Attorney-Client Privilege & Insurance: What Can Be Disclosed?

When a law firm files an insurance claim—especially a malpractice or cyber claim—it's natural for the insurer to request information. But in doing so, firms may face a tricky ethical question: **Are we waiving privilege by cooperating with our carrier?**

For managing partners and firm leadership, understanding how attorney-client privilege interacts with insurance obligations is essential. Missteps here can not only jeopardize a claim but also trigger client trust issues, ethics violations, or worse—courtroom fallout in related litigation.

Let's break down what you need to know.

The Insurance Cooperator's Dilemma

Most legal malpractice and cyber policies include a **"duty to cooperate"** clause. This means:

- Promptly notifying the insurer of a potential claim or incident
- Providing requested documents, interviews, or case updates
- Not admitting liability or taking certain actions without carrier approval

On the flip side, attorneys are bound by the **duty of confidentiality** and **attorney-client privilege.** These are not the same:

- **Confidentiality** (Rule 1.6 under the ABA Model Rules) prohibits disclosure of any information related to client representation—regardless of privilege.
- **Privilege** protects legal communications made in confidence for the purpose of seeking legal advice.

So, what happens when an insurer asks for client emails, legal memos, or strategy documents as part of claim investigation?

You're stuck between two duties—and neither is optional.

What Can Be Disclosed Without Waiving Privilege?

Here's where it gets nuanced. In many cases, insurers will ask for **basic claim information** that can be provided without revealing privileged communications or breaching confidentiality:

- Date and nature of the alleged error or incident
- Parties involved
- Timeline of events
- Description of the legal matter and services provided
- Public or court-filed documents

But when insurers request **internal firm communications, client memos,** or **emails discussing litigation strategy**, that's where privilege risk emerges.

Some courts have held that sharing privileged material with an insurer **waives** privilege—especially if the carrier ends up in litigation (e.g., a coverage dispute).

Others, however, recognize a "common interest" or "tripartite" relationship between insured, insurer, and defense counsel—protecting those disclosures under certain conditions.

Bottom line: **Jurisdiction matters.** And so does the language in your policy.

How to Protect Privilege While Cooperating with Insurers

As a decision-maker, your firm can take proactive steps:

1. **Review your policy's cooperation clause**—is privilege addressed directly?
2. **Work with breach coaches or panel counsel**—they can guide communication without compromising privilege.
3. **Use counsel-to-counsel communications** when responding to insurers—especially on sensitive matters.
4. **Mark privileged documents accordingly**, and limit what's shared unless absolutely necessary.
5. **Get client consent**, if disclosure is unavoidable and permitted by ethics rules.

When in doubt, document your process. Courts are more likely to uphold privilege if you've shown a good-faith effort to protect it.

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What About Insurance Applications and Claim Forms?

Another risk zone: **insurance applications, renewals, and prior knowledge declarations**. If your firm discloses a "potential claim" involving a client and provides background, that could become discoverable in later litigation—especially if the client sues.

Some best practices:

- Stick to factual descriptions—avoid editorializing or quoting legal advice.
- Consult your broker or coverage counsel before submitting complex or sensitive disclosures.
- Treat insurance disclosures as potentially discoverable documents.

And remember, errors here don't just risk privilege—they can invalidate coverage due to misrepresentation or non-disclosure.

Leadership's Role in Managing This Risk

Managing partners and firm leadership should:

- Train attorneys on privilege risks when dealing with insurers
- Centralize insurance communication through a risk manager or general counsel
- Involve outside counsel for high-stakes claims or disclosures
- Ensure your broker understands legal ethics and privilege concerns

Your insurance is there to protect you—but only if the way you interact with your carrier doesn't open another front of liability.

Do your insurance policies respect privilege?

IMA helps law firms navigate the gray areas of insurance cooperation, ethics, and privilege. We work with firms to structure coverage and claims processes that preserve attorney-client protections. Contact us for a confidential consultation or policy review.

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