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Attorney-Client Privilege in Bad Faith Litigation: Privilege Issues From Perspectives of Policyholders and Insurers

TUESDAY, NOVEMBER 29, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Sean T. Carnathan, Partner & Founder, **O'Connor Carnathan and Mack**, Burlington, MA

Evelyn M. Merchant, Founding Member, **Berk Merchant & Sims**, Miami, FL

Meghan C. Moore, Shareholder, **Flaster Greenberg**, Boca Raton, FL

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Overview of Today's Discussion

- **Attorney-Client Privilege in First Party and Third Party Bad Faith Cases**
  - When Claims and Litigation File Discovery Is Sought
  - How the Privilege Can Be Pierced
- **Important Considerations**
  - Privilege in the Tripartite Relationship
  - Privilege in Complex Multi-Party, Multi-Insurer Litigation
  - Preserving Privilege: Common Interest Doctrine and Joint Defense Agreements

Difference Between Attorney-Client Privilege and Work Product Doctrine

- **Attorney-Client Privilege**
  - Generally governed by state law
  - Scope
  - Discoverability
- **Work Product Doctrine**
  - Fact Work Product
  - Opinion Work Product

Bad Faith Claim Hypotheticals

- First-party coverage claim for damage to commercial building
  - Insurer does not assert advice of counsel
  - Insurer does assert advice of counsel
- Third-Party Plaintiff Claim for Failure to Settle within Policy Limits
  - Insurer has witness interview memoranda that it declines to produce as work product
    - The memoranda recount what the witness said
    - The memoranda recount the attorney's thoughts and impressions about the interview

How can you obtain information claimed to be privileged?

- Information not privileged (attorney acting as adjuster)
- Insurer asserts advice of counsel
- Waiver of the privilege (disclosure of attorney-client communications)
- Implied waiver
- Crime-fraud exception

Implied Waiver

When the insurer voluntarily injects an issue into the case, whether legal or factual, the insurer voluntarily waives attorney-client privilege.

Example: In *State Farm Mutual Automobile Ins. Co. v. Lee,* 13 P.3d 1169., 1173-74 (Ariz. 2000) Attorney-client communications were discoverable because the insurer defended its denial of coverage based on its agents' subjective understanding of the law as informed by counsel even though the insurer said it was not asserting an advice of counsel defense.

***In re Mt. Hawley Ins. Co.*, 829 S.E.2d 707, 717 (S.C. 2019).**

An insurer does not waive the privilege simply by denying liability for bad faith in its answer.

- South Carolina adopted the *Lee* standard -

- The insurer defends a bad faith claim on the basis of its subjective and allegedly reasonable understanding of the law and
- that understanding necessarily involves what the insurer learned from its counsel.
- But added one additional requirement: the party seeking waiver of the attorney-client privilege must also make a *prima facie* showing of bad faith.

Crime-Fraud Exception

- Applies when legal advice has been obtained in furtherance of an illegal or fraudulent activity.
- Standard applied by some courts in the insurance context (*Hutchinson v. Farm Family Cas. Ins. Co.*, 273 Conn. 33, 867 A.2d 1 (2005)): "[W]hether the plaintiffs have established, on the basis of nonprivileged materials, that there is probable cause to believe that:

(1) the defendant has acted in bad faith and
(2) the defendant sought the advice of its attorneys in order to conceal or facilitate its bad faith conduct."

Relevant Cases from Various Jurisdictions:

Vladislav & Tatyana Semeryanov v. Country Mut. Ins. Co., 2015 U.S. Dist. LEXIS 197187, *7 (D. Or. 2015):

> If the insured asserts that the insurer has engaged "in an act of bad faith tantamount to civil fraud" and makes "a showing that a reasonable person would have a reasonable belief that an act of bad faith has occurred" or that an insurer has engaged in a "bad faith in attempt to defeat a meritorious claim," then the insurer will be deemed to have waived the privilege. *See Cedell*, 295 P.3d at 246-47. Obviously, something more than an honest disagreement between the insurer and the insured about coverage under the policy must be at play. *MKB Constructors v. Am. Zurich Ins. Co.*, No. C13-0611 JL R, 2014 U.S. Dist. LEXIS 102759, 2014 WL 3734286, at *7 (W.D.Wash. July 28, 2014).

