PROTECTED BY PRIVILEGE OR SUBJECT TO DISCLOSURE? WHAT LAW FIRMS AND LAWYERS SHOULD KNOW ABOUT COMMUNICATIONS WITH THEIR MALPRACTICE INSURERS

A law firm has identified an attorney error, is confronted with an angry, dissatisfied client, and a malpractice lawsuit is imminent. What now? Both the law firm and the lawyer face a multitude of challenges and considerations as they prepare to undertake the defense of their reputation and livelihood.

When presented with a potential malpractice claim, one of the most crucial and difficult decisions that must be tackled is determining when to inform a law firm's malpractice insurer. Since timely notification of a claim is a precursor to coverage under claims-made professional liability policies, it is imperative that lawyers and law firms promptly contact their insurer and provide written notice of the incident or circumstances that may result in a claim even if a complaint has not yet been filed.[i]

This initial pre-claim notification marks the beginning of the insured-insurer relationship. Once a malpractice action is commenced and defense counsel is engaged, communications between the insured-insurer continue and increase in frequency and substance as discovery ensues and litigation strategy develops.

Two well-established privileges that facilitate the free flow of information and communication between an attorney and his or her client and promote a platform for effective legal counseling and advocacy are the attorney-client privilege and the work-product doctrine. An analogous privilege has not yet been established for the "insured-insurer" context.[ii] In fact, federal courts have held that simply because a communication occurs between an insured and an insurer does not render that communication privileged.[iii]

In the absence of an explicit insured-insurer privilege, how secure is sensitive information communicated by attorneys to their malpractice insurers from the potential risk of disclosure?

I. The Attorney-Client Privilege and Work Product Doctrine are Instructive

In order for an insured-insurer communication to be protected from disclosure, it must fall under the scope of the attorney-client privilege, the work product doctrine, or the common interest doctrine.[iv]

Generally, two approaches are applied to determine whether a communication between an insured and insurer falls within the realm of attorney-client privilege. The majority of states, including Illinois, Nevada, and Missouri, adopt the position that communications between an insured and its insurer are presumptively protected by privilege in circumstances in which the insurer is obligated to retain counsel to defend the insured on a claim arising under the policy.[v] A minority of jurisdictions, such as New York and Maryland, follow a narrower approach in which the privilege does not apply unless: (1) the purpose of the communication is to obtain legal advice in connection with the insured's defense by counsel retained by the insurer; and (2) the communication is made with the expectation of confidentiality.[vi] As a general rule of thumb,

courts are more likely to find insured-insurer communications privileged when the insured is seeking legal advice and/or a legal defense. However, when the communication concerns a coverage dispute, courts are more likely to refuse the privilege, due to the fact that in cases where coverage is contested, the insured and insurer are adverse.[vii]

The work-product doctrine may further protect not only communications but the disclosure of certain documents exchanged between an insured and insurer.[viii] The work-product doctrine may be extended to shield from discovery reports, analyses, and/or other documents prepared by the insured or defense counsel in anticipation of litigation.[ix] One of the obstacles that attorneys and/or law firms invoking the work-product doctrine must overcome is establishing that the document or communication for which privilege is sought, was, in fact, prepared in anticipation of litigation.

II. The Applicability of the Common Interest Doctrine

Numerous jurisdictions[x] including, but not limited to, New York, Illinois, and California, also recognize that communications between an insured and insurer defending a claim under a professional liability policy are protected by the common interest doctrine (also known as the joint defense privilege). The common interest doctrine protects communications that are relevant to or advance the interest of clients possessing a shared legal interest or goal.[xi] Under the common interest arrangement, any member, including the attorney-insured, defense counsel, and the malpractice insurer can exchange communications freely with the protection of the privilege. Most jurisdictions require that the common interest between the insured and insurer be "legal" as opposed to "economic" or "commercial" in nature.[xii]

To invoke the protection of the common interest doctrine, the communication must first satisfy the requirements of attorney-client privilege.[xiii] This means that the communication: (1) is made for the purpose of facilitating legal advice or services in the course of a professional relationship; and (2) is primarily of a legal nature.[xiv] For an attorney-insured to establish the existence of a common interest privilege with his or her insurer, the attorney must also demonstrate the following: (1) the communication was made during the course of a joint defense or common enterprise; (2) that the communication was made to further shared interests; and (3) that the privilege has not been otherwise waived.[xv]

What constitutes "common interest" varies by jurisdiction. For example, Illinois requires the interests of the parties be "nearly identical" in order for the privilege to apply.[xvi] Other jurisdictions, such as New York, have recognized the common interest privilege even where parties' interests are not identical.[xvii]

