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Attorney-Client Privilege

Among Attorney, Client, Third-Party Administrator and

The Workers' Compensation Case Manager:

Is There a Privilege?

Introduction

The attorney-client privilege is one of the oldest of privileges of confidential communications known to the common law. 8 J.Wigmore, Evidence § 2290 (McNaughton rev. 1961). Typically, within a corporate setting, the attorney-client privilege has been narrowed to only allow for confidentiality between the client and employees of the client; however, when such communications take place in the presence of a third person who is an *agent* of the client, the confidentiality is not destroyed. Specifically, “there undoubtedly are situations...in which too narrow a definition of ‘representative of the client’ will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely.” *In re Bieter*, 16 F.3d 829, 937-38 (8th Cir.1994).

Does Privilege Attach?

Under Tennessee workers' compensation laws, a system of case

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management for coordinating the medical care services provided to employees claiming benefits under workers compensation law was promulgated, Employers may utilize a case manager at their own expense. If a case manager is utilized, the employee is required to cooperate with the case manager to ensure that quality medical care services are made available to injured and disabled employees. *Tenn. Code Ann.* § 50-6-122(a)(1). However, nowhere in the statute does it ever refer to whether or not the communications between the case manager, the employer's attorney, the employer, the insurance carrier, or the third-party administrator (TPA) are privileged. We have always taken the position that case management notes are discoverable.

Given the clearly defined role of nurse case managers and workers' compensation case managers in workers' compensation cases, there is an argument that the attorney-client privilege should attach to all communications among the attorney, employer, TPA, and any case manager associated with workers' compensation litigation. Such support is grounded in the United States District Court case *Royal*, in which it was held that the independent consultant involved in communications between the attorney and its client, was not a *stranger* to the attorney-client relationship and was deemed an "*insider*" for the purposes of the privilege. The independent consultant was qualified more properly as an agent or representative of the client, whose presence did not waive the attorney-client privilege. *Royal Surplus Lines Ins. v. Sofamore Danek Group*, 190 S.F.D. 463, 469 (W.D.Tenn.1999). A workers' compensation case manager is intimately involved with the underlying workers' compensation claim, which forms the basis of the litigation, and possesses information regarding the claimant's medical treatment and diagnosis, which would remain unknown to the attorney and client in the absence of communications of such. The workers'

compensation case manager is precisely the sort of person with whom an attorney *must* confer with confidentially in order to fully advise his client. Similar to that which was held by the District Court in *Royal*, the definition and role of a workers' compensation case manager supports a view of the case manager as an agent or representative of the employer for the purposes of resolving a workers' compensation claim. Therefore, a good faith argument can be made that communications between the employer, adjuster, and their attorney should be protected by the attorney-client privilege.

Work-Product Doctrine

Work-product is defined as "documents and other tangible things prepared in anticipation of litigation by or for a party, or by or for a party's representative." *Royal*, 190 S.F.D. at 473, *referencing, Hickman v. Taylor*, 67 S.Ct. 385 (U.S.1947). The work-product doctrine protects the attorney's preparatory work on a case and materials prepared by a party's representative.

Under this reasoning, any documents, notes, or written communications generated by a case manager at the direction of an employer's counsel or for the benefit of an employer's counsel should qualify as potential work-product as long as such is prepared in reasonable anticipation of litigation. Arguably, once a case manager becomes involved in a workers' compensation claim, there is a reasonable anticipation of litigation if the claim does not settle. Therefore, the work product doctrine may be explored as a means by which to protect the notes and written communication such as email among employers, third-party administrators, attorneys, and their case managers.

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