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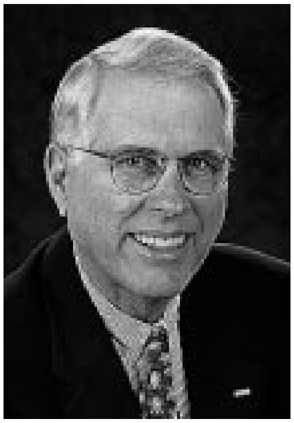
From the Chairman

by Donn P. McVeigh, CPCU, ARM



Donn P. McVeigh, CPCU, ARM, is nationally prominent in the risk management and captive insurance fields. His proficiency is built on a solid base of experience as an underwriter, broker, and consultant since 1951. He has authored many articles and other publications; participated in numerous national and local seminars; has taught insurance and risk management subjects at the university level; and has led various CPCU and ARM classes. McVeigh holds a B.A. degree in insurance and an M.S. degree in risk management from San Jose State University (Evening Division). He has been a member of the CPCU Society's Golden Gate (nee Northern California) Chapter since 1962. He has been managing director, Creative Risk Concepts International, (Oakland, California) since 1985.

The national committee has many plans underway, which will be refined at the Leadership Summit meeting in Tampa. Prominent among those plans are two seminar sessions CLEW will present at the Annual Meeting and Seminars in New Orleans in October of this year. As usual, a mock trial will be conducted, this time featuring the D&O contested issues between a New Orleans policyholder and our old reliable insurer, Shifting Sands Mutual Insurance Company. Our former chairman, Stanley L. Lipshultz, J.D., CPCU, is now preparing the script.

Our second seminar is titled "Technology in the Courts: What Really Works." Our own Steven A. Stinson, J.D., CPCU, has obtained the services of a real judge to preside over this presentation. It involves the impact of information technology on courtroom proceedings. This should be a must for all litigating attorneys, expert witnesses, and claims and underwriting professionals who are asked from time to time to act as percipient witnesses.

CLEW had offered a third seminar titled "How to Start Your Own Consulting Practice," but it was eliminated. However, this seminar is available to local chapters that may wish to cosponsor it. While the Annual Meeting seminar was intended to be a condensed version (only three hours) of the all-day seminar that can be presented to local chapters, it was eliminated at the Annual Meeting because of time constraints and elimination of too much important information. Seminar presenters are George M. Gottheimer Jr., Ph.D., CPCU, CLU, James A. Robertson, CPCU, and your humble chairman.

Any CPCU, whether a CLEW member or not, is welcome to attend our committee meetings at the Leadership Summit or at the Annual Meeting. ■

What's in this Issue?

From the Editor

by Daniel C. Free, J.D., CPCU, ARM

Daniel C. Free, J.D., CPCU, ARM, is president and general counsel of Insurance Audit & Inspection Company, an independent insurance and risk management consulting organization founded in 1901 by his great-grandfather. He is past president of the Society of Risk Management Consultants (SRMC), an international association of independent insurance advisors.

Free is also a founding member of the CPCU Society's CLEW Section, and currently serves as editor of *CLEWS.*

This issue has some thought-provoking content. We offer an article entitled "CGL Insurance Coverage for Claims of Trademark Infringement" by Christopher L. Lynch, Esq. of Lindquist & Vennum, PLLP. The article reminds us of three things insurance law professors pound into the heads of their students. Those are:

1. You have to *read* the policy.
2. What were the reasonable expectations of the insured?
3. What was the insurer's intent?

We also offer the second in a series of articles by your editor entitled: "Consulting in a Hard Market: Observations from the Front Lines" In gathering information for this article, we learned that a good many consultants are encountering the same kind of challenges, experiences, and, in some cases, frustrations. My guess is that some who contributed to the article would have some colorful answers to questions 2 and 3 above.

