

# California Insurance Law Coverage Newsletter for Attorneys

Bruce Cornblum - Insurance Coverage Scholar-Attorney-Litigator  
11665 Avena Place, Suite 202A, San Diego CA 92128  
858-485-8770 email [cornblum@pacbell.net](mailto:cornblum@pacbell.net)

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website: [brucecornblum.com](http://brucecornblum.com)

## ATTORNEY PRIVILEGE COMMUNICATIONS WITH “OTHERS”, NOT THE CLIENT

### In general:

Insurance coverage litigation by no means is limited to discussions of the meaning of policy terms. Insurance litigation includes such subjects as civil practice and procedure, rules of evidence, knowledge of discovery practice. It also includes a requirement of the knowledge of the attorney-client privilege. The three volume work titled CALIFORNIA INSURANCE LAW DICTIONARY AND DESK REFERENCE, has as one of its subjects a section entitled ATTORNEY-CLIENT PRIVILEGE which is extensive and thorough (covering 30 pages of text).

The attorney-client privilege is not limited to communication with the client. It also includes communications with “others”, not the client. This is the subject of a recent opinion entitled *Firemans Fund v. Superior Court* (2011) 196 Cal.App.4th 1263, 1273.

### Attorney communication

Confidential communication is broadly construed, and defined as either information transmitted between a client and his lawyer or advice given by the lawyer. [Evidence Code §§ 917, 952; *People v. Clark* (1990) 50 Cal. 3d 583, 618, 268 Cal. Rptr. 399, 789 P.2d 127; *Gordon v. Superior Court* (1997) 55 Cal. App. 4th 1546, 1557, 65 Cal. Rptr. 2d 53] The protected communication not only includes information given from a client to the attorney, but also the legal opinions and advice tendered by the attorney to the client in the course of their professional relationship. [Evidence Code § 952] Attorney communications with the client's employees or agents are protected. [*Upjohn Co. v. U.S.*

(1981) 449 U.S. 383, 101 S. Ct. 677, 683–684, 66 L. Ed. 2d 584]

Almost any act done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of the communication, and the only question will be whether, in the circumstances of the case, it was intended to be done as such. The client, supposedly, may make a specimen of his handwriting for the attorney's information, or may exhibit an identifying scar or show a secret token. If any of these acts are done as part of a communication to the attorney, and if the communication is intended to be confidential, the privilege comes into play. [*City & County of San Francisco v. Superior Court In and For City and County of San Francisco*, (1951) 37 Cal. 2d 227, 235, 231 P.2d 26] The privilege covers even the transmission of documents which are available to the public. In this regard, it is the actual fact of transmission which merits protection, since discovery of the transmission of specific public documents might very well reveal the transmitter's intended strategy. [*Solin v. O'Melveny & Myers, LLP*, (2001) 89 Cal. App. 4th 451, 461, 107 Cal. Rptr. 2d 456]

**Attorney communication with “others” (non client); attorney's “opinion” is privileged; *Fireman's Fund v. Superior Court* (2011) 196 Cal.App.4th 1263, 1273, 127 Cal.Rptr.3d 768**

While most instances in which an assertion of the attorney-client privilege involves

communication between an attorney and his or her client, the statutory language is not so narrow. [*Fireman's Fund v. Superior Court* (2011) 196 Cal.App.4th 1263, 1273, 127 Cal.Rptr.3d 768]

An attorney's *opinion*, not otherwise communicated to the client is privileged. [*Fireman's Fund v. Superior Court* (2011) 196 Cal.App.4th 1263, 1273, 127 Cal.Rptr.3d 768] See § **W23 WORK PRODUCT [§ W23:3]**.

An attorney's legal opinion communicated to others in the law firm is privileged under Evidence Code § 954. [*Fireman's Fund v. Superior Court* (2011) 196 Cal.App.4th 1263, 1274, 127 Cal.Rptr.3d 768]

An attorney's legal opinion shared with a non-attorney agent retained by the attorney to assist with representation remains confidential and privileged. [*Fireman's Fund v. Superior Court* (2011) 196 Cal.App.4th 1263, 1274, 127 Cal.Rptr.3d 768]

An attorney's evaluation of a witness along with an opinion regarding the witness's usefulness are confidential communications. [*Fireman's Fund v. Superior Court* (2011) 196 Cal.App.4th 1263, 1274, 127 Cal.Rptr.3d 768] See § **W23 WORK PRODUCT [§ W23:3]**.

