legal memorandum, the corporation was forced to produce hundreds of additional documents and produce two employees to testify regarding their communications with in-house counsel.

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<sup>69</sup> 744 N.E.2d 154 (Ohio 2001).

<sup>70</sup> 13 P.3d 1169 (Ariz. 2000).

<sup>71</sup> See *Silva v. Fire Ins. Exch.*, 112 F.R.D. 699, 700 (D. Mont. 1996); *In re Bergeson*, 112 F.R.D. 692, 697-98 (D. Mont. 1986); *Escalante v. Sentry Ins. Co.*, 743 P.2d 832, 842-43 (Wash. Ct. App. 1987).

<sup>72</sup> 220 F.3d 406 (2000).

The loss of the attorney-client privilege through inadvertent disclosure is an unsettled area of law which has generated three distinct approaches:<sup>73</sup> the rule that an inadvertent disclosure vitiates the privilege and constitutes a waiver;<sup>74</sup> the “no waiver” rule;<sup>75</sup> and a middle of the road approach, analyzing the reasonableness of the steps taken to preserve the confidentiality of privileged documents.<sup>76</sup>

The strict responsibility approach essentially treats any inadvertent disclosure of privileged information as a waiver of the privilege, ignoring the rule that a waiver requires the “intentional” relinquishment of a known right. The underlying premise for this approach is that once a third party obtains possession of a privileged communication, confidentiality is lost and cannot be restored.<sup>77</sup> The leading case for this approach is *Underwater Storage, Inc. v. United States Rubber Co.*,<sup>78</sup> in which the plaintiff’s lawyer inadvertently provided a privileged letter to the defendant pursuant to a consent order. Return of the privileged document was sought based on involuntary production. The plaintiff also argued that if the production was voluntary, then the waiver was only with respect to the produced piece of paper. The court rejected plaintiff’s argument stating:

The plaintiff turned over to his attorney the documents to be produced. The letter was among them. The Court will not look behind this objective fact to determine whether the plaintiff really intended to have the letter examined. Nor will the court hold that the inadvertence of counsel is not chargeable to his client. Once the document was produced for inspection, it entered the public domain. Its confidentiality was breached thereby destroying the basis for the continued existence of the privilege.<sup>79</sup>

Of the three approaches, this is the easiest to administer and yields the most consistent results; however, it is also the most criticized, largely because it is not only the harshest but it frequently “punishes the client for the attorney’s mistake.”<sup>80</sup>

The balancing test approach, adopted by most jurisdictions, looks to the circumstances surrounding an inadvertent disclosure to determine whether the attorney-client privilege has

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<sup>73</sup> *Ciba-Giegy Corp. v. Sandoz Ltd.*, 916 F. Supp. 404, 410 (D.N.J. 1995); *Gray v. Bicknell*, 86 F.3d 1472, 1483 (8<sup>th</sup> Cir. 1996)(describing the three different approaches).

<sup>74</sup> See, e.g., *Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990); *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989).

<sup>75</sup> See *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 938 (S.D. Fla. 1991); *Helman v. Murry’s Steaks*, 728 F. Supp. 1099, 1104 (D. Del. 1990); *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 954 (D.C. Ill. 1982).

<sup>76</sup> See *United States v. Keystone Sanitation Co.*, 885 F. Supp. 672, 676 (M.D. Pa. 1994).

<sup>77</sup> *Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990) (enforcing the attorney-client privilege after the offending document has already been reviewed “would do no more than seal the bag from which the cat has already escaped.”); see also Carl Pacini, *Accountants, Attorney-Client Privilege, and the Kovel Rule: Waiver Through Inadvertent Disclosure Via Electronic Communications*, 28 Del. J. Corp. L. 893, 911 (2003) (The need for the privilege has essentially disappeared once the opposing party knows the contents of privileged communications.)

<sup>78</sup> 314 F. Supp. 546 (D.D.C. 1970).

<sup>79</sup> *Id.* at 549.

<sup>80</sup> Joshua K. Simko, *Inadvertent Disclosure, the Attorney-Client Privilege, and Legal Ethics: An Examination and Suggestion for Alaska*, 19 Alaska L. Rev. 461, 466 (2002).

been waived. Under this approach, the courts apply a five-factor test: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measure taken to rectify the disclosures; (5) whether the overriding interests of justice would or would not be served by relieving a party of its error.<sup>81</sup>

In the evaluation of the first factor, courts have looked to see if the party had a screening process in place and how it was implemented.<sup>82</sup> A precaution as minimal as stamping a document “confidential” or “privileged” has been considered adequate protection.<sup>83</sup> The second, third, and fourth factors of the balancing approach are examined relatively easily. Obviously, under the second factor the fewer the disclosures the more likely a court is to maintain the privilege.<sup>84</sup> With regard to the third factor, the extent of the disclosure, the less knowledge the receiving attorney has of the contents of the document disclosed, the more likely the court is to protect the document.<sup>85</sup> Under the fourth factor, the less time taken to retrieve or attempt to remedy the situation by way of filing a motion for protective order or other means, the more likely a court is to uphold the privilege.<sup>86</sup> The fifth factor under this approach is more subjective, similar to the first. When applying this factor, courts look to the unique circumstances of each case to determine whether the privilege has been waived.<sup>87</sup>

