Coverage Privileges and Protections: Insured vs. Insurer and Claimant vs. Insured

Related People:
Sherilyn Pastor

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The attorney-client privilege is usually defined as applying to, and protecting from discovery, confidential communications between a client and its lawyer (or their respective agents) made for the purpose of obtaining or providing legal advice.[2] But in the liability insurance context, there are often more than two actors: the insurer, the policyholder, insurer-provided defense counsel, the insurer's coverage counsel, and at least one plaintiff in the underlying action against the policyholder. Under those circumstances, thorny privilege issues can arise, two of which are discussed in this article.

The first of those is the privilege between the insurer and its coverage counsel. Of the thousands of decisions regarding the scope of the attorney-client privilege in that context, many have upheld the privilege. But policyholders engaged in coverage litigation, and particularly ones asserting claims of bad faith, are increasingly arguing that communications between an insurer and its counsel are not necessarily protected from discovery. Some courts have agreed with these arguments, creating exceptions to the privilege or limiting the privilege quite significantly. This article is not exhaustive in discussing the case law on these privilege issues; rather, it reviews some of the key decisions on this point, focusing mainly on recent case law. It also provides practical tips for both sides.

The second issue concerns enterprising third-party claimants that are increasingly seeking discovery of insurance information, including communications between the policyholder, its defense counsel, and the insurer, in an effort to prove liability and damages against policyholders. On that front, this article discusses scenarios that are becoming more common and steps that insurers and policyholders may take to protect against disclosure of that sort of information to third-party claimants.