We also offer the first installment of a two-part series on the discoverability of risk management information. This piece is not only interesting reading but something that should be carefully considered by risk managers, claims adjusters, and others whose very thoughts may be sought and fought over by the opposition. Support your section and the Society!

I also take this opportunity to encourage you to send us your articles for publication. We are always looking for new, interesting, and educational ideas. We look forward to your contributions. ■

New Look for Your Newsletter

This issue premieres a new look for your section newsletter. This modern, dynamic design maximizes the space on each page while preserving an easy-to-read format. And keeping in line with our concern for the environment, the newsletter is printed on recycled paper.

CGL Insurance Coverage for Claims of Trademark Infringement

by Christopher L. Lynch, Esq.

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Last September, an article appeared in this column discussing the importance of protecting your company's intellectual property, including its trademarks (Protecting Your Company's Most Important Assets, David A. Allgeyer, Lindquist & Vennum P.L.L.P.). Trademark infringement, however, is a two-way street. For every company asserting a claim of trademark infringement, there is a company or individual accused of being the infringer. If your company finds itself in the latter position, the cost of defending against the claim—not to mention the cost of paying a settlement or damages award to the claimant—can be substantial.

To protect itself against such a possibility, your company can purchase insurance specifically covering liability stemming from intellectual property claims. However, in the event your company does not have such a policy, or did not have such a policy in effect at the time the infringement occurred or the claim arose, there is another possible source of insurance—namely, your company's Commercial General Liability (CGL) policy.

Possible Basis for Coverage

The typical CGL policy does not expressly cover trademark infringement claims. But it probably does cover two general categories of claims: (1) claims seeking monetary damages because of "Bodily Injury or Property Damage," and (2) claims seeking monetary damages because of "Personal Injury or Advertising Injury." It is within the confines of "Advertising Injury" protection that coverage for claims of trademark infringement has sometimes been found.

Many CGL policies in existence today are based more or less on the standard form CGL policy promulgated by the Insurance Services Office (ISO) in 1986. The coverage provided under the 1986 form obligates the insurer to pay those sums that the insured becomes legally obligated to pay as damages because of advertising injury. The policy defines "advertising injury" as an injury arising out of one or more listed offenses, including "misappropriation of advertising ideas or style of doing business," and "infringement of copyright, title, or slogan." The policy requires that the advertising injury be caused by an offense committed "in the course of advertising your goods, products, or services," but frequently does not define "advertising."

Many courts interpreting policies with coverage provisions similar to those in the 1986 form have ruled that a claim for trademark or trade dress infringement may fit within the policy's coverage of claims of "misappropriation of advertising ideas or styles of doing business." The general reasoning is that a trademark may constitute "advertising" in that it is a means of publicly marketing and promoting goods or services so that they will be identified with a particular source. Other courts have justified a finding of coverage by reasoning that the policy's inclusion of coverage for claims of infringement of "title" is broad enough to encompass claims of trademark infringement.

In short, if your company's CGL policy follows this general form, you may have a basis to demand coverage for a trademark infringement claim; so check your company's CGL policy. Also, remember to check your company's old insurance policies. Some CGL policies cover an "occurrence" that took place during the policy period, even if the claim based on that occurrence arises after the policy period has ended. These old policies may provide coverage in addition to, or in lieu of, your existing policies.

It All Depends

Simply because your company's CGL policy contains coverage for "Advertising Injury" claims does not guarantee you will have an easy time convincing either your liability insurer or a court to extend coverage to a claim of trademark infringement. Coverage for such claims is fraught with legal limitations and factual exclusions.

Coverage Depends on the Particular Language of the Policy

Not all CGL policies follow the 1986

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CGL Insurance Coverage for Claims of Trademark Infringement

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standard form. Some policies expressly exclude coverage for trademark infringement claims. Others may specifically define the parameters of covered "advertising activity" or utilize different terms in describing the particular claims that constitute advertising injury claims.

A change of a single word can mean the difference between coverage and no coverage. Thus, it is extremely important to look to the specific language of your company's particular policy to determine whether the claim may be covered.