Cedell v. Farmers Ins. Co. of Wash., 176 Wn.2d 686, 700-701, 295 P.3d 239, 246-247 (Wa. S.Ct. 2013):

> If the civil fraud exception is asserted, the court must engage in a two-step process. First, upon a showing that a reasonable person would have a reasonable belief that an act of bad faith has occurred, the trial court will perform an in camera review of the claimed privileged materials. Second, after in camera review and upon a finding there is a foundation to permit a claim of bad faith to proceed, the attorney-client privilege shall be deemed to be waived.

Spargo v. State Farm Fire & Cas. Co., 2017 U.S. Dist. LEXIS 96823, *17-19, 2017 WL 2695292 (D. Nev. 2017):

> The Nevada Supreme Court could adopt any one of the three general approaches or some variant thereof. All of these approaches seek to resolve the conflict that exists in upholding an insurer's assertion of the attorney-client privilege in the context of a bad faith claim in which the opinions and recommendations of its coverage counsel are relevant in assessing whether the insurer acted reasonably in light of "the evidence before it at the time it denied the claim." *City of Myrtle Beach v. United National Ins. Co.*, 2010 U.S. Dist. LEXIS 89725, 2010 WL 3420044, at *4 (D.S.C. Aug. 27, 2010). The *Hearn* test comes closer than the other approaches in accommodating the public interest in upholding the attorney-client privilege when it is fair to do so, but in also recognizing that the privilege should not apply when the opinions or advice provided by the insurer's counsel are material to determining whether the insurer acted in bad faith. Application of the *Hearn* approach is probably not significantly different from the crime-fraud analysis proposed by the courts in *Cedell, Heyden* and *Madden*. The *Hearn* approach, however, avoids the arguable confusion or weakening of the crime-fraud exception by applying it in the context of an insurance bad faith claim. As the dissent in *Madden* recognized "bad faith" does not necessarily equate to fraud. *See also Potter*, 912 P.2d at 272 (defining "bad faith") and *Lubbe v. Barba*, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975) (setting forth the elements of common law fraud). This Court therefore predicts that Nevada will follow the majority of jurisdictions in adopting the *Hearn* approach.
>
> *Hearn* stated that before holding that the attorney-client privilege does not apply, the plaintiff is required to make "a substantial showing of merit" to his case. *Hearn*, 68 F.R.D. at 582. The court applied that requirement in the context of a lawsuit alleging violations of the plaintiff's civil rights. In *City of Myrtle Beach*, the district court imposed a similar requirement in an insurance bad faith claim which it characterized as making a *prima facie* case of bad faith. 2010 U.S. Dist. LEXIS 89725, 2010 WL 3420044, at *7. *See also ContraVest Inc. v. Mt. Hawley Ins. Co.*, 2017 U.S. Dist. LEXIS 48638, 2017 WL 1190880, at *4 (D. S.C. March 31, 2017). This Court believes that such a requirement is necessary. Otherwise, an insurer's mere denial that it acted in bad faith will automatically trigger discovery of confidential attorney-client communications regardless of whether there is any reasonable basis to the claim of bad faith. The plaintiff should be required to show she has a reasonably viable bad faith claim before the the insurer is required to disclose its attorney-client communications.

Heynen v. Allstate Ins. Co., 2013 U.S. Dist. LEXIS 195609, *4-6, 2013 WL 12171613 (D. Alaska 2013):

> The supreme court concluded that "services sought by a client from an attorney in aid of . . . a *bad faith breach* of a duty are not protected by the attorney-client privilege." The court then articulated a two-step process for courts to apply when an insured seeks to compel discovery of privileged claims file materials under the crime-fraud exception: (1) "[b]efore

engaging in *in camera* review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies;" and (2) "once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court." The court concluded that the defendant insurer's "seemingly belated reservation of rights letter" and actions after the letter was sent, including the insurer's failure to communicate with the insured, were sufficient to support a good faith belief that *in camera* review of the materials might reveal evidence to establish that the crime-fraud exception applied.