This balancing approach arguably best serves the purpose of the attorney-client privilege. Critics of this approach argue, however, that it leads to inconsistent results and promotes over-expenditure of judicial resources in that the *ad hoc* determination of reasonableness and fairness encourages parties to litigate every dispute involving inadvertent disclosure.<sup>88</sup>

The final approach is known as the “no waiver” or “modern” approach. Under this approach, as long as the disclosure was truly inadvertent, a court will enforce the privilege. Because the privilege belongs to the client, only the client may waive it and the inquiry is with regard to the client’s intent.<sup>89</sup> This approach is lauded for its ease of administration and predictable results. Given that the approach looks to the intent of the client, it seems more fair

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<sup>81</sup> See *Hydraflow, Inc. v. Enidine Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985); *United States v. Keystone Sanitation*, 885 F. Supp. 672, 676 (M.D. Pa. 1994); *Allread v. City of Grenada*, 988 F.2d 1425, 1433 (5th Cir. 1993); *Sampson Fire Sales, Inc. v. Oaks*, 201 F.R.D. 351, 360 (M.D. Pa. 2001); *Wallace v. Beech Aircraft Corp.*, 179 F.R.D. 313, 314 (D. Kan. 1998); see also *N.Y. Times Newspaper Div. v. Lehrer McGovern Bovis, Inc.*, 300 A.D.2d 169, 752 N.Y.S.2d 642 (1st Dept. 2002); *Kraus v. Brandstetter*, 185 A.D.2d 300, 586 N.Y.S.2d 270 (2d Dept. 1992); *Mfrs. & Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 522 N.Y.S.2d 999 (4th Dept. 1987).

<sup>82</sup> *In re Grand Jury Investigation*, 142 F.R.D. 276, 279-80 (M.D.N.C. 1992); *Fed. Deposit Ins. Corp. v. Marine Midland Realty*, 138 F.R.D. 479, 483 (E.D. Va. 1991).

<sup>83</sup> *Local 851 Int’l Bhd. of Teamsters v. Kuehne Y Nagel Air Freight, Inc.*, 36 F. Supp. 2d 127, 132 (E.D.N.Y. 1998).

<sup>84</sup> See *Rotelli v. 7-Up Bottling Co.*, 1995 WL 234171 at \*3 (E.D. Pa. Apr. 19, 1995).

<sup>85</sup> See Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision-Making*, 48 Emory L.J. 1255, 1274 n. 65 (1999).

<sup>86</sup> See *In Re Grand Jury (Impounded)*, 138 F.3d 978, 981 (3d Cir. 1998).

<sup>87</sup> *Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576 (D. Kan. 1997).

<sup>88</sup> *Berg Elecs., Inc. v. Molex, Inc.*, 875 F. Supp. 261, 263 (D. Del. 1995).

<sup>89</sup> *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 952 (N.D. Ill. 1982).

to the parties because it does not punish the client for the attorney's negligence.<sup>90</sup> But critics argue that this approach is deficient because it is too difficult to discern the client's intent and removes all incentives for attorneys to protect the client's confidential documents.<sup>91</sup>

Given the rise in electronic document productions, and the ease with which documents may be inadvertently disclosed via electronic means such as email, attorneys should be well versed in their jurisdiction's requirements and ethical rules, not only to avoid violations, but also to zealously advocate its client's position to the fullest extent. Regardless of the jurisdiction, it is always prudent to exercise care in maintaining and producing privileged communications. Often, a claims representative may find it necessary to permit others, including reinsurers, to review its claims file. Whenever possible, privileged documents should be segregated to avoid waiver arguments and to demonstrate care was taken to preserve the privilege in the event there is an inadvertent disclosure in subsequent litigation.

## **VII. CONCLUSION**

The attorney-client privilege remains an important protection, but it is constantly subject to challenge and the rules for application are seldom concrete and always changing. Each situation is fact-specific and can turn upon decisions made and procedures adopted throughout the entire claims process -- well before the privilege issue is ever raised -- and throughout the conclusion of the litigation. While there are no guarantees, a concerted effort to clearly define the roles of various players in the claims process and understand the potential pitfalls can minimize the chances of unnecessary disclosures and maximize the opportunity to protect confidential communications.

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<sup>90</sup> See Carl Pacini, *Accountants, Attorney-Client Privilege, and the Kovel Rule: Waiver Through Inadvertent Disclosure Via Electronic Communications*, 28 Del. J. Corp. L. 893, 912 (2003).

<sup>91</sup> See *id.* at 913.