Moreover, the ISO revised its standard form CGL policy in 1998 and again in 2001. The 1998 form defines "advertising" and modifies the scope of advertising injury coverage to apply to claims arising out of "the use of another's advertising idea in your advertisement," and "infringement upon another's copyright, trade dress, or slogan in your advertisement," among other claims. While there has been little case law discussing the effect of these changes, industry commentators have suggested that the 1998 form emphasizes the need for a connection between a company's alleged misconduct and the company's "advertising" activity. Furthermore, the 1998 form expressly extended coverage to certain claims of "trade dress" infringement, but did not provide express coverage for claims of "trademark" infringement. That omission may support an argument that the policy was not intended to cover trademark infringement claims.

The limits contained in the 2001 form are even clearer. In an apparent attempt to close the window completely on trademark infringement coverage, the ISO's 2001 form specifically excludes from coverage any advertising injury "arising out of the infringement of copyright, patent, trademark, trade secret, or other intellectual property rights." Thus, an insured whose policy follows the 2001 form may be hard pressed to convince either its insurer or a court to provide coverage for a trademark infringement claim.

Even if your company's policy generally follows the 1986 standard form, subtle and not-so-subtle variations in a policy's language may drastically affect the scope and type of coverage that is offered. A change of a single word can mean the difference between coverage and no coverage. Thus, it is extremely important to look to the specific language of your company's particular policy to determine whether the claim may be covered.

Coverage Depends on the Law Governing the Interpretation of Your Policy

The success of your attempts to secure coverage for trademark infringement claims also depends in large measure on which jurisdiction's law governs the interpretation of your company's CGL policy. Some courts have taken a narrow interpretation of what constitutes covered advertising activity—holding, for example, that "advertising" requires widespread, public dissemination. Moreover, while various courts have indicated that infringing packaging or promotional activities are sufficient to cause an advertising injury, some jurisdictions require a definite nexus between the claimed infringement and traditional advertising activity. In other words, the actual infringement has to occur in the course of traditional advertising activity. Finally, some courts have ruled as a matter of law that trademark and trade dress infringement claims simply do not qualify as either claims for "misappropriation of advertising ideas" or claims for "infringement of copyright, title or slogan" and therefore do not fall within a CGL policy's "advertising injury" coverage.

Coverage Depends on the Facts of the Underlying Infringement Claim

The existence of CGL coverage for a trademark infringement claim also depends heavily on the specific facts surrounding the claim levied against your company. Most CGL polices contain numerous exclusions from advertising injury coverage, including, without limit, exclusions for claims arising out of a breach of contract (e.g., an employment contract), for claims based on advertisements that were first published outside the policy period, and for claims based on the publication of material known to be false. Whether any of these exclusions will apply in your case depends on the language of the exclusion, the facts underlying the alleged infringement, and—because an insurer's duty to defend is typically determined from the allegations contained in the underlying complaint—the wording of the complaint filed against your company.

Conclusion

Like any insurance issue, the existence and scope of CGL coverage for trademark infringement claims are dependent on the specific contracts, laws, and facts that apply to the case at hand. A company accused of trademark infringement, however, should immediately consult the CGL policy. Under the right circumstances, such a policy might provide a source of insurance coverage for the infringement claim. ■

Consulting in a Hard Market: Observations from the Front Lines

by Daniel C. Free, J.D., CPCU, ARM

Editor's note: This is the second in a series by Daniel C. Free, J.D., CPCU, ARM. The first article, "Consulting in a Hard Market: Staffing to Meet Demand," appeared in the March 2003 issue of *CLEWS.*

Risk management consultants are an excellent resource for very current information about what is happening in the insurance marketplace. Like a reporter embedded in a military unit, the consultant can often see things as they unfold, relating information back to those who can then choose how to respond. One might attribute this to the multilateral relationship we have with agents, brokers, and underwriters for the many different sizes and types of our policyholder clients. Indeed, hard market cycles present unique challenges. Most of us who are veterans of at least one previous hard cycle can attest that our clients' needs change and that we must tailor our efforts to serve our clients effectively.

