States' Differing Approaches to Attorney-Client Relationships in the Insurance Context Complicate Privilege Issues

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In his August 14, 2013 “Privilege Points” release, Tom Spahn discusses the privilege where a liability carrier is in the picture:

The attorney-client privilege necessarily depends on an attorney-client relationship. Some states recognize what is called a "tripartite" relationship among a liability insurance carrier, its insured, and the lawyer it hires to represent the insured. Such a relationship can create conflicts issues, but generally assures privilege protection when the insured's lawyer communicates with the insurance carrier.

Other states take a different approach. In Larson v. One Beacon Insurance Co., the court noted that under Colorado law "'there is no attorney-client relationship between an insurance carrier and the attorney it hires to represent the insured.'" Civ. A. No. 12-cv-03150-MSK-KLM, 2013 U.S. Dist. LEXIS 81181, at *15 (D. Colo. June 10, 2013) (citation omitted). This meant that the attorney-client privilege did not protect communications between the insurance carrier (or its lawyer) and the insured (or his lawyer). On the other hand, because the insurance carrier and the insured were cooperating in opposing the plaintiff's claim, they could freely share work product without waiving that separate protection.

Even states adopting Colorado's view of attorney-client relationships in the insurance context sometimes stretch to find the attorney-client privilege applicable in this setting. And perhaps most importantly, the ability to freely share work product usually covers all or nearly all of the communications between a liability insurance carrier and its insured.