Furthermore, the applicability of the common interest doctrine may depend on the timing of the communications sought to be privileged. In many circumstances, an attorney or law firm cannot wait until the commencement of a malpractice lawsuit to start a dialogue regarding defense strategy. Frequently, communications between an attorney-insured and his or her insurer regarding the incident giving rise to the potential malpractice lawsuit occur many months and sometimes even years prior to the filing of the complaint. In some circumstances, an attorney or law firm confronted with a professional dilemma may even seek guidance from an ethics hotline

before initiating communications with their malpractice insurer. Many state and local bar associations have established attorney hotlines for advice on potential legal and ethical concerns that may arise in the course of practice.[xviii] Although callers in search of advice are generally required to state their name and telephone numbers, the identity and substance of the calls are privileged and confidential, and not shared with other departments or legal authorities.[xix]

With the exception of the Fifth Circuit, the majority of Federal Circuits, including but not limited to California, Illinois, and Indiana, follow the rule that litigation need not be anticipated or threatened in order for the common interest privilege to apply.[xx] These courts do not limit the privilege to actions taken and advice obtained solely in the shadow of litigation since attorneys and law firms may engage in preemptive consultation in an effort to avoid malpractice and ensure compliance with established rules.[xxi] Other jurisdictions, such as the Fifth Circuit, require that litigation be actual, anticipated or threatened in order for the common interest doctrine to provide protection.[xxii] Notwithstanding the above, it should be noted that depending on the circumstances, attorneys may still have an obligation to make certain disclosures regarding the potential mistake or error at issue to the client, assuming that the client is not already aware of the same.[xxiii]

III. Conclusion

Even though it may not be uniformly applied and is largely assessed on a case-by-case basis with variations according to jurisdiction, the common interest doctrine has been successfully invoked in the insurer-insured context to protect communications. So long as the communications are made within the parameters of the jurisdictional requirements (*i.e.* is part of a common legal interest and in connection with potential litigation), a law firm or lawyer confronted with a disgruntled client and the threat of a malpractice lawsuit should not be concerned in collaborating with their malpractice insurer for fear of the risk of disclosure. In fact, based on the majority of jurisdictions examined herein, communication with malpractice insurers at the onset of a potential claim is ultimately beneficial as it secures a defense (even if under a reservation of rights) and opens the door to negotiating an early, cost-effective resolution.

By: Andrew R. Jones, Esq. and Izabell Lemkhen, Esq. of Furman Kornfeld & Brennan LLP

END NOTES

[i] Failure to provide timely notice of a claim may result in the loss of coverage. In some states, (*e.g.* New York), courts strictly construe the notice requirements under policies and treat certain conditions of an insurance policy as conditions precedent to coverage. Prejudice to the insurer is not required to deny coverage for late notification. *Sirignano v. Chi. Ins. Co.*, 192 F. Supp. 2d 199 (S.D.N.Y. 2002).

[ii] *See, e.g., Aiena v. Olsen*, 194 F.R.D. 134, 136 (S.D.N.Y. 2000); *Linde Thomson Langworthy Kohn & Van Dyke v. RTC*, 5 F.3d 1509, 1514 (D.C. Circ. 1993).

[iii] *Id.; see also, Calabro v. Stone*, 225 F.R.D. 96, 98 (E.D.N.Y. 2004).

[iv] *Aiena v. Olsen, supra*, 194 F.R.D. at 136.

[v] *State ex rel. Tillman v. Copeland*, 271 S.W.2d 42, 47-48 (Mo. Ct. App. 2008) (statements made by insured to insurer that relate to claim against insured for which the insurer is providing coverage are "privileged communications"); *Nevada Yellow Cab Corp. v. Eighth Judicial District Court*, 152 P.3d 737 (Nev. 2007); *Claxton v. Thackston*, 201 Ill. App. 3d 232, 235 (Ill. App. Ct. 1st Dist. 1990) (the attorney-client privilege also extends to "communications between an insured and insurer, where the insurer is under an obligation to defend.").

[vi] *Calabro, supra*, 225 F.R.D. at 98 (denying confidentiality of communications where the insured did not show any of the following: (1) that the communication at issue was for the purpose of obtaining legal advice; (2) that it was intended to persuade the insurance carrier to retain counsel to defend him; or (3) that the communication was made with an expectation that confidentiality be maintained); *Cutchin v. State*, 143 Md. App. 81, 94 (Md. Ct. Spec. App. 2002) (adopting a test resembling the narrow approach, where the court looks to whether the dominant purpose of the communication was for the insured's defense and whether the insured had a reasonable expectation of confidentiality).