It is both interesting and instructive to listen to the comments that consultants make about how the business of consulting changes during a hard market. We have gathered together a few of these observations.

Consultants generally agree that the demand for our services increases sharply during a hard market. There are several reasons. First, stratospheric premium increases make financial managers curious to know if they are being singularly gouged. Most are looking for innovative solutions or alternatives from a source whose income does not rise with the premium.

That said, policyholders might be faced with a number of confusing alternatives as their brokers look for ways to stem the increase. An independent source can evaluate these and offer sound advice quickly and efficiently. Finally, an independent voice can give a board of directors a better comfort level that what it is being forced to accept is, in fact, consistent with what is happening to similarly sized and situated institutions.

Consultants report that they are called upon to provide a different array of services during a hard market. For example, our firm has received a number of inquiries about the feasibility of creating a captive insurer, joining a multi-owner or rent-a-captive, or increasing reliance upon self-insurance. While this may be beneficial to policyholders seeking greater control over the cost of risk, it does not bode well for our industry if good risks leave the market and adverse selection results. Jim Mahurin, CPCU, of Franklin, Tennessee agrees: "This means a loss to standard markets of perfectly good risks." He also reports that a lack of standard markets for good risks with slightly unusual exposures is forcing some policyholders to approach specialty markets.

Most consultants agree that lack of availability of insurance is not as bad in this cycle as it was in the last, but there are fewer insurers due to mergers, acquisitions, and insolvencies, all of which reduces competition. This means that some assignments that are routine under normal market conditions are being deferred. For example, many organizations, particularly public entities, bid their insurance program every three years. Consultants are advising their clients to put such projects off for now. "We take them out (to bid) if they insist, but we try to talk them out of it," says Hayden Knowlton, CPCU, of Waters Risk Management in Pinellas Park, Florida. "For a lot of our clients, there just aren't that many markets," he added.

Capacity problems are another issue. "Some of our clients cannot obtain or afford the limits they need. This is true with respect to both property and liability," says James B. Hood Jr., CPCU, of the Orchard Park, New York firm of Aldridge & Cox, Inc. "Coverage restrictions are as much of a problem now as premium," adds Hood. "Things that you used to get thrown in for next to nothing are either unavailable or very hard to get."

> *"They (insurers) want much more information, that I am not sure they look at, but won't renew without it."*

Another change is the amount of underwriting information insurers require, says Hood. "They (insurers) want much more information, that I am not sure they look at, but won't renew without it." This additional demand for information makes everything more urgent. Insureds that have been with the same carriers for 10 years or more are suddenly buried with requests for information that has never been asked for before. In some cases, pulling it together is a monumental task that has to be completed on very short notice or carriers will not renew at all.

Acting as a *de facto* field office of the state insurance commissioner is another thorny problem that occurs more frequently in a hard market. Many states have laws requiring a certain number of days' notice if an insurer intends to raise a policyholder's premium by more than a statutorily prescribed percentage. Unfortunately, some insurers simply choose to ignore the law, requiring the consultant to either remind the insurer of its legal duty or contact the state insurance commissioner on the client's behalf. Most of our respondents commented that, more recently, insurers simply send a nonrenewal letter in accordance with statutory guidelines, then later agree to renew at whatever

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price they choose. The ethical implications of this could be the subject of a completely separate article.

Is there any way to lower your client's blood pressure in such situations? One method that worked for us was to track the client's premiums, by line of coverage, back to the early 1980s, accounting for changes in the exposure base. We graphed the results, which looked like an upside-down bell curve. The controller went to his board meeting with the positive "spin" that he knew of nothing that could be purchased today for the same price as it was in 1985. The board accepted this proposition, to his great relief. Sadly, this tactic does not always do the trick.

