



By  
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Confidentiality of insurer-reinsurer communications cannot be taken for granted in light of the aggressive document discovery process featured in commercial litigation.

In litigation, policyholders seeking coverage from insurers increasingly demand that the insurers disclose their communications with reinsurers. Nevertheless, this threat to confidentiality can be managed once the threat is identified, assessed and controlled.

While most discovery requests focus on claim-related communications, in some cases underwriting and contract negotiation documentation also may be vulnerable. In one recent

both. Insureds also seek communications they assert may shed light on the meaning of the policy language. And in bad-faith cases, insureds may hope to uncover inconsistencies in treatment of similar claims.

Parties often seek to avoid disclosure by asserting the attorney-client privilege based upon a “common interest agreement,” but this does not guarantee protection. In practical terms, use of a common interest agreement is not dissimilar to use of a turn signal while driving—it is a good practice, but should not be blindly relied upon.

Some jurisdictions require that the circumstances demonstrate a “common legal enterprise,” which may exist only when two parties have a common interest and the communications are designed to “further the common goal.” Consequently, it may be crucial to carefully phrase insurer-reinsurer communications so they reflect an objective to further a common legal objective.

Perhaps the greatest threat to establishment of a “common interest” is a documented dispute between insurer and reinsurer. If a reinsurer has denied the claim, or issued an aggressive reservation-of-rights letter, that may be deemed inimical to the existence of a “common interest” needed to support a shared privilege.

Managing this threat begins with identifying the risk and educating underwriting and claims personnel to understand that even attorney-client communications may be the subject of discovery. The risk of disclosure of legal or strategic advice can be managed by ensuring such communication uses language clearly demonstrating the furtherance of a common legal enterprise or goal.

Finally, deferring or at least downplaying reinsurance claim disputes will help avoid jeopardizing the existence of a common interest between insurer and reinsurer that is vital to shielding sensitive legal communications from third-party discovery. **BR**

# Confidential? Not Necessarily

**Insight:** The risk of discovery of sensitive communications can be managed by demonstrating the ‘common interest’ between insurer and reinsurer.

case, an insurer claimed the insured had concealed from it the decrepit condition of a dry-dock that sank. The insured successfully obtained discovery of reinsurance documentation believed to include a premium rating formula that might indicate the insured knew details regarding the condition of the dry-dock.

The court concluded that such documents might shed light on the insurer’s appreciation of the risk and were therefore discoverable. This decision counsels in favor of reviewing reinsurance files before bringing an action to rescind a policy.

The most commonly sought reinsurance documentation consists of claim-related communications. Insureds hope to find acknowledgments that the claim is covered, that the insured’s loss is substantiated, or

**Asserting attorney-client privilege does not always guarantee protection.**

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