[vii] *In re Pfizer Inc. Securities Litig.*, No. 90 Civ. 1260 (SS), 1993 WL 561125 (S.D.N.Y. 1993) (privilege inapplicable to communications between corporate insured and its carrier because the purpose of the communication was to seek insurance coverage rather than legal advice).

[viii] *Aiena, supra*, 194 F.R.D. 136.

[ix] *Calabro, supra*, 225 F.R.D. at 99.

[x] Courts in the following jurisdictions have either adopted the common interest doctrine or favorably recognized it: **New York**, *U.S. Bank Natl. Assn. v. APP Intl. Fin. Co.*, 33 A.D.3d 430, 823 N.Y.S.2d 361, (N.Y. App. Div. 1st Dep't 2006) ("In New York, we recognize that the public interest is served by shielding certain communications from litigation . . . and have afforded a conditional or qualified privilege to a communication made by one person to another upon a subject in which both have an interest, known as the common interest doctrine"); **Illinois**, *see, e.g. Beneficial Franchise Co. v. Bank One, N.A.*, 205 F.R.D. 212, 2001 U.S. Dist. LEXIS 5986 (N.D. Ill. 2001)("[T]he common interest doctrine applies to any parties who have a "common interest" in current or potential litigation . . . "); **California**, *see, e.g., McKesson HBOC, Inc. v. Super. Ct.*, 9 Cal. Rptr. 3d 812, 818 (Cal. Ct. App. 2004) (dictum) ("In other words parties aligned on the same side in an investigation or litigation may, in some circumstances, share privileged documents without waiving the attorney-client privilege."), **Florida**, *see, e.g., Visual Scene, Inc. v. Pilkington Bros.*, PLC, 508 So. 2d 437, 440-41 (applying common interest doctrine to protect communications shared between counsel to plaintiff and defendant in civil action to further parties' common interest in defeating counterclaim and cross-claim brought against them by common co-defendant.), **Texas**, *see. e.g., In re Skiles*, 102 S.W.3d 323, 326-27 (Tex. Ct. App. 2003) (applying common interest doctrine to protect communications shared between counsel to civil defendant and non-party), **Arizona**, *see, e.g., Ariz. Indep. Redistricting Comm'n v. Fields*, 75 P.3D 1088, 1099-1101 (Ariz. Ct. App. 2003) (applying common interest doctrine to protect communications shared between counsel to plaintiff in a civil action and non-party). Other jurisdictions that recognize the common interest doctrine include Delaware, Georgia, Massachusetts, Missouri, New Jersey, and Tennessee. *See generally* Katherine T. Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and how Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 51, 55 (2005) (also referred to as the "community of interest privilege," the "joint prosecution privilege," the "joint privilege," and the "pooled information privilege.").

[xi] *See, e.g., In re Grand Jury Proceedings*, 156 F.3d 1038, 1042-43 (10th Cir. 1998); *U.S. v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996).

[xii] *See, e.g., Duplan Corp v. Deering Milliken*, 397 F.Supp. 1146, 1164 (D.S.C. 1974); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995); *Beneficial Franchise Co. v. Bank One, N.A.*, 205 F.R.D. 212, 216. 2001 U.S. Dist. LEXIS 5986 (N.D. Ill. 2001); *compare, Hewlett-Packard Co. v. Bausch & Lomb, Inc*., 115 F.R.D. 308, 310 (N.D. CA 1987) (holding that the sharing of confidential information is protected even if the interest is primarily commercial or financial).

[xiii] *See In re Grand Jury Subpoenas*, 89-3 & 89-4, 902 F.2d 244, 249; *Minebea Co., Ltd. V. Pabst*, 228 F.R.D. 13, 15 (D.D.C. 2005).

[xiv] *Liberman v. Gelsten, supra*, 80 N.Y.2d at 437.

[xv] *In re Grand Jury Subpoena Duces Tecum*, 406 F. Supp. 381 (S.D.N.Y. 1975).

[xvi] *McNally Tunneling Corp. v. City of Evanston*, 2001 U.S. Dist. LEXIS 17090, 2001 WL 1246630 (N.D. Ill. Oct. 16, 2001)(stating that in order for a common interest to be found, it is not enough that the parties have some interests overlap; the parties must have a strong identity of interests).

[xvii] 3*30 Acquisition Co., LLC v. Regency Sav. Bank, F.S.B*, 12 A.D.3d 214, 783 N.Y.S.2d 805, 2004 N.Y. App. Div. LEXIS 13144 (1st Dept. 2004); *see also, e.g., GUS Consulting GmbH v. Chadbourne & Parke LLP*, 2008 NY Slip Op 28200, 20 Misc. 3d 539, 858 N.Y.S.2d 591, 2008 N.Y. Misc. LEXIS 3069 (N.Y. Sup. Ct. 2008).