When a normally reserved financial manager learns that her property insurance premium is up by 30 percent, her blanket limit has been eliminated, and her deductible doubled, expect fireworks.

Soothing the savage beast (the client) can be especially difficult. When a normally reserved financial manager learns that her property insurance premium is up by 30 percent, her blanket limit has been eliminated, and her deductible doubled, expect fireworks. Then when she finds out that coverage for terrorism will be an additional X thousand dollars, get ready to experience "shock and awe." Practice tip for novice consultants: when this happens, do not recommend a meeting with an underwriter unless you know ahead of time that the underwriter has the experience and knowledge to offer an explanation, or better yet, the authority to negotiate. Unfortunately, the latter seems unlikely to veteran consultants.

In many cases, consultants report that it is next to impossible to get to any one at an insurance company who can make a decision. "The reduction in force of the insurance industry over the past 10 to 15 years has removed people with the experience to make decisions on complex accounts," says Mahurin. Several consultants offered that it is very difficult and time-consuming to get even the minor amendments made to policies once they are in force because, it is believed, no one has any authority to make decisions.

The historically cyclical nature of the insurance marketplace is exasperating for those who have been in the industry for several cycles. When asked to compare the current cycle with previous ones, Michael Coyle, CPCU, also of Aldrich & Cox comments: "This is my fourth or fifth hard market cycle. In other hard markets, at least there were some well-trained people to deal with. In this market, nobody understands what the policyholder's needs are and they don't care." He adds: "You know . . . it doesn't have to be this way." This is certainly food for thought considering Coyle's time in the industry. ■

Discoverability of Risk Management Information

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Whether discovering it or protecting it, the information in a claim file can make or break a case. This is the first of a two-part series on the subject.

Risk managers create, receive, and manage various kinds of information that should be kept confidential, if possible. This topic discusses the extent to which risk management information is legally protected from discovery (i.e., required disclosure) by outside parties.

This information is general and does not constitute legal advice. Appropriate legal counsel should be consulted in all specific situations.

Examples of risk management information it might be desirable to keep confidential include:

- insurance coverage information
- loss runs and other claims history, both as to identification of incidents and their monetary or other resolution
- pending claims investigation activities, liability assessment, and amounts paid and reserved
- loss control inspections
- post-injury remediation

This information is usually sought to support a claim and increase its value or likelihood of success, but to obtain the information, legal proceedings are usually necessary.

Apart from litigation, arbitration is becoming an increasingly important and

prevalent forum for "alternative dispute resolution." The rules affecting discoverability of risk management information in arbitration proceedings may differ markedly from those in litigation.

State vs. Federal Court

A basic understanding of the structure of the American judicial system is useful in understanding which rules of "discovery" may apply to a given dispute. "Discovery" is the legal procedure by which a party in litigation seeks information from or about an adverse party (or a third party) in the course of prosecuting or defending its lawsuit.

Under the American political system of federalism, separate, independent state and national governments coexist. Each is sovereign in its respective sphere. Thus, as might be expected, state and federal courts primarily hear cases involving their respective laws. Federal courts also hear "diversity" cases involving citizens of different states, although, in those cases, the federal courts still apply substantive state law.

State courts also hear some cases involving some aspects of federal law, since where state and federal laws conflict, the latter take precedence under the U.S. Constitution's "supremacy clause."

The division between state and federal court jurisdiction dates to the United States' origins.

At independence from Britain, no national government existed, and each state was, in effect, a separate country. The power of each state's courts was coextensive with that of a sovereign nation, limited only by that state's own constitution.

During and after the American Revolution, it became apparent that a strong central government was needed to safeguard and advance the national interests. By adopting the U.S. Constitution, the states ceded a portion of their inherent authority to the new national government in matters affecting national interests.

