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Best Practices in Administering Benefit Claims #7 – Understanding Attorney-Client Privilege in the Benefits Claims Process

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When a plan administrator is attending to a benefit claim and thinks it is time to call in an attorney, are those discussions privileged and protected from disclosure to claimants? In this week's blog, we take a look at some of those communications between attorneys and plan administrators and examine whether or not they are privileged. To the surprise of many, communications between a plan administrator and the plan's attorney may not be protected from disclosure by the attorney-client privilege.

Let's start with the basics: The attorney-client privilege generally protects communications (and the substance of those communications) between an attorney and a client that are made in confidence for the purpose of obtaining or providing legal assistance to the client. In the ordinary course, those communications are privileged and not discoverable by anyone in litigation (or in other proceedings). This privilege exists to ensure the free flow of information between the attorney and client.

When addressing a claim for plan benefits, however, communications between the plan administrator and the plan's attorney may not benefit from that privilege. As the courts have explained, a plan fiduciary must act solely in the interests of participants and beneficiaries. Therefore, when a plan fiduciary speaks with a lawyer about matters relating to plan administration, the "real client" vis-à-vis the plan attorney is the participant or beneficiary who is impacted by the issue and not the plan fiduciary. This is often referred to as the "fiduciary exception" to the attorney-client privilege.

In the benefit claim context, the so-called fiduciary exception may require the production of communications between a plan administrator and plan counsel concerning plan administration. For example, an email or memorandum from the plan's lawyer to the plan administrator addressing whether or not a participant is entitled to benefits under a plan may be discoverable by the participant as part of the administrative record. The fact that the email or memorandum was written by a lawyer may not necessarily shield it from production.

At the same time, the fiduciary exception is not without its limits. For instance, once the interests of the parties are clearly adverse (they diverge), a plan administrator may engage counsel and the attorney-client privilege should protect from disclosure communications about a participant's claim. As a practical matter, some courts have concluded that the interests sufficiently diverge once a participant's appeal (not claim) for benefits is finally denied. In addition, communications between a plan attorney and a plan fiduciary about a plan fiduciary's personal liability also are not discoverable by a participant or beneficiary.

There are many nuances to the fiduciary exception, and it is important to be mindful of its application during the administration of claims for benefits and appeals.

For further discussion of the attorney-client privilege and fiduciary exception, you can check out our Benefits Brief Podcast.

On the blog next week, we'll discuss managing litigation of a benefits claim.

You can find our previously published best practices here:

- #1 – Know (and Read) Your Plan Document
- #2 – Know (and Read) Your SPD
- #3 – Dealing with Benefit Assignments
- #4 – Know (and Understand) the Law: Full and Fair Review
- #5 – Establishing (and Following) a Good Claims Process
- #6 – Distinguishing an Inquiry from a Claim

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