THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE FOR IN-HOUSE INSURANCE COUNSEL

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HOW DOES PRIVILEGE WORK?

Is our discussion here privileged?
Nature of the Attorney-Client Privilege

Origin of Attorney-Client Privilege:

- Privilege is a rule of evidence that is dictated by federal common law in federal non-diversity cases, and by state evidence rules in diversity and state law cases.
  - Federal Common Law – FRE 501
    - “Privilege, primarily is a right to be left alone, a right to unfettered freedom in certain narrowly prescribed relationships, from the state’s coercive or supervisory powers and from the nuisance of its eavesdropping. Even when thrown into the lap of litigation, they are not the property of the adversaries as such; even in litigation, they may be exclusively the property of perfectly neutral persons who wish to preserve, despite litigation, just as they preserved prior to litigation, their right to be left alone in their confidences.” 31 Tulane law Review, 101, 109-115 (1956)

- State Evidence Rules – e.g., California Evidence Code Section 954
  - The client, whether or not a party to a litigation or business transaction, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer.
  - The “Client” is any individual or corporation and includes any authorized representative of the client (e.g., another attorney).
Nature of the Attorney-Client Privilege (continued)

- The privilege can be extended to third parties assisting the attorney in rendering legal services (e.g., other attorneys, paralegals, secretaries, consultants, accountants) - but not designated experts.
- The client must be consulting with attorney in that capacity.
- The privilege applies equally to outside attorney & in-house counsel.
- The privilege applies equally to litigation and non-litigation matters.
- The privilege applies to writings and oral communications equally.
Attorney-Client Privilege vs. Work Product Doctrine

- Attorney-Client Privilege:
  - Attorney has ethical and legal obligation to protect privilege.
  - Communication must be for a legal purpose vs. business purpose.
    - Under federal law, “one of the significant purposes” must be to obtain legal advice.
    - California state law applies a “predominant purpose” test.
  - The privilege is owned by client and can only be waived by client.
  - Extended to third parties only if there is a legal purpose.
  - Extended to other counsel and clients if there is a “common purpose.”
  - Exceptions to privilege (e.g., crime-fraud).
Attorney-Client Privilege vs. Work Product Doctrine

- Attorney Work-Product Doctrine
  - Protects work done by an attorney (mental impressions, opinions, conclusions and theories) even if not shared with client.
  - Attorney is holder of protection, but client may assert on attorney’s behalf.
  - Applies to litigated and non-litigated matters.
  - Extends to work done by another person at instruction of attorney to assist.
  - Crime Fraud exception does not apply unless attorney is subject of crime.
Waiver of the Privilege

- Counsel or third party can destroy privilege
  - Inadvertent waiver.
  - Knowing waiver.
  - Will the court care how it was waived?
- Privilege can be waived with client’s permission.
- Is the risk of waiver worth the deal?
Practical Applications of Privilege For In-House Counsel

- Underwriting
- Claims
- Employment
- Business Transactions
- Regulatory/Compliance/Corporate
- Government Affairs
- Litigation For/Against the Company
- Reinsurance
Application of Protection Rules to In-House Counsel

- Should attorney-client privilege affect how the in-house counsel does her/his job for the client?
- Is there a more prudent way to protect the client?
- What are the consequences of asserting the privilege?
  - Civil and/or criminal/quasi-criminal investigations – benefit of disclosing information vs. risk of waiving privilege further and allowing access to sensitive information
  - Can you still prove your litigated case if you assert privilege?
  - Cannot use privilege as a sword and a shield!
  - Bankruptcy/Receivership: Privilege still exists, but holder is trustee or receiver.
Application of Privilege - Underwriting

- The application process and information about insured’s business.
- Information from renewal process.
- Does the privilege extend to managing general agents?
- Do communications with a broker waive privilege?
Application of Privilege - Claims

- Communications with “coverage counsel”.
  - Is coverage counsel rendering legal advice or playing “super adjuster”?  
  - Is advice of counsel defense worth waiver?
- Communications with defense counsel.
- Communications with colleagues in Underwriting.
- Communications with insured’s broker/accountants regarding pending/threatened/resolved claims.
- Communications with colleagues in Litigation.
- Communications with other insurers regarding coinsured claims and defense of them.
  - Application of “common interest” doctrine.
  - Joint defense agreements.
Application of Privilege - Employment

- Is it Legal Advice or HR Advice?
- Status of employee (current, former, about to be former).
- Who does the in-house lawyer represent?
Application of Privilege - Business Transactions

- Does the work or communication have a dominant, or at least significant, legal purpose?
- Do in-house employees performing due diligence qualify for the privilege?
  - At whose direction and for what purpose?
- Can blending of the purposes destroy the privilege?
- Does the presence of third parties to the communication render it not privileged?
- Is there a waiver if deal does not go through?
- Does carving out specific legal issues and keeping a smaller “legal group” protect privilege?
- How does work-product apply in the business transaction?
Application of Privilege – Regulatory/Compliance/Corporate

- Easier to isolate legal purpose of communication on these topics.
- Compliance with SEC, DOI Regs, Sarbanes–Oxley, etc.: Legal questions?
- Are all such inquiries privileged matters?
- DOI investigations; SEC Inquiries/Investigations.
- Is there a difference between public companies and mutuals?

“This case poses a very difficult choice ... I know, coin toss!”
Application of Privilege - Government Affairs

- Cross-over with Regulatory and Compliance.
- What about advice on how to draft legislation to get around or conform with other statutes?
- Is work done in promoting the client’s policy principles work-product, or privileged? What if shared with others in the Company for non-legal/business reasons?
Application of Privilege - Litigation For/Against the Company

- Internal Investigations
  - What is the scope?
  - Review of Documents.
  - Interviews of employees.
  - Who is doing them?
    - In-house counsel.
    - Employees at in-house.
  - Role of in-house counsel when outside counsel is retained.
  - Preparation of reports, white papers.
  - Cooperation with government agency - how far? Worth a waiver?
  - In-house counsel acting as liaison between business leaders and outside counsel.
  - Cross-over with Independent Board, or other committee, investigation.
Application of Privilege - Litigation For/Against the Company (continued)

- Prosecution/Defense of Litigation With Third-Parties
  - Role of in-house counsel in monitoring litigation vs. claims handling or transactional involvement.
    - How involved?
    - Reporting
  - Responsibility for obtaining *all* company files
    - Who defines scope of search
    - Discovery unit work privileged?
    - Business of document retention vs. work-product protection

- Use of experts/Consultants
  - Business Practices
  - Damages
Application of Privilege - Reinsurance

- As a reinsurer, how does your right to audit a file/books and records square with cedent’s privilege objections?
- As a reinsured, how can you shield privileged communications from retrocessionaire and still satisfy “cooperation?”
- What effect does privilege/work-product have on proving your claim?
THE FUTURE OF THE PRIVILEGED COMMUNICATION

- The Privilege is under attack, and will continue to be so.
- Can it survive?