

MEMO: Update from Practice Section Council Meeting

All,

I just returned from the Practice Section Council Meeting attended by the Chairs of the other sections of the Bar.

This is some information I wanted to share with you:

1. The ISB is accepting nominations for the following awards: (1) Distinguished Lawyer; (2) Professionalism; (3) Pro-Bono; (4) Service; (5) Outstanding Young Lawyer; (6) Distinguished Jurist; and (6) Section of the year. Nominations are due on March 25. If you want to nominate someone or a section, please submit your nomination to Diane Minnich.
2. The Idaho Law Foundation is in need of volunteers for the National Mock Trial Competition. The event is scheduled for May 12 through 14. If you are interested in volunteering, please contact Mahmood Sheikh.
3. The Diversity Section is looking for monetary donations and volunteers for seminars it will be hosting in September 2016 in North Idaho and Boise for the 225th Anniversary of the Ratification of the Bill of Rights. If you are interested contact Jason Gray at Jason@blacklawpllc.com.
4. Mahmood asked each section Chair to identify any public service projects that they are working on. If any of you are interested in taking the lead on a public service project for our section, please let me know.
5. Our membership level is relatively flat for 2016, as compared to 2015. Total litigation section members for 2015 was 323. Total section members to date for 2016 is 318. So we are down five members, but we should make that up as new members are admitted to the Bar over the course of 2016.

Please feel free to share this information with others.

Sincerely,

Clay Gill
ISB Litigation Section Chair

IDAHO SUPREME COURT ELECTION – CANDIDATES FORUM

Sponsored by the Idaho State Bar Appellate Practice Section, the Idaho State Bar Litigation Section and Idaho Women Lawyers, Inc. with special thanks to event host the University of Idaho College of Law

Tuesday, April 19, 2016

Idaho Law & Justice Learning Center, 514 W. Jefferson Street – Boise

Also available via live stream by clicking: <http://bit.ly/1RS6rB3>

4:00 – 6:00 pm (MT)

Hosted reception to follow

Idaho Supreme Court Chief Justice Jim Jones announced his retirement last month. Four candidates are vying for the position: Ms. Robyn M. Brody of Rupert, Hon. Sergio A. Gutierrez of Nampa, Sen. Curtis D. McKenzie of Nampa and Mr. Clive J. Strong of Boise. Three of the four candidates will participate in the forum. Sen. McKenzie expresses his regrets that he cannot attend because of a previously scheduled election event. He relayed his appreciation and thanks those attending. This forum will be an opportunity to learn about the candidates and to hear answers to questions posed by moderator Marc Johnson of Gallatin Public Affairs.

For more information, please contact Idaho State Bar Litigation Section Chairperson Clay Gill (ccg@moffatt.com / (208) 345-2000), Idaho State Appellate Practice Section Chairperson Christopher Pooser (christopher.pooser@stoel.com / (208) 389-9000) or Idaho State Bar Appellate Practice Section Governing Council Member Syrena Case Hargrove (scasehargrove@yahoo.com / (208) 344-2989).

****This message has been sent to members of the Idaho State Bar at the request of the Appellate Practice Section and the Litigation Section. The Idaho State Bar sends email messages to its members on issues and events directly connected to the Idaho State Bar and the Idaho Law Foundation only. ****

Attorney Client Privilege

Ben Ritchie
Litigation Section
April 15, 2016

MOFFATT
THOMAS

www.moffatt.com

HAPPY TAX DAY

- "The difference between death and taxes is that death doesn't get worse every time Congress meets." Will Rogers
- "Income tax returns are the most imaginative fiction being written today." Herman Wouk
- "There's nothing wrong with the younger generation that becoming taxpayers won't cure." Dan Bennett

4/14/2016

MOFFATT
THOMAS

2

Idaho Rule of Evidence 502

"A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."

4/14/2016

MOFFATT
THOMAS

3

Idaho Rule of Evidence 502

- (1) between the client or the client's representative and the client's lawyer or the lawyer's representative,
- (2) between the client's lawyer and the lawyer's representative,
- (3) among clients, their representatives, their lawyers, or their lawyers' representatives, in any combination, concerning a matter of common interest, but not including communications solely among clients or their representatives when no lawyer is a party to the communication,
- (4) between representatives of the client or between the client and a representative of the client, or
- (5) among lawyers and their representatives representing the same client.

4/14/2016 4

**MOFFATT
THOMAS**

Idaho Rule of Evidence 502

Who may claim the privilege?

