

## **I. Basics of Attorney-Client Privilege**

### **A. State law applies the rule of decision.**

1. Federal Rule of Evidence 501 provides, "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."
2. Generally speaking, there is a high degree of uniformity between and among states. *See, e.g., Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 625 (D.Nev. 2013) ("Nonetheless, Bard recognizes that under New Jersey, Arizona, and Nevada law, the basic substantive elements of the attorney-client privilege are the same . . . [U]nder each state's law, confidential communications between an attorney and client made for the purpose of giving or receiving legal advice are privileged.") *Id.* (internal citations omitted).

### **B. Purpose of attorney-client privilege**

1. "The principle upon which these communications are protected from disclosure applies to every attempt to give them in evidence, without the assent thereto of the person making them. That principle is, that he who seeks aid or advice from a lawyer ought to be altogether free from the dread that his secrets will be uncovered; to the end that he may speak freely and fully all that is in his mind." *Bacon v. Frisbie*, 80 N.Y. 394, 400 (1880); *see also Priest v. Hennessy*, 51 N.Y.2d 62 (1980).
2. "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." *Trammel v. United States*, 445 U.S. 40, 51 (1980).
3. The purpose of the protection is to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him or her to give sound and informed advice and to encourage full and frank communication between attorneys and their clients, thereby promoting broader public interests in the observance of law and administration of justice. *Upjohn, Co. v. United States*, 449 U.S. 383, 389 (1981)

### **C. Elements of the Privilege**

1. Protects confidential communications between lawyer and client that relate to the client's seeking of legal advice or services.
2. Communications need not involve litigation – applies to any matters where the client seeks legal advice. *Bacon v. Frisbie*, 80 N.Y. at 400.

3. “The privilege applies only if (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, or his subordinate 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.” *U.S. v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D. Mass. 1950); *see also People v. Mitchell*, 58 N.Y.2d 368, 373 (1983).
4. In the United States, privilege can be asserted as to communications from the client to/from its in-house counsel, provided the other elements of the privilege are met. *U.S. v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 360 (D. Mass. 1950).
5. “The [attorney-client] privilege applies to communications with attorneys, whether corporate staff counsel or outside counsel.” *Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y.2d 588, 592 (1989).
6. Communications relating solely to non-legal business matters are not privileged. *People v. Belge*, 1977, 59 A.D.2d 307, 399 N.Y.S.2d 539 (4th Dep’t); *see also U.S. v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 359-60 (D. Mass. 1950) (“Where a communication neither invited nor expressed any legal opinion whatsoever, but involved the mere soliciting or giving of business advice, it is not privileged.”); *TVT Records v. Island Def Jam Music Group*, 214 F.R.D. 143, 146 (S.D.N.Y. 2003); *Koumoulis v. Indep. Fin. Mktg. Group*, 295 F.R.D. 28, 48 (E.D.N.Y. 2013).
7. The test when the communication involves a mixture of legal and business considerations is whether the legal character of the communication is “predominant.” *Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y.2d 588, 594 (1989); *United States v. Davis*, 131 F.R.D. 391, 401 (S.D.N.Y. 1990); *In re Currency Conversion Fee Antitrust Litig.*, 2002 U.S. Dist. LEXIS 21196, at \*5-6 (S.D.N.Y. Nov. 1, 2002).
8. Generally, the protection of privilege extends only to communications, not facts. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).
9. The mere delivery of a document to the attorney does not make it privileged. *King v. Ashley*, 96 A.D. 143, 146 (1904).

## II. Work-Product Doctrine

- A. The work-product doctrine is a rule of discovery.
- B. Codified in FRCP 26(b)(3)(A) and state rules of procedure.
- C. Protects materials that are prepared in anticipation of litigation from discovery.
- D. Protection for work product can be overcome if:
  - 1. the materials are otherwise discoverable (relevant, not privileged) and
  - 2. the party seeking discovery shows that it (i) has a “substantial need” for the materials and cannot obtain their equivalent without “undue hardship”
  - 3. BUT, even if this showing (substantial need and undue hardship) is made, in ordering discovery, the court “must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.”

FRCP 26(b)(3)(B)

- E. However, “[d]ocuments or portions of documents that qualify as “opinion work product” are ‘entitled to virtually absolute protection.’” *United States v. Mount Sinai Hospital*, 185 F.Supp.3d 383, 390 (S.D.N.Y. 2016)

## III. Waiver

- A. “At Issue” Doctrine
  - 1. “‘At issue’ waiver of privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information.” *Deutsche Bank Trust Co. of Americas v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 63-64 (1st Dept. 2007).
    - a. Where a party asserts reliance upon the advice of counsel as an affirmative defense (usually to a claim of bad faith) that party puts the privileged advice “at issue” and “waives the attorney-client privilege with respect to all communications to or from counsel concerning the transactions for which counsel’s advice was sought.” *Village Bd. of Village of Pleasantville v. Rattner*, 130 A.D.2d 654, 655 (2nd Dept 1987).