State ex rel. Allstate Ins. Co. v. Madden, 215 W.Va. 705, (W.V. S. Ct. 2004) (crime-fraud exception applies to obviate attorney-client privilege and work product protections under West Virginia law):

Moreover, for the exception to be operable, the fraud or crime contemplated need not have been actually committed; the mere intent to perpetrate the wrongdoing will suffice. In other words, "'the client need not succeed in committing the intended crime or fraud in order to forfeit the attorney-client privilege. The dispositive question is whether the attorney-client communications are part of the client's effort to commit a crime or perpetrate a fraud.'" *Medical Assurance*, 213 W. Va. at 473, 583 S.E.2d at 96 (Davis, J., concurring) (quoting *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 187 (Fla. Dist. Ct. App. 2001), stay denied, 832 So. 2d 768 (Fla. Dist. Ct. App.), review denied, 828 So. 2d 385 (Fla. 2002) (table decision)). Neither must the attorney be aware of his or her client's intention to commit a crime or fraud for the exception to be implicated. "The crime-fraud 'exception applies even if the attorney is unaware of the client's criminal or fraudulent intent, and applies of course where the attorney knows of the forbidden goal.'"

* * *

The elements of the crime-fraud exception, as recognized by the United States Supreme Court in the seminal case of *United States v. Zolin*, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989), require the party seeking to establish the exception to demonstrate, "through nonprivileged evidence, '"a factual basis adequate to support a good faith belief by a reasonable person," that in camera review of the [privileged] materials may reveal evidence to establish the claim that the crime-fraud exception applies.'" Medical Assurance, 213 W. Va. at 475-76, 583 S.E.2d at 98-99 (Davis, J., concurring) (quoting *Zolin*, 491 U.S. at 572, 109 S. Ct. at 2631, 105 L. Ed. 2d at 490 (quoting *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo. 1982))). In so doing, "the party opposing the privilege may use any nonprivileged evidence in support of its request for in camera review[.]" *Zolin*, 491 U.S. at 574, 109 S. Ct. at 2632, 105 L. Ed. 2d at 492. However, where a determination of privilege has not yet been made, the party seeking disclosure may also rely on the allegedly privileged materials to establish a prima facie showing that the crime-fraud exception applies to compel disclosure. Id., 491 U.S. at 573-74, 109 S. Ct. at 2631-32, 105 L. Ed. 2d at 491-92.

Morton v. Bank of the Bluegrass, 18 S.W.3d 353, 360-361, 1999 Ky. App. LEXIS 110, *20-21 (Ky. App. 1999)

> Citing *Cummings v. Commonwealth*, 221 Ky. 301, 298 S.W. 943 (1927), the Kentucky Supreme Court held in *Steelvest, supra*, that "the [attorney-client] privilege is generally considered to be absolute as to communications made by or to a person advising with an attorney as to past transactions and offenses. [Citation Omitted.] However, the rule does not apply to future transactions when the person seeking the advice is contemplating the committing of a crime or the perpetration of a fraud." *Steelvest, supra*, at 487. As "the privilege of the [attorney- client] relationship is an obstacle to the fact finding process and is to be strictly confined within the narrowest possible limits consistent with the logic of its principle[,]" *see Futrell v. Shadoan*, Ky., 828 S.W.2d 649, 651 (1992), we conclude that the trial court erred in denying Shirley the right to depose the attorneys for Standard. She has the right to depose the attorneys concerning their knowledge as to any underwriting rule, their knowledge of any plan by Standard to perpetrate a fraud on the Mortons, and any other similar and relevant matter not subject to the attorney-client privilege.

State Farm Fire & Casualty Co. v. Superior Court, 54 Cal. App. 4th 625, 648-649, 62 Cal. Rptr. 2d 834, 850 (Cal. Ct. App. 1997):