As a result, even today, the federal government's power is limited to that granted to it under the Constitution. Where it exists, federal authority is paramount. Where it does not exist, such as disputes between citizens of a single state regarding state law, no federal authority exists at all. Examples are claims of negligence, product liability, defamation, or violation of a state safety statute. This is why most litigation remains in state courts, and every federal court opinion begins with a statement referencing the basis for federal jurisdiction.

Federal court jurisdiction is of two types:

1. Where the federal government's own laws are concerned, such as an alleged violation of the federal constitution (e.g., "equal protection" or "due process"), or of a federal statute or regulation.
2. "Diversity jurisdiction," as noted above, where all parties on one side

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of the litigation are from different states than all parties on the other side. (Diversity jurisdiction is intended to help assure an out-of-state plaintiff a fair trial, since otherwise the defendant would have the substantial advantages of a "hometown" court and jury.)

Here are the basic divisions for which rules apply:

1. If the litigation is in state court, discovery is normally governed by that state's rules of both evidence and of civil procedure.
2. If the litigation is in federal court and concerns a federal issue, the *Federal Rules of Evidence* (FRE) and the *Federal Rules of Civil Procedure* govern discovery, as interpreted by federal judges, "in the light of reason and experience." Since the U.S. Constitution provides for a federal court system, the Constitution's "Necessary and Proper Clause" empowers Congress to create rules for federal court operation, including evidence and procedure.
3. If the litigation is a diversity action in federal court, the *Federal Rules of Civil Procedure* apply. However, ***the state's substantive law (including rules of privilege)*** usually apply. This distinction also arises from the nature of our federal (i.e., dual) political system. In 1938 the U.S. Supreme Court ruled that the United States, as a limited government vis-à-vis the states, had no power to establish a national "common law" (e.g., negligence) applicable in federal courts. Therefore, in determining whether, in federal court:
   a. *The Federal Rules of Civil Procedure* and *Federal Rules of Evidence*, or
   b. A state's own "discovery" rules will apply.

It is usually necessary to determine whether the particular rule is procedural or substantive, and whether a federal issue or a state issue is predominant. For example, state law of privilege has been held to predominate in federal court (in diversity cases) when the suit concerns defamation, malpractice, personal injury, interference with business relationships, and breach of contract.

Federal law of privilege has governed in cases involving civil rights, racial discrimination, and securities fraud. Since courts often disagree as to the character and boundaries of these rules, whether or not a particular type of information must be disclosed will ultimately depend upon the individual court and judge.

Scope of Permitted Discovery

Most state rules of procedure and evidence are similar to the *Federal Rules*. This discussion is based upon the *Federal Rules*, but the potential applicability of state rules should be checked in each case.

Under the *Federal Rules of Evidence*, an extremely broad scope of discovery is permitted:

> Any matter, not privileged, that is relevant to the claim or defense of any party may be discovered.

"Relevant evidence" means *"evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"* (FRE 401). The relevant information sought need not even be admissible at trial, so long as discovery appears *"reasonably calculated to lead to the discovery of admissible evidence."* Thus, "fishing expeditions" having some logical connection to the litigation are *not* improper, since they may lead to the discovery of admissible evidence.

Also discoverable are the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter.

Privileges

Given the broad scope of permitted discovery, a recognized privilege must apply to prevent the discovery of any potentially relevant risk management information. As stated by the Supreme Court, a legal privilege must "serve public ends" and "promote sufficiently important interests to outweigh the need for probative evidence."

The two principal legal privileges of concern to risk managers are the attorney-client and workproduct privileges. Other legal privileges, such as avoiding self-incrimination, protecting trade secrets, encouraging frank deliberation among government officials, religious counseling and marital communications, may also be important in particular instances.

Privileges operate independently. If one of them applies, the information is not discoverable.

Attorney-Client Privilege

This is the familiar privilege that protects from disclosure communications between a client and an attorney. The privilege dates back to the 16th century. The U.S. Supreme Court has described its purpose as "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." The client may refuse to disclose and may prevent any other person from disclosing confidential communication between itself and its attorney. The underlying policy for confidentiality is encouragement of client truthfulness so that effective, reliable advice may be sought and provided. Sub-issues include:

What Precisely Falls Within the Privilege?