## **DARRYL WEISSMAN**

Darryl Weissman is a member of the firm of Wolff & Samson PC, in West Orange, New Jersey and practices in the areas of fidelity and surety law and construction litigation. He received his Bachelor of Arts degree in 1970 from Adelphi University, and his Juris Doctor degree in 1975 from Brooklyn Law School. He was admitted to the bar of the State of New York in 1976, and to the bar of the State of New Jersey in 1991. He is a member of the ABA Forum on the Construction Industry, the Fidelity & Surety Law Committee of the Tort and Insurance Practice Section of the American Bar Association and a member of the New Jersey Bar Association's Fidelity & Surety Law Committee. Mr. Weissman authored an article for the 1992 Northeast Surety & Fidelity Claims Conference entitled "Impracticable, Impossible and Intolerable Conditions - Excusing the Contractor and Surety from Performing the Contract." In 1995, he delivered a paper at the same conference entitled "Pay-When-Paid Clauses and the Surety." At the 1996 Northeast Surety and Fidelity Claims Conference, Mr. Weissman delivered an article entitled "Limitations and Notice Defenses to Payment Bond Claims - Can the Courts Still be Relied Upon to Enforce the Surety's Rights?" He has also presented papers entitled "The Surety's Priority Battle With State Labor Departments Over Unpaid Contract Funds" (Northeast Surety & Fidelity Claims Conference, October 1998), "Liability of the Performance Bond Surety for Delay Damages, Consequential Damages and Liquidated Damages" (Surety Claims Institute, June 1999), and "Pre-Emptive Loss Prevention - Has The Surety Secured The Intellectual Property Rights Required For Performance" (Northeast Surety & Fidelity Claims Conference, September 2002); more recently, he served as Chair of the surety program at the 2006 meeting of the Surety Claims Institute.

In the surety field, he has successfully argued at the trial and appellate levels, resulting in reported decisions in favor of surety clients, including *Hutton Construction Co., Inc. v. County of Rockland, et al.*, 52 F. 3d 1191 (2nd Cir. 1995), and *Allied Mechanical and Plumbing Corp., v. Dynamic Hostels Housing Development Fund Co., Inc., Mundo Developers, Ltd. and St. Paul Fire and Marine Insurance Co.*, 62 B.R. 873 (Bkrtcy. S.D.N.Y. 1986).

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Joe Monaghan is Counsel to the firm of Wolff & Samson PC, in West Orange, New Jersey and practices in the areas of fidelity and surety law and construction litigation. He received his undergraduate degree in 1983 from Georgetown University and his Juris Doctor degree in 1988 from Rutgers School of Law. Mr. Monaghan joined Wolff & Samson in 1988 and, after eight years with the firm, then spent five years as surety counsel with one of the firm's clients before returning to the firm in 2002. Mr. Monaghan recently co-authored the chapter entitled "Deciding to Litigate: The Surety's Recourse Against its Principal and Indemnitors," in *MANAGING AND LITIGATING THE COMPLEX SURETY CASE* (Philip L. Bruner and Tracey L. Haley, eds., 2d ed. ABA 2007) and also co-authored the chapter entitled "Bond, Contractual, and Statutory Provisions and the General Agreement of Indemnity" in the *BOND DEFAULT MANUAL* (Duncan L. Clore, Richard E. Towle and Michael J. Sugar, Jr., eds., 3d ed. ABA 2005). His reported decisions in surety cases include *In re Modular Structures, Inc.*, 27 F.3d 72 (3d Cir. 1994) and *Eagle Fire Protection Corp. v. First Indemnity of America Ins. Co.*, 145 N.J. 345 (1996).

### ***JASON W. GLASGOW***

Jason Glasgow is currently Claim Counsel in the Travelers Bond and Financial Products Home Office Fidelity Department, managing complex commercial crime claims. Prior to joining Travelers in 2006, Jason was in private practice, handling matters in the areas of fidelity and surety litigation, insurance defense and insurance coverage. Jason received his Bachelor's degree in Economics from the University of Puget Sound in 1997 and graduated with Honors from the University of Connecticut School of Law in 2002. He is a member of the Connecticut Bar and is licensed to practice law in the federal and state courts of Connecticut. Jason has co-authored articles relating to the surety and fidelity industry and is a member of the Fidelity & Surety Law Committee of the Tort and Insurance Practice Section of the American Bar Association and a member of the Fidelity Law Association.

### ***DOUGLAS J. WILLS***

Doug Wills is a graduate of The Catholic University of America and University of the District of Columbia School of Law, both located in Washington, D.C. Following graduation from law school, he served as a Law Clerk to the Honorable Robert E. Francis, Superior Court of New Jersey, Chancery Division. Doug is licensed to practice law in the State of New Jersey, the Commonwealth of Pennsylvania and the District of Columbia. He has obtained approximately ten years of surety experience while working as claims counsel for Reliance Surety Company and St. Paul Surety Company and in his present position as Senior Surety Counsel with Liberty Mutual Surety. He also had the benefit of working in private practice throughout the Philadelphia region for approximately five years, where he gained extensive courtroom experience. Doug is a member of the Fidelity & Surety Law Committee of the Tort and Insurance Practice Section of the American Bar Association.