> Those portions of the September 25 declaration, which are not privileged, contain similar accusations by Ms. Zuniga. She identifies an "Administrative Services" manual for the AIM system which was responsive to real parties request for production but which was not produced. She identifies information which she claims contradicts statements made by Charles Hook in his declaration in support of the motion for summary judgment. She declares that she was involved in a conversation with "one of the Company's senior executives" in which he advised "that State Farm witnesses should not admit that forgeries happen, unless and until they are compelled to do so by Court order." In the same conversation he also advised that "we have to decide how to tell our story should the Company be compelled to admit that it has knowledge of the 'unauthorized signatures.' He said we should try to make this practice look like a 'service.' " She states that she was aware of the existence of a number of documents "pertaining to the Company's practices and procedures regarding signatures and the taking of applications by agents which were never produced to plaintiffs in the *Taylor* case." She also declares that State Farm prepares witnesses "on how to give up as little information as possible at deposition." But for trial, the witnesses "were trained to appear helpful and polite, and to drop the evasive tactics used to keep information from being disclosed at deposition."

> We conclude the foregoing evidence is more than sufficient for application of the crime/fraud exception to the privileged materials contained in the Zuniga declarations.

The Tripartite Relationship – what is it, what is privileged, and who has the right to waive privilege and when?

Hypothetical 1

- Garden variety auto accident – Mary crashes into Joe, and Joe sues Mary. Mary's insurance company appoints counsel to defend her.
- No real coverage issues, plaintiff's demand well within policy limits
- No reservation of rights
    - Privilege as between Insurer and Insured?
    - Privilege with regard to Third-Party Plaintiff?
    - What if the case doesn't settle, the plaintiff hits a surprise home run and gets a judgment well in excess of policy limits, then comes after the insurance company for failure to settle/bad faith?
    - What if the insured settles with the plaintiff and assigns her claims against the insurance company to the plaintiff?

Hypothetical No. 2

- Commercial liability case, involving covered and uncovered claims
- Insurer reserves rights with regard to uncovered claims
    - How does that impact the relationship and the privilege?
        - Privilege as between insured and insurer?
        - What if insured gets separate counsel at insurer's expense?
    - What if insurer does not reserve rights but demands are well in excess of policy limits?
    - Any impact on tripartite relationship?
- Commercial liability case, involving covered and uncovered claims
    - Will communications between the insurance company and defense counsel be discoverable in a subsequent bad faith action brought by the insured against the insurer? Are those communications discoverable by third parties?

Hypothetical No. 3

- What if multiple insurers are defending a single insured?
- Construction defect suit: A developer and a general contractor are being defended by the general contractor's insurance company even though the developer and general contractor's interests are in part adverse. (The developer is being defended as an additional insured.)
- What safeguards should be in place to protect attorney-client privileged communications between the developer, its counsel, and the insurer from being discovered by the general contractor and vice versa?

What if you want to share some information?

- Generally, communications between an attorney and client that are disclosed to third parties are not privileged.
- Under the common interest doctrine, attorney client communications disclosed to a third party remain privileged if:

(1) the party shares a common legal interest with the client who made the communication;
(2) The communication is made in furtherance of that common interest; and some states also require a showing that
(3) The communication relates to pending or anticipated litigation.

Relevant Cases from Various Jurisdictions:

Country Life Ins. Co. v. St. Paul Surplus Lines Ins. Co., 2005 U.S. Dist. LEXIS 39691, *19-21, 2005 WL 3690565 (C.D. Ill. 2005):

> To maintain the privilege, the common interest must relate to litigation or a legal interest, and not business, commercial or financial interest. *For Your Ease Only*, 2003 WL 21920244 at *1; *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 689 F.Supp. 841, 845 (N.D.Ill.1988); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y.1995); *Blanchard v. EdgeMark Financial Corp.*, 192 F.R.D. 233, *237 (N.D.Ill., 2000). The sharing parties need not be allies in all respects; they need only have some interests in common. *See In re LTV Securities Litigation*, 89 F.R.D. 595, 604-05 (N.D.Tex. 1981), cited in *National Union Fire Ins. Co. v. Continental Illinois Group*, 1987 U.S. Dist. LEXIS 9765, No. 85C7080 and 7081, 1987 WL 18933 (N.D.Ill. Oct. 22, 1987).
>
> To establish a joint-defense privilege, the party claiming privilege must demonstrate (1) the documents were made in the course of a joint-defense effort; and (2) the documents were designed to further that effort. *See Bay State Ambulance*, 874 F.2d at 28; *Grand Jury Proceedings v. U.S.*, 156 F.3d 1038, 1042-1043 (10th Cir.1998); In re *Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 126 (3d Cir.1986); *Ocean Atlantic Development Corp. v. Willow Tree Farm, L.L.C.*, 2002 U.S. Dist. LEXIS 6978, 2002 WL 649043, *5 (N.D.Ill., 2002).
>
> The parties must have a manifested common interest in the litigation. *Evans*, 113 F.3d at 1457; *see also Bay State Ambulance*, 874 F.2d at 28. While a written agreement between the parties is not required to invoke the joint defense privilege, the parties asserting the privilege must, in the very least, show an expressed intent to cooperate in the litigation. *For Your Ease Only, Inc.*, 2003 WL 21920244 at *1; *Ludwig v. Pilkington North America, Inc.* 2004 U.S. Dist. LEXIS 16049, 2004 WL 1898238, *3 (N.D.Ill., 2004)