A common misunderstanding is that the attorney-client privilege protects *information*, so that, for example, giving an existing document to an attorney protects it from disclosure. Not so! It is the actual *communication* between the client and attorney that is privileged, not the information *per se*.

For example, a loss run or safety inspection does not become off-limits simply because it has been provided to an attorney. However, a third party may not inquire what information was or was not provided to an attorney, since that would delve into the communication. As another illustration, a witness is frequently asked in deposition or at trial, with whom, *other than the witness' attorney,* a matter was discussed, and what was said. The information itself is discoverable, except if it was never communicated to anyone outside the attorney-client context.

To be protected under attorney-client privilege, the communication must relate to a fact of which the attorney was informed by the client for the purpose of securing primarily either an opinion on law, legal services, or assistance in some legal proceeding. The purpose may not be to commit a crime or tort.

When Does the Privilege Attach and How Long Does it Last?

The attorney-client privilege attaches as soon as the client communicates with the attorney (or the attorney's subordinate) about prospective representation, even if the attorney is thereafter not retained. The privilege is permanent, surviving termination of the attorney-client relationship so long as the client does not destroy it by disclosing the information to a third party.

■ *. . . it is essential that risk managers treat privileged information as such, and also do what they can to prevent others within the organization from disseminating the information beyond the attorney-client relationship.*

With few, if any, exceptions, the privilege even survives the client's death. In such case, since the client can no longer waive the privilege, expressly or by conduct, the attorney can never disclose the communication. Note that the attorney-client privilege belongs to the client. It is the attorney's duty to protect that privilege so long as the client does not waive it, either expressly or by disclosure of the privileged communication to a third party. Disclosure to a co-party or his attorney where there is an agreement among the parties to pursue a common interest is an exception to the waiver rule. It has developed in multiple-party cases to facilitate cooperative efforts among parties who share common interests.

A corollary to this rule is that once the client communicates the information to a third party (other than one assisting the attorney), the privilege is broken. Accordingly, it is essential that risk managers treat privileged information as such, and also do what they can to prevent others within the organization from disseminating the information beyond the attorney-client relationship.

Who Is the Client?

When the client is not an individual, the legal entity is the client. Generally, individuals empowered to act on behalf of the corporate entity have the power to assert or waive the privilege.

The privilege itself is not limited to communications between a corporation's management "control group" and counsel. This would frustrate the purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation.

In the case of public agencies whose officials make confidential communications to agency lawyers, the purpose of the communication may be essential in defining the privilege. If the communication is to elicit legal advice, the attorney-client privilege may be invoked, whereas not when the lawyer communication is for policy-making.

Work-Product Privilege

Materials prepared by a party, or by its attorney or other representative, in *anticipation of or while in litigation*, is known as "work product." The rationale for this privilege is that each party is expected to prepare its own case and may not simply wait until others have expended time and resources to assemble evidence, then request that it be disclosed from them.

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However, documents prepared in anticipation of litigation are not absolutely protected from discovery. A party seeking discovery may obtain them by showing:

1. A substantial need for the materials in the preparation of its case.
2. Inability without undue hardship to obtain the substantial equivalent of the material by other means.

When a court finds that conditions for disclosure have been met and orders discovery, it must protect against disclosure of an attorney's "mental impressions, conclusions, opinions, or legal theories," collectively known as "opinion work product." (These terms are frequently not used precisely, and it is often unclear whether a generic reference to "attorney work product" refers to all material prepared in anticipation of litigation, or only to an attorney's impressions and opinions.)

Preventing disclosure of work product generally is intended to encourage attorneys to prepare thoroughly for trial, to analyze both the favorable and unfavorable aspects of a case, and to prevent attorneys from taking undue advantage of the industry and effort of other attorneys.