- The client
- The lawyer on behalf of the client
- The guardian, conservator, or PR of the client
- Successor, trustee, or similar representative of a business organization client

4/14/2016 5

**MOFFATT
THOMAS**

Idaho Rule of Evidence 502

Definitions

- (1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.
- (2) A "representative of the client" is one having authority to obtain professional legal services, or an employee of the client who is authorized to communicate information obtained in the course of employment to the attorney of the client.
- (3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.
- (4) A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal service.
- (5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

4/14/2016 6

**MOFFATT
THOMAS**

Idaho Rule of Evidence 502

Exceptions

- (1) In furtherance of crime or fraud
- (2) Claimants through same deceased client
- (3) Breach of duty by lawyer or client
- (4) Document attested by lawyer
- (5) Joint clients
- (6) Shareholder actions

4/14/2016 7

**MOFFATT
THOMAS**

Federal Rule of Evidence 501

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

4/14/2016 8

**MOFFATT
THOMAS**

Federal Common Law

- (1) Where legal advice of any kind is sought
- (2) From a professional legal adviser in his capacity as such
- (3) The communications relating to that purpose
- (4) Made in confidence
- (5) By the client
- (6) Are at his instance permanently protected
- (7) From disclosure by himself or by the legal adviser
- (8) Unless the protection be waived

The party asserting the privilege bears the burden of proving each element

4/14/2016 9

**MOFFATT
THOMAS**

Attorney Client Privilege for
In-house Counsel

- Who is the client?
- Control Group Test v. the Subject Matter Test
- *Upjohn v. United States*

4/14/2016 MOFFATT THOMAS 10

Attorney Client Privilege for
In-house Counsel

- Shift from the subject matter of the communication to the role of the in-house attorney
- Regardless of the nature of the communication, claims of the privilege have been denied based primarily on the fact that the in-house attorney was not acting as an attorney during the communication
- In-house counsel may be acting in a non-legal capacity, such as a negotiator, business advisor, messenger, or corporate investigator

4/14/2016 MOFFATT THOMAS 11

Legal Tests

- Company claiming privilege "must prove that all of the communications it seeks to protect were made primarily for the purpose of generating legal advice." *U.S. v. Chevron Corp. (N.D. Cal. 1996)*
- Privilege only applies where in-house counsel is acting in traditional role as lawyer in a professional legal capacity. *Georgia-Pacific v. GAF Roofing (S.D.N.Y. 1996)*
- Whether the communications were made as part of the corporation's effort to secure legal advice or services. *Southern Bell v. Deason (Fla. 1994)*
- Must concern a legal matter of interest to the organization. *Restatement of the Law Governing Lawyers Section 73*

4/14/2016 MOFFATT THOMAS 12

Dewitt v. Walgreen

- In 2009 Walgreens instituted a new Immunizer Policy requiring all pharmacists to become certified immunizers drafted by the Executive Pharmacy Director and an In-house attorney.
- A pharmacist refused to comply with the policy on religious grounds, resigned, and brought a discrimination suit.
- Walgreens claimed privilege on communications relating to formation of Immunizer Policy.

4/14/2016



13

Dewitt v. Walgreen cont.

- "Indeed, communications between in-house counsel and corporate representatives...are not presumed to be made for the purposes of obtaining advice."
- "Because in-house counsel may operate in a purely or primarily business capacity in connection with many corporate endeavors, Walgreens must make a clear showing that the speaker made the communications for the purpose of obtaining or providing legal advice—rather than business advice."
- "Only the legal advice given by in-house counsel and the communications directed to in-house counsel for the purpose of obtaining legal advice are privileged."

4/14/2016



14

T3 Enterprises, Inc. v. Safeguard Business Systems

- Communications between a corporation and its in-house counsel are not presumed to be made for their purpose of obtaining legal advice.
- Party claiming privilege must make a clear showing that the communications were made for the purpose of obtaining or providing legal advice, rather than business advice.
- Cited to and adopted *Dewitt v. Walgreen*


4/14/2016



15


T3 Enterprises, Inc. v. Safeguard Business Systems cont.

- Defendants' Motion to Compel: Sought protection for engagement letter and conflict waiver and attachments.
- Court found that client had reached out to attorney and asked to represent client before correspondence was sent.
- Found that co-defendants shared a common legal interest and that engagement letter was not privileged because it was a privileged communication between an attorney and client.

4/14/2016  16


T3 Enterprises, Inc. v. Safeguard Business Systems cont.

- Plaintiff's Motion to Compel: Sought production of emails and attachments between corporate representatives and in-house counsel.
- The Court conducted an in-camera review and found that a number of them concerned factual matters and business advice, not legal advice.

4/14/2016  17

A/C Privilege and Bad Faith Cases

- *Hilborn v. Metropolitan Group Property* (D. Idaho 2013)
- *Stewart Title v. Credit Suisse* (D. Idaho 2013)
- Both cases involved motions to compel claims files that were claimed as privileged under a/c privilege and work product, including investigations by coverage counsel.
- Court found Idaho Supreme Court would adopt holding from *Cedell v. Farmers*, which held no presumption of privilege between insured and insurer in the claims adjusting process. Insurer cannot claim privilege for quasi-fiduciary tasks of investigating, evaluating, and processing the claim. The privilege only applied where the attorney is providing the insurer with counsel as to its own potential liability, including the existence of insurance coverage.

4/14/2016  18

For more information or questions, please contact:

Ben Ritchie
900 Pier View Dr., Suite 206
P.O. Box 51505
Idaho Falls, ID 83405
bcr@moffatt.com
(208) 522-6700

4/14/2016

MOFFATT
THOMAS

19
