

Attorney + Client
= Privilege...

Not so fast following
*Stewart Title Guaranty v.
Credit Suisse*

Ethical Considerations of Mixed
Roles of Coverage and Investigation



The beginning.....Washington State

- Washington “FIRSTS”
 - ▣ The first Starbucks
 - ▣ *Cedell v. Farmers* – February 21, 2013
 - ▣ Seattle Seahawks –February 2, 2014

- Impacts on Idaho
 - ▣ Starbuck invasion on every corner
 - ▣ *Stewart Title Guaranty v. Credit Suisse* – April 3, 2013
(U.S. District Court for the District Idaho, Judge Winmill)
 - ▣ *Hilborn v. Metropolitan Group* – November 15, 2013
(U.S. District Court for the District Idaho, Judge Winmill)

Attorney Client Privilege Overview

- Attorney-Client Privilege: Protects confidential communication between attorneys and clients from discovery or public disclosure.
 - ▣ Idaho Rule of Evidence 502
 - Definitions:
 - “Confidential Communication”: 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.
 - General Rule: 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 which were made ...

Attorney Client Privilege

□ Critical Points

- That a person is attorney does not necessarily make all communication privileged with that person. *Upjohn Co. v. U.S.*, 449 U.S. 383, 395 (1981).
- It protects only communications and advice between attorney and client in the context of a professional relationship involving the attorney **as an attorney**, and not documents prepared for some other purpose. *Schmidt v. California State Auto Ass'n*, 127 F.R.D. 182, 183 (D. Nev. 1989).
- The privilege only protects disclosure of the communication – it does not protect disclosure of underlying facts by those who communicated it with the attorney. *Upjohn Co. v. US*, 449 US 383, 395 (1981).
- Not dependent on anticipation of litigation (like work product doctrine), but instead depends on the nature of the relationship involved. *Mission Nat'l Ins Co v. Lilly*, 112 F.R.D. 160, 163 (D. Minn 1986).

Types of Cases

- Involve insurance – title insurance, bad faith actions, etc.
 - In the insurance context, the question of whether a communication falls within the attorney-client privilege can often be a difficult one because of the investigatory nature of the insurance business.
 - The line between what constitutes claim handling and the rendition of legal advice is often more cloudy than crystalline.

HSS Enter., LLC v. AMCO Ins. Co., No. C06-1485-JPD, 2008 U.S. Dist. LEXIS 11841, *9 (W.D. Wash. Jan. 14, 2008).

Cedell v. Farmers Ins. of Washington

295 P. 3d 239 (Wash Sup. Ct. 2013)

□ Facts

- Mr. Cedell's home destroyed in a fire.
- Filed a bad faith action when Farmers (his insurer) refused to pay the fire loss claim one year after the fire.
- Farmers retained "coverage counsel" to assist in its evaluation of the claim.
- Farmer's coverage counsel, Ryan Hall, activities included examining Cedell and his girlfriend under oath, sending a letter to Cedell regarding coverage, and extending to Cedell a one-time offer of \$30,000.00, good for ten days.
- During discovery in the bad faith litigation, Farmers produced a heavily redacted copy of its claim file, including a privilege log that cited the attorney-client privilege and work product.

□ Holding

- Farmers could only overcome the presumption favoring disclosure by showing that Hall was simply offering legal opinions (*i.e.*, providing Farmers with counsel on its own potential liability – true coverage analysis), rather than acting in a quasi-fiduciary way.
- Farmers was not permitted to claim attorney-client privilege or work product as a reason for non-disclosure.

Stewart Title Guaranty Co. v. Credit Suisse

2013 WL 1385265 (D. Idaho 2013), 2013 U.S. Dist. Lexis 49804

□ Facts

- Credit Suisse purchased title insurance from Stewart Title included mechanics lien coverage.
- Lien claimants asserted their liens had priority over Credit Suisse's mortgage.
- Credit Suisse tendered defense to Stewart Title.
- Stewart Title's claim rep and in-house counsel began investigating liens.
- Hired outside legal counsel to assist in investigation.
- Stewart Title had litigation counsel defending against Credit Suisse's lawsuit.

Stewart Title Guaranty Co. v. Credit Suisse

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□ Holding

- In camera review of only coverage documents
- All documents dealing with factual investigation of lien claims were discoverable
- Documents discussing both coverage and factual are discoverable with the coverage issue did not address the bad faith claim

“Super Adjuster” Problem

- Legal Question: Whether the attorney BOTH investigated the claim and provided coverage advice?
- Lessons for Attorneys
 - Attorney Awareness of Issue
 - Multi-level Communication with Insurance Clients
 - Attorney’s scope and forms of communication
 - Judge Winmill: Insurers should set up and maintain separate files so as not to comingle different functions.

Ethical Implications

- Rule 1.2: Scope of Representation
- Rule 1.4: Communication
- Rule 1.6 Confidentiality of Information

Rule 1.2: Scope of Representation

- A lawyer shall abide by a client's decision concerning the objectives of representation, and
- As required by Rule 1.4 shall consult with client
- Comment 6: The scope of services to be provided by a lawyer may be limited by agreement with client or by the terms under which the lawyer's services are made available to the client. Example given in comments is "limited to insurance coverage."

Rule 1.4: Communication

- (a) A lawyer shall:
 - ▣ (a)(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - ▣ (a)(3) keep the client reasonably informed about the status of a matter
- A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation.
- Comment 5: The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

Rule 1.6 Confidentiality of Information

- (a) A lawyer shall not reveal information related to representation of a client unless a client gives informed consent....
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:....
 - ▣ (6) to comply with other law or court order.