In re XL Specialty Ins. Co., 373 S.W.3d 46, 51-53 (Tx. S. Ct. 2012):

III. Texas Rule of Evidence 503(b)(1)(C)—The Allied Litigant Doctrine

Courts of appeals have generally applied Rule 503(b)(1)(C) to joint defense situations where multiple defendants, represented by separate counsel, work together in a common defense. Notably, and in contrast to the proposed federal rule, Texas requires that the communications be made in the context of a pending action. *See* Tex. R. Evid. 503(b)(1)(C) (protecting from disclosure communications between a client "to a lawyer . . . representing another party in a *pending action* and concerning a matter of common interest therein") (emphasis added). Although criticized, the pending action requirement limits the privilege "to situations where the benefit and the necessity are at their highest, and . . . restrict[s] the opportunity for misuse." *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 388 (M.D.N.C. 2003). Thus, in jurisdictions like Texas, which have a pending action requirement, no commonality of interest exists absent actual litigation. Accordingly, our privilege is not a "common interest" privilege that extends beyond litigation. Nor is it a "joint defense" privilege, as it applies not just to defendants but to any parties to a pending action. Rule 503(b)(1)(C)'s privilege is more appropriately termed an "allied litigant" privilege.

The allied litigant doctrine protects communications made between a client, or the client's lawyer, to another party's lawyer, not to the other party itself. *See, e.g., Robert Bosch, LLC v. Pylon Mfg. Corp.*, 263 F.R.D. 142, 146 (D. Del. 2009) ("[T]o qualify for and to maintain continued protection [under the common interest privilege], the communication must be shared between counsel."); *Walkowiak*, at 5 (noting that the joint defense doctrine "does not apply to . . . communications [made directly to] other parties themselves"). This attorney-sharing requirement makes clear that the privilege applies only when the parties have separate counsel. *See, e.g., In re Teleglobe*, 493 F.3d at 365 ("[T]he [common interest] privilege only applies when clients are represented by separate counsel."); *Griffith v. Davis*, 161 F.R.D. 687, 692 (C.D. Cal. 1995) ("The [joint defense] doctrine applies where parties are represented by separate counsel but engage in a common legal enterprise.").

Broessel v. Triad Guar. Ins. Corp., 238 F.R.D. 215, 219-220 (W.D. Ky 2006):

Another situation where the common interest is deemed sufficient to preclude waiver is when parties share a common defense. *Id.* at 201. This joint defense concept developed in the "criminal context when multiple defendants, each having separate counsel, share information to effect a united defense." *Id.* More and more, to protect the joint defense privilege, parties enter into written joint defense agreements in an effort to assure that information shared among the attorneys for each of the defendants will remain privileged despite the sharing. *Id.* Here, Defendant and the other six members of the mortgage insurance industry in the

United States did just that in May 2003. All seven signatories to this agreement appreciated the need to pool their resources in preparing a common or united defense to the claims asserted in an alleged class action suit filed against one of its members, Mortgage Guaranty Insurance Corporation ("MGIC") (DN 120, Exhibit 1, Affidavit of Earl Wall; 007382-007392). Essentially, all seven members recognized they may become co-defendants in that action or become defendants in an alleged class action raising the same claims (DN 120, Exhibit 1, Affidavit of Earl Wall; 007382-007392). While the seven members of the mortgage insurance industry did not become co-defendants in the same civil action, all but one are presently defending against the same claims asserted in six alleged class action lawsuits prosecuted by the same law firm.

