From the Bench

by Thomas A. Croft, Esq.

Caught with Your Pants Down: Why the Attorney-Client Privilege Matters

The "advice giving" marketplace in the self-insured world is populated with all sorts of folks with all sorts of expertise – outside auditors, consultants of various stripes, cost containment experts, subrogation experts, regulatory compliance experts, etc. – and yes, lawyers. This is a good thing, as there are resources available for TPAs, Brokers, MGUs and stop loss carriers and their reinsurers to get the expert advice they need in navigating the shoals that threaten safe passage in the complex, often-changing self-insured environment.

Candor is important, if not essential, in dealing with such advisers. Without full information from the client about the situation giving rise to the consultation, the expert consultant cannot be expected to provide counsel that is as meaningful or complete as he or she otherwise might be able to offer. In short, the advice can only be as good as the background information provided by the entity seeking it. Such advisers need the benefit of their client's initial analysis of the problem – their "first take" on the subject matter at issue--whether that be a claims matter under a Plan, a claims matter under a stop loss policy, a question involving the terms of a PPO contract, a subrogation situation, an "R&C" opinion, or something else. Advisers also need to be in a position to communicate their advice back to their clients in confidence.

Despite the need for candor and confidentiality, the vast majority of communications between the players in the self-funded arena and their various advisers are not confidential, in the sense that they are fully discoverable (if relevant) in the event of litigation between the entity seeking the advice and a third-party. Simply labeling the communications as "confidential" does not protect them from discovery unless some recognized legal privilege protects them. So – all that necessary candor flowing in both directions between most advisers and most clients can ultimately be exposed to scrutiny by

the very party to which the client least wants them exposed: their potential adversary. This is the "caught with your pants down" scenario described in the title.

There is one exception: communications between an attorney and his or her client in which legal advice is sought or given in the context of a true attorney-client relationship. (Note: some states may provide for an accountant-client privilege of sorts as well).

I will (shamelessly) borrow from an excellent article about the attorney-client privilege by the Atlanta-based law firm of Smith, Gambrell & Russell, LLP at www.sgrlaw.com/resources/trust_the_leaders/leaders_issues/ttl5/916/, entitled "What the Attorney-Client Privilege Really Means" (Fall 2003):

"The attorney-client privilege is the oldest privilege recognized by Anglo-American jurisprudence. In fact, the principles of the testimonial privilege may be traced all the way back to the Roman Republic, and its use was firmly established in English law as early as the reign of Elizabeth I in the 16th century. Grounded in the concept of honor, the privilege worked to bar any testimony by the attorney against the client.

As the privilege has evolved, countless policy justifications have played a role in its development. At its most basic, the privilege ensures 'that one who seeks advice or aid from a lawyer should be completely free of any fear that his secrets will be uncovered.' Thus, the underlying principle of the privilege is to provide for 'sound legal advice [and] advocacy.' With the security of the privilege, the client may speak frankly and openly to legal counsel, disclosing all relevant information to the attorney and creating a 'zone of privacy.' In other words, shielded by the privilege, the client may be more willing to communicate to counsel things that might otherwise be suppressed. In theory, such candor and honesty will assist the attorney in providing more accurate, well-reasoned professional advice, and the client can be secure in the knowledge that his statements to his lawyer will not be taken as an adverse admission or used against his interest. Indeed, armed with full knowledge, counselors at law are better equipped to 'satisfy all of their professional responsibilities, uphold their duties of good faith and loyalty to the client, and [contribute] to the efficient administration of justice.'

For all of its policy considerations and justifications, the attorney-client privilege has a very real practical consequence: the attorney may neither be compelled to nor may he or she voluntarily disclose matters conveyed in confidence to him or her by the client for the purpose of seeking legal counsel. Likewise, the client may not be compelled to testify regarding matters communicated to the lawyer for the purpose of seeking legal counsel." (footnotes omitted).

A *sine qua non* for the existence of the attorney-client privilege is the existence of an attorney-client relationship. Without that, there is no privilege and no protection of confidentiality. This is usually a simple matter to determine: client hires lawyer to give legal advice. If no lawyer is involved, there is no privilege. But what about lawyers on staff of companies dispensing advice? The client hires the company, but someone with a law license gives legal advice to the client about the matter at hand. Does the privilege exist in those situations? In my opinion, the answer is unclear.

Lawyers are prohibited from sharing fees with non-lawyers in virtually every U.S. jurisdiction. This is why lawyers who practice in groups practice in law firms, where all the owners of the enterprise are attorneys. But the lawyer on staff of a corporation who dispenses legal advice works for his or her employer, and it is the employer who bills the client for services rendered. Regardless of whether the lawyer is acting appropriately by providing legal advice to the businesses' client, is there still a protectable attorney-client privilege in existence? My suggestion to the client is to *ask,* and confirm in writing (email is fine) that : 1) we have an attorney-client relationship; and 2) the attorney-client privilege applies to our communications.

The express and explicit confirmation from the lawyer that an attorney-client relationship exists is some (but not dispositive) assurance that the attorney-client privilege applies. It will also require that the lawyer involved first determine whether a conflict of interest exists under the ethical rules governing lawyers in his or her jurisdiction, and decline representation if one does. This protects the client from the lawyer simultaneously giving advice about the same matter to entities with interests adverse to the client.

If advice from outsiders is necessary for an attorney to give legal advice to a client about a given situation (or to assist the attorney in the prosecution or defense of an active litigation or arbitration), it is best practice to have the attorney retain the outside consultant and communicate with him or her directly about matters connected with the case. Communications (or at least the documents reflecting them) are protected by a privilege called the work product doctrine in most jurisdictions, and they also may be protected under various rules

of procedure that prohibit the discovery of the identity of experts who have not been designated as persons who will testify as such at trial.

It should be noted that an attorney-client relationship does not exist unless the attorney is giving *legal* advice to the client. Just what constitutes "legal advice" is the subject of many, many reported cases, and they reflect disparate and conflicting results. But suffice it so say that pure "business advice" does not qualify, nor does work done by a lawyer in a pure "claims adjusting" role prior to a decision on a claim where no real legal analysis is required or involved. As to the latter, I would argue that most anytime a lawyer is consulted about a coverage issue – be it under a Plan or under a stop loss contract – legal advice is necessarily and inextricably involved, and that such services are the practice of law, so that the privilege applies.

Like any other privilege, the attorney-client privilege can be lost by waiver. Most commonly, this occurs when otherwise protected communications are shared with third persons outside the attorney-client relationship. A client should always consult with counsel before forwarding email or correspondence to any third party.

Buckle up. ■

Known for his extensive writing on medical stop loss insurance issues, both in The Self-Insurer and on his comprehensive website, www.stoplosslaw.com, Tom has been practicing law for 34 years. Currently he practices through his own firm, CROFT LAW LLC, in Atlanta, GA. He regularly advises and represents stop loss carriers, MGUs, and occasionally TPAs, brokers, and self-insured groups, in connection with matters relating to stop loss insurance and the disputes that may arise among these entities regarding it. He currently serves on SIIA's Healthcare Committee. He has been honored as a Georgia "Super-Lawyer" for the past six years running, and is listed as "Tier 1" in insurance by Best Lawyers. He is an honors graduate of Duke University and Duke University School of Law, where he formerly served as Senior Lecturer and Associate Dean.