- b. A party does not put its privileged communications "at issue" merely by alleging that it was, for instance, not negligent, or that it did not engage in willful misconduct. *See Bank of New York v. River Terrace Associates, LLC*, 23 A.D.3d 308, 311 (1st Dept. 2005); *American Re-Insurance Co. v. U.S. Fidelity & Guar. Co.*, 40 A.D.3d 486, 492 (1st Dept. 2007) (Ceding insurer does not put privileged communications at issue merely by alleging that its settlement was reasonable and in good faith, nor are the communications put in issue by reinsurer's contention that a portion of the payment was made in settlement of bad faith claims).
2. "[T]hat a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself "at issue" in the lawsuit[.]" *Deutsche Bank Trust Co. of Americas v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 64 (1st Dept. 2007); *see also American Re-Insurance Co. v. U.S. Fidelity & Guar. Co.*, 40 A.D.3d 486 (1st Dept. 2007) ("The only category of potential materials that is subject to disclosure based on substantial need is trial preparation materials.").
3. "Disclosure of the mere fact of a consultation is no basis for a waiver as to the content of that consultation." *AMBAC Indem. Corp. v. Bankers Trust Co.*, 151 Misc.2d 334, 341 (NY Supreme NY Cty 1991).
4. A cedent does not waive the privilege by seeking coverage under its reinsurance. *AIU Insurance Company v. TIG Insurance Co.*, 2008 WL 5062030, \*12-13 (S.D.N.Y. 2008).

**B. Disclosure to third parties**

1. General rule: "communications between an attorney and a client that are made in the presence of or subsequently disclosed to third parties are not protected by the attorney-client privilege." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 620 (2016).
2. Exceptions
  - a. Inadvertent disclosure
  - b. Common Interest
    - (1) "[A]n attorney-client communication that is disclosed to a third party remains privileged if the third party shares a common legal interest with the client who made the communication and the communication is made in furtherance of that common legal interest." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 620 (2016).

- (2) The New York Court of Appeals recently held that the common interest doctrine permits a limited disclosure of confidential communications only to parties who share (i) “a common legal (as opposed to business or commercial) interest” (ii) “in pending or reasonably anticipated litigation.” *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 N.Y. 3d 616, 622 (2016).
- (3) In light of *Ambac* and other courts finding that cedents and reinsurers do not share a common interest, cedents risk waiving the attorney-client privilege by sharing privileged communications with reinsurers. *See, e.g., Mass. Bay Ins. Co. v. Stamm*, 700 N.Y.S.2d 707, 708 (App. Div. 2000) (“the insurers waived any attorney-client privilege with respect to documents transmitted to the reinsurers”); *Progressive Casualty Insurance Co. v. Federal Deposit Insurance Corp.*, 49 F. Supp. 3d 545 (N.D. Iowa Oct. 3, 2014) (“Progressive also failed to establish that an agreement between it and its reinsurers established a ‘cooperative and common enterprise towards an identical legal strategy.’”); *Bancinsure, Inc. v. McCaffree* (D. Kan. Oct. 4, 2013) (same).
- (4) However, courts grappling with these issues have reached varying results. *See, e.g., ARTRA 524(g) Asbestos Trust v. Transp. Ins. Co.* 2011 U.S.Dist.LEXIS 110272, at \*45 (N.D.Ill. Sep. 28, 2011) (common interest exists in cedent/reinsurer relationship); *Hawker v. Bankinsurance, Inc.*, 2013 WL 6843088 (E.D.Cal. Dec. 27, 2013) (same); *United States v. BDO Seidman*, 492 F.3d 806, 816 (7th Cir. 2007), cert. denied sub. nom *Cuillo v. U.S.*, 522 U.S. 1242 (2008) (no litigation requirement).

- (5) Even where there is a common interest, the doctrine does not provide a means for one party to force production of the privileged documents of another. *See, e.g., Am. Re-Insurance Co. v. United States Fid. & Guar. Co.*, 40 A.D.3d 486, 491 (App. Div. 1st Dept. 2007) (“the parties' interests in the present action are indisputably adverse, and the mere fact that they shared an interest in the eventual outcome of the underlying coverage litigation is not sufficient to create a common interest so as to defeat USF & G's claimed privileges.”)

## C. Audit Rights

1. Access to Records and Cooperation Clauses do not require disclosure of privileged communications
  - a. “Access to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client or attorney work product privileges. To hold otherwise would render these privileges meaningless.” *Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 13 A.D.3d 278, 279 (1st Dept. 2004).
  - b. "Paragraphs four and five of the arbitration award discuss the access to records arguments, stating in part: 'The Access to Records clause does not grant Respondents access to Petitioners' documents protected by the attorney-client privilege or the work product doctrine (hereinafter "Confidential Material"). Petitioners have sole discretion to determine the extent to which access to and copies of Confidential Material will be provided.'" *Liberty Mut. Ins. Co. v. Nationwide Mut. Ins. Co.* 87 Mass.App.Ct. 1127, fn. 4 (2015) (affirming arbitration award denying access to privileged documents).
  - c. “Although a reinsured may contractually be bound to provide its reinsurer with all documents or information in its possession that may be relevant to the underlying claim adjustment and coverage determination, absent more explicit language, it does not through a cooperation clause give up wholesale its right to preserve the confidentiality of any consultation it may have with its attorney concerning the underlying claim and its coverage determination. Provided that the reinsured has been forthright in making available to its reinsurer all factual knowledge or documentation in its possession relevant to the underlying claim or the handling of that claim, it has satisfied its obligations under the cooperation clause.

The reinsurer is not entitled under a cooperation clause to learn of any and all legal advice obtained by a reinsured with a ‘reasonable expectation of confidentiality.’” *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 797 F.Supp. 363, 369 (D. N.J. 1992); *Travelers Cas. & Surety Co. v. Century Indemn. Co.*, 2011 WL 5570784 (D.Conn. Nov. 16, 2011) (“reinsurer is not entitled under a cooperation clause to learn ... legal advice obtained by a reinsured with a reasonable expectation of confidentiality.”)

#### IV. Conclusion

- A. Being mindful of the contours of the attorney-client privilege, exceptions thereto, and methods of waiver is critical, especially in light of jurisdictional differences.