An example would be notes of employee interviews conducted by an attorney during a confidential investigation of the organization's conduct. Another would be identification of which documents an attorney had showed a witness prior to a deposition. This would tend to suggest the attorney's legal strategy, mental impressions, and thought processes concerning the evidence. A court may also require an attorney's opinion work product to be excised from a set of documents so that the balance can be produced. *FRCP* 26(b)(3). The attorney's opinions may also be discoverable when at issue in the litigation, such as the reason underwriters delayed in bringing a lawsuit to rescind an insurance policy. *Bird v Penn Cent. Co.* (1973, ED Pa) 61 *FRD* 43, 17 FR Serv 2d 1402. A party may not assert reliance upon an attorney's advice and then refuse to disclose it.

The federal courts are divided on the question of whether materials prepared in anticipation of previously terminated litigation are protected. ■

War Stories

by Daniel C. Free, J.D., CPCU, ARM

Several years ago, I was part of a team of lawyers defending a corporate insured in a case involving several large corporate defendants. The case somehow "landed" in one of Indiana's most rural, backwater counties, in front of what had to be one of Indiana's most rural, backwater judges.

From the outset, it was obvious that this judge harbored a great deal of contempt, in varying degrees and in no particular order, for all of the following: large corporate defendants, complex litigation, "big city" lawyers, rules of civil procedure, hearings, lengthy trials, "the record" and the usual flurry of motions, counter-motions, briefs, affidavits, and other elements of motion practice in the complex case. By contrast, he was jovial and outgoing to a fault with the plaintiff's counsel, who was local and a sole practitioner. He did pretty much everything he could to help his local colleague to position the case for a good settlement. Motions filed by any of the defendants were routinely denied. Any motion filed by the plaintiff (if there were any) were summarily granted. Rules of procedure were followed, but only enough to avoid reversible error.

■ *Mr. Free, you better go back to your insurance company and get some more money . . .*

At one pretrial conference, the judge ambled in to his chambers in a flannel shirt and a pair of faded blue jeans, which he apparently wore underneath his robe. He sat down in his chair and, after adjusting his rather ample physique to achieve some measure of comfort, propped his cowboy boots up on the conference table. Then he pulled out a bag of shelled peanuts and asked if anyone wanted any. During the course of the conference, he sat quietly, eating his peanuts and throwing the shells at a trash can a few feet away, only hitting it occasionally.

When it came to be my turn, I explained our client's position. He looked at the plaintiff's attorney, snickered, and then turned to me and said, "Mr. Free, you better go back to your insurance company and get some more money, cause I've seen this man here make a jury just break down and cry." Not much went well that day for the defense side people and I am sure that a number of claims executives got phone calls later that afternoon.

Trial dockets in small rural counties are not that crowded and the trial date came up fast. There was a considerable amount of discovery that needed to be completed, particularly since the plaintiff's responses were at best skimpy. One by one, each of the defendants moved to continue the trial, citing an array of very sensible reasons. We were the last to file ours and we thought for sure that at least one of the six or so motions would be granted. Not so. Every day for about a week, we got an order signed by his honor denying somebody's motion for a continuance. By the time he got to us, the judge had apparently gotten fed up with drafting and signing orders denying all of these motions, because we never got an order. All we got was a copy of our motion adorned with a one inch square post-it note that read: *"No damnit!"* ■

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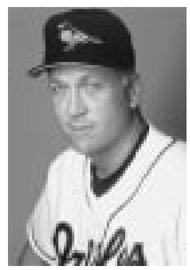

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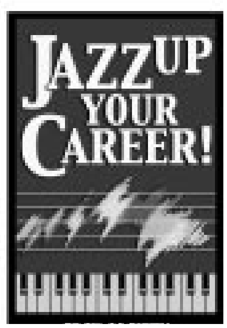

Upper left photo courtesy of the New Orleans Metropolitan Convention and Visitors Bureau; Carl Purcell.

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