#### *Attorney drafting a declaration*

Asking questions regarding what knowledge an attorney had when drafting a declaration for a witness is privileged in that it involves the attorney's legal opinions involved in drafting the declaration. [*Fireman's Fund v. Superior Court* (2011) 196 Cal.App.4th 1263, 1274, 127 Cal.Rptr.3d 768]

#### *Attorney drafting answers to interrogatories; Work product privilege*

In *Carehouse Convalescent Hosp. v. Superior Court* (2006) 143 Cal. App. 4th 1558, 50 Cal. Rptr. 3d 129 defense counsel compiled information listing the nursing hours per day per patient at her client's nursing home in response to interrogatories requesting this information. The trial court ordered the attorney be available for deposition to explain the methodology in arriving at the answers set forth in the responses to

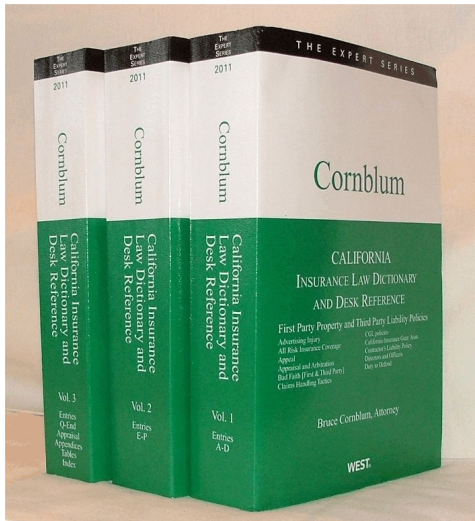
interrogatories. The attorney filed a petition for writ of mandate to oppose and set aside this order. The Court of Appeal granted the writ of mandate. The Court of Appeal observed [143 Cal.App.4th 1558, 1565]:

“As to the *second prong*, plaintiffs say they need [attorney's] deposition to confirm in their mind her calculations in the same manner as she calculated the ratios. [Attorney] could not be heard to complain because she created this situation on her own. By doing so, she represented to Respondent Court and to [plaintiffs] that she is an expert with superior knowledge of how nursing staff ratios should be calculated.”

“*The argument is a fallacy, and*, if taken to its logical conclusion, would permit the deposition of an attorney who used his or her impressions, conclusions, opinions or legal research or theories to assist the client's responses to request for admissions. [Attorney] is an advocate, not an expert witness. Since she (quite understandably) has not been designated as an expert to testify at trial, her deposition is irrelevant and her opinions are not evidence.” [*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 297, 4 Cal.Rptr.3d 883 (“The opinions of experts who have not been designated as trial witnesses are protected by the attorney-work product rule.”).] (emphasis added)

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**BOLDS references** are to sections in Volumes 1, 2 and 3 of **CALIFORNIA INSURANCE LAW DICTIONARY AND DESK REFERENCE**, 2011 Edition available through Thomson West Publishing at 1-800-344-5008.



The 2011 Three-Volume Edition of *CALIFORNIA INSURANCE LAW DICTIONARY AND DESK REFERENCE* (17<sup>th</sup> Edition, 4700 pages) – authored by Attorney Cornblum is now available through Thomson West.

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### **Author BRUCE CORNBUM, Attorney at Law**

Bruce Cornblum is an acknowledged insurance coverage trial and appellate attorney who specializes in California insurance law. For 46 years Mr. Cornblum has specialized in proving to California courts that insurance companies do not understand the meaning of their own policies.

He provides scholarly legal services to insureds (and/or their attorneys) with issues relating to duty to defend, denial of coverage, contractors insurance, subcontractors insurance, appraisal proceedings under first party policies, insurance coverage, personal injury, homeowners insurance, business litigation, insurance bad faith. To obtain coverage opinions, preparation of pleadings, supervision of discovery, pre-trial conference, preparation of motions in liminae, preparation of appellate briefs contact Bruce Cornblum at **858-485-8770** or E-mail: [cornblum@pacbell.net](mailto:cornblum@pacbell.net)

**WESTLAW RESEARCH** – Subscribers to WestLaw can research all volumes of *California Insurance Law Dictionary and Desk Reference* on WestLaw by referencing **CAINLAWDDR**.

Mr. Cornblum has been appellate counsel in the Courts of Appeal and Supreme Court in over 100 litigated matters. Our website contains additional information regarding Mr. Cornblum and his law practice.

**BRUCE CORNBUM**  
**11665 Avena Place, Suite 202A**  
**San Diego (Rancho Bernardo), California 92128**  
**858-485-8770**

Website: [www.brucecornblum.com](http://www.brucecornblum.com)  
Blog: [www.californiainsurancelawblog.wordpress.com](http://www.californiainsurancelawblog.wordpress.com)  
Email: [cornblum@pacbell.net](mailto:cornblum@pacbell.net)