[xviii] *See ABA Business Conduct Standards*, available at the following website: http://www.americanbar.org/content/dam/aba/migrated/about/ABA_Business_Conduct_Standards.authcheckdaa.pdf.; *see also, See Ethics Hotline*, State Bar of California, available at the following website: http://ethics.calbar.ca.gov/Ethics/Hotline.aspx; New York County Lawyer's Association, Barry R. Temkin and Wally Larson Jr., *Guidelines on NYCLA's Ethics Hotline*, NEW YORK COUNTY LAWYER VO. 2 NO. 7 (2006), available at the following website: http://www.nycla.org/siteFiles/sitePages/sitePages367_0.pdf; *Ethics and Special Services*, State Bar of Arizona, available at the following website: http://www.azbar.org/ethics; *ISBA Ethics Infoline*, Illinois State Bar Association, available at the following website: http://www.isba.org/ethics.

[xix] *Id., supra*.

[xx] *United States V. BDO Seidman, LLP*, 492 F.3d 806, 816 (7 th Cir. 2007) (stating that communications need not be made in anticipation of litigation fall within the common interest doctrine); *Pampered Chef v. Alexanian*, 737 F. Supp. 2d 958, 2010 U.S. Dist. LEXIS 95706 (N.D. Ill. 2010) (the common interest must relate to a legal matter, though it need not relate to litigation per se); *Rubloff Dev. Group, Inc. v. St. Consulting Group, Inc.*, 2011 U.S. Dist. LEXIS 70929, 2011 WL 2600761 (N.D. Ill. June 30, 2011) (this common interest need not relate to litigation per se, but it must relate to a legal matter); *FDIC v. Fid. & Deposit Co. of Md.*, 2013 U.S. Dist. LEXIS 77702 (S.D. Ind. June 3, 2013) (communications need not be made in anticipation of litigation); *see also In re Grand Jury Subpoena (Custodian of Records, Newparent, Inc.)*, 274 F.3d 563, 572 (1st Cir. 2001); *In re Regents of the Univ. of California*, 101 F.3d 1386, 1390-91 (Fed. Cir. 1996);

[xxi] *In re Regents of the Univ. of California, supra*, 101 F.3d at 1391.

[xxii] *See, e.g., Polycast Tech. Corp. v. Uniroyal, Inc.*, 125 F.R.D. 47, 50 (S.D.N.Y.1989) ("[a]ctual or potential litigation is a necessary prerequisite for application of the joint defense privilege"); *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc.2d 99, 108 (N.Y. Sup. Ct. 2003) (joint defense doctrine can be applied to communications consisting of "legal advice in [both] pending or reasonably anticipated litigation"); *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 711 (5th Cir. 2001) ("there must be a palpable threat of litigation at the time of the communication, rather than a mere awareness that one's questionable conduct might someday result in litigation . . .").

[xxiii] The issue of client disclosure obligation was outlined succinctly recently in *Encyclopedia Britannica, Inc. v. Dickstein Shapiro, LLP*, 2012 U.S. Dist. LEXIS 169657 (D.D.C. Feb. 2, 2012) ("The Court also finds that Britannica's allegation that Dickstein should have notified it of a possible malpractice claim fails as a matter of law. The Rules of Professional Conduct speak to "inform[ing]" one's client and abstaining from "withholding" information. Under some circumstances, a lawyer may, indeed, have an obligation to advise his client about a possible malpractice claim. Most obviously, when a lawyer continues to represent a client who may have a viable malpractice case against the lawyer, the client may unknowingly be relying on legal advice from a conflicted source. See Restatement (Third) of the Law Governing Lawyers § 20, cmt. c (2000) ("If the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client[] . . . pointing out the possibility of a malpractice suit and the resulting conflict of interest that may require the lawyer to withdraw.") Here, however, the problems with the patent chain were detailed in the Alpine defendants' motion to dismiss, and, as explained above, Britannica was primarily represented by other counsel at that time. It is hardly the case that Britannica was unknowingly relying on legal advice from a conflicted source or that Dickstein was otherwise taking advantage of Britannica's ignorance for its own benefit. Britannica has cited no case suggesting that a lawyer has an obligation to inform a former client, who is both otherwise represented and informed of all the facts, that he might be able to sue for malpractice. An obligation to notify the client under such circumstances would not alleviate a problematic situation; rather, it would simply be an invitation to sue. **Furthermore, whatever may be made of Dickstein's notification to its insurer, that action cannot itself trigger a requirement to disclose the possibility of a malpractice suit to a client.** Hence, Dickstein was not required to notify Britannica of a possible malpractice claim here." [**emphasis added**]).