The third and final situation where the common interest is deemed sufficient to preclude waiver is "when two or more clients share a common legal or commercial interest and, therefore, share legal advice with respect to that common interest." *Id.* at 203. "The common interest doctrine encourages parties working with a common purpose to benefit from the guidance of counsel, and thus avoid pitfalls that otherwise might impair their progress toward their shared objective." *Id.* The doctrine has evolved from *Duplan Corp. v. Deering Milliken,* 397 F.Supp. 1146 (D.S.C. 1974), "which was limited to a common shared legal, rather than a common shared financial or commercial, interest." *Epstein,* supra, at 203. Notably, "[u]nlike the joint defense privilege, the common interest does not require or imply that an actual suit is or ever will be pending." *Id.*

Maplewood Partners, L.P. v. Indian Harbor Ins. Co., 295 F.R.D. 550, 601-602 (S.D. Fla. 2013):

The conclusion to be drawn from these decisions is that an insured who brings a bad faith action against its insurer can obtain communications which were made between the insurer and counsel it hired to represent the insured as to those matters in which the insurer and insured had a common interest. In other words, any privilege as to communications between MapleWood Partners, acting through Glaser, and its attorneys was a shared privilege with Indian Harbor if the communications related to the defense of the Underlying Matters and to the extent that there was a pending claim for coverage (i.e., MapleWood Partners had no reasonable expectation of privacy in light of the Policy's mandated cooperation), and litigation had not yet been filed (litigation was not even "anticipated" prior to January 1, 2008, according to the parties).

However, to be clear, the parties are not aligned as to their coverage dispute before me and, as such, Plaintiffs' communications with coverage counsel as to the present case are not discoverable. Similarly, Defendant's communications with its own counsel are not discoverable, generally, as discussed later in this Order. In litigation involving an insurer's allegedly bad faith conduct, the Supreme Court of Florida

has held that, other than in limited circumstances (e.g., where a waiver was established), "when an insured party brings a bad faith claim against its insurer, the insured may not discover those privileged communications that occurred between the insurer and its [own] counsel during the underlying action." *Genovese v. Provident Life & Accident Ins. Co.*, 74 So. 3d 1064, 1068-69 (Fla. 2011). Communications between an insurer's adjuster and its outside counsel do not waive the insurer's attorney-client privilege. *See, e.g., Royal Bahamian Ass'n v. QBE Ins. Corp.*, 2010 U.S. Dist. LEXIS 101275 (S.D. Fla. Sept. 20, 2010) (after *in camera* review, court determined that communications with insurer's field adjuster were privileged and privilege had not been waived); but see *TIG Ins. Corp. v. Johnson*, 799 So. 2d 339, 342 (Fla. 4th DCA 2001) (upholding order, in breach of contract case, compelling production of letters between the insurer and its lawyer hired to investigate underlying claims brought against its insured, presumably because a waiver of the privilege occurred by insurer's failure to provide a privilege log).

Fox Paine & Co., LLC v Houston Cas. Co., 2016 N.Y. Misc. LEXIS 1485, *57, 2016 NY Slip Op 50635(U), 18-19, 51 Misc. 3d 1212(A), 37 N.Y.S.3d 207:

> Applying the law as it exists in the Second Department with respect to the common-interest privilege, HCC was required to establish that the communications between the Paine Parties' defense counsel, HCC and its counsel, and the Excess Insurers and their counsel were not only attorney-client communications made to further a common identical or nearly identical legal interest, but were also made in anticipation of litigation in which the communicating parties had a common legal interest (*Stenovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc 2d 99, 108, 756 N.Y.S.2d 367 [Sup Ct NY County 2003], *cited in Hudson Valley Marine, Inc. v Town of Cortlandt*, 30 AD3d 377, 816 N.Y.S.2d 183 [2d Dept 2006]).

Common Interest and Joint Defense Agreements.

Do you need them?

What should they say?

- Have you ever won or defeated a challenge to attorney-client privilege?
- Under what circumstances?