

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

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October 7, 2020  
Strafford Webinars

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### DATE & TIME

**Wednesday, October 7, 2020 | 1:00 p.m. - 2:30 p.m. EDT**

This CLE webinar will discuss whether the attorney-client privilege is being further eroded in bad faith litigation. It will guide policyholder and insurer counsel on the tripartite nature of attorney-client privilege among the insurer, the insured, and the attorney representing the insured and who controls the privilege if the insured later asserts a claim for bad faith against the insurer. The panel will offer best arguments and strategies for policyholders seeking to break the privilege and insurance defense counsel seeking to preserve it.

### Description:

Judges in bad faith cases must choose between upholding the attorney-client privilege and allowing policyholders to discover how the insurer reached its decision on a particular claim. Thus, **courts have articulated various tests** for determining when the privilege is waived that sometimes satisfies no one completely.

Policyholders seek to show that the attorney-client privilege or work product doctrine does not apply to the documents, information, and testimony in the claims file related to the handling of the subject claim. Analyses of the claims or related issues by the insurer's in-house counsel might be a treasure trove for the plaintiff. **Not every document drafted by counsel or even every communication by counsel is necessarily privileged** in the claims analysis context.

Counsel for insurers must be careful to avoid waiving the privilege by asserting an "advice of counsel" defense or **involving the attorney directly or indirectly as a claims adjuster** during the claim investigation.

Listen as our authoritative panel of both policyholder and insurer counsel analyzes the attorney-client privilege in the context of the tripartite relationship, the issue of implied waiver of the privilege in subsequent bad faith claims, and best practices for both plaintiff's counsel and defense counsel to either pierce or protect the privilege in bad faith litigation.

### Speakers:

- Meghan C. Moore, Shareholder, Flaster Greenberg PC
- Sean T. Carnathan, Partner & Founder, O'Connor Carnathan and Mack

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- Evelyn M. Merchant, Attorney, Berk Merchant & Sims

**Outline:**

1. Overview of the attorney-client privilege in the tripartite relationship
2. Implied waiver of the privilege in bad faith litigation
3. Piercing the privilege: plaintiff perspective
4. Defending or maintaining the privilege: defense perspective

**Benefits:**

The panel will review these and other key issues:

- Has there been a trend toward the erosion of the attorney-client privilege in bad faith litigation?
- What tests do courts use to determine whether there has been an implied waiver of the privilege?
- How have courts applied the joint defense exception to the attorney-client privilege in bad faith claims.

**ATTORNEYS MENTIONED**

Meghan Moore