2019 Annual Conference
March 13-15
Orlando, FL

Best Practices for Coordinating Workers Compensation and General Liability Defense Counsel in Catastrophic Construction Losses

Construction injuries often lead to two claims: one pending in workers' compensation court and a civil action based on negligence. The embattled construction general contractor and/or owner entities are therefore required to defend two claims at once filed by the same employee (or estate), as in *Morales v. Zenith Ins. Co.*, 152 So. 3d 557 (Fla. 2014) unless a Texas-style exclusivity can be invoked (*Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433 (Tex. 2009). This discussion focuses on a "best practices" approach when coordinating litigation in multiple jurisdictions in the construction context and where the workers' compensation bar does not provide an exclusive remedy to the injured worker.

PART I. THE GOALS OF MULTI-JURISDICTIONAL COORDINATION

Goal One: Reaching Global Settlements.

Our primary goal is full and final closure of all claims, in all jurisdictions, leveraging the litigation posture of both claims to get the best possible outcome for the client.

Goal Two: Avoiding Collateral Estoppel.

Findings reached by a Workers' Compensation Law Judge may have a binding effect in the general liability litigation where the issue decided in the workers' compensation proceeding is identical to that presented in the negligence action. This is called "collateral estoppel" and can be negative for the construction employer where findings of the workers' compensation court can remove or impair certain defenses.

Goal Three: Weaponizing Coordination – Tactics that Benefit the Employer.

Defending related claims in multiple jurisdictions creates special hazards for the defendant. This document explores those pitfalls. But defending dual claims in jurisdictions with wildly different litigation pacing, different disclosure tools, and (usually) two different counsel representing the claimant can create opportunities for the prepared employer. This protocol is intended to maximize the opportunity for the savvy employer to:

- Use the differences in litigation pacing to the advantage of the employer.
- Use differences in disclosure rules and timelines to the advantage of the employer.
- Leverage disparities in claimant/plaintiff's counsel motivations and domain competence.

- Create jeopardy for the claimant/plaintiff in regards to fraud.
- Get a "second bite at the apple" by repeating discovery tools in each jurisdiction.

Goal Four: Reduction of Litigation Costs – Reducing Duplicative Effort.

Where counsel defending the same employer/insured and particularly where there is one ultimate indemnitor, counsel representing those interests in differing jurisdictions should be communicating to reduce overall litigation expense, wasted effort, unnecessary duplication of effort, and implications of incomplete or improper disclosure in either jurisdiction.

The Limitations of this Protocol.

This protocol is "best practice" for proactively preparing the employer/project for a catastrophic workplace injury. This guide is written by attorneys with decades of experience defending workplace accidents. We have seen "what works" and what does not. This is meant as a plain English overview to acquaint the practitioner with the practice points and pitfalls of multi-jurisdictional litigation.

PART II. BEFORE THE LOSS: ASSEMBLING THE TEAM.

If you are waiting until a loss has occurred to retain counsel and prepare a plan of action, you are waiting too long! The best practice is to develop a "go to" team of professionals to engage immediately upon notice of a workplace loss. Consider whether the following should be part of the "initial alert" team:

- Broker.
- Employer's litigation manager.
- Project stakeholder with knowledge of the project or workplace.
- Carrier representative (if not self-insured)
- Safety personnel – on site.
- Carrier or TPA safety consultants / safety professionals
- On site nurse or health.
- Third Party Administrator(s) for Workers' Compensation and civil.
- General Liability Defense Counsel.
- Workers' Compensation Defense Counsel.
- Investigators (outside).
- Key vendors, including surveillance providers, nurse case management, MSA vendors, and any other vendors required by the project owner or carrier.

Get the team together formally or informally to discuss the program/project goals. The team should be familiarized with following:

- Physical aspects of the worksite.
- Names and types of contractors on site.
- Union affiliations of various labor groups involved,
- The phasing of the work (i.e., "We are in the concrete pouring phase and expect to move to framing in March…etc.").
- The project expected completion dates, when various labor groups "phase out" of project.
- Project contract numbers/contract references.
- The "lingo" of the project, any special terms or descriptions.
- Correct identities of various labor actors, i.e., "walking boss" etc.
- Media accounts of project or contractors (i.e., "Sandhogs" TV show, etc.).

- Specifics of the worksite, including unique hazards or construction obstacles.
- Location of first aid, on-site health, and closest urgent care locations.

PART III. PRIVILEGES, DISCLOSURES, AND COLLATERAL ESTOPPEL.

Counsel representing the employer in regard to the civil or worker's compensation proceeding must consider whether the transfer of information, documents, medical records, surveillance materials, etc., creates a disclosure or privilege issue in the other case. In order to do this, counsel must be cognizant of the relevant disclosure requirements in each jurisdiction. Further, counsel must be familiar with the relevant discovery tools available in each jurisdiction.

Consider the following questions:

- Which side of the house takes the lead on investigation?
- Which parts of the investigation are revealed to which counsel, and when?
- What are the applicable privileges, and how could they be abrogated?

Brief Overview of Applicable Privileges.

[1] The Attorney-Client Privilege

CPLR 4503(a)(1) codifies the attorney-client privilege. In general, the privilege applies only if

(1) the asserted holder of the privilege is or sought to become a client;
(2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
(3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
(4) the privilege has been (a) claimed and (b) not waived by the client.

There is no requirement that the communication be related to specific litigation. Thus, it is not necessary that litigation be pending, or even anticipated. The purpose of the privilege is to allow and promote full and open communication between a client and attorney on all matters in which legal advice is sought.

[2] Attorney Work Product.

An attorney's "work product" is privileged. CPLR 3101(c). And, like the attorney-client privilege, the attorney work product privilege is an absolute privilege. It is never discoverable. So, it does not matter whether the work product material is otherwise unavailable to the demanding party without undue hardship, or even entirely unavailable.

[3] What Qualifies as Work Product?

Work product applies only to material created by an attorney. Furthermore, it applies only to those things that are uniquely the product of a lawyer's learning and professional skills, such as materials that reflect the attorney's legal research, analysis, conclusions, legal theory or strategy. What is not work product:

- A list of “notice” witnesses, obtained through the attorney’s zeal as an investigator, is *not* work product — the investigation did not require the unique skills of a lawyer.[1]
- Indices of documents are *not* work product.[2]
- When a witness dictates a statement to an attorney, and the attorney acts as a scribe, the statement is *not* work product. However, the attorney’s notes about the witness, which would reflect analysis and strategy, *are* work product.

Documents prepared in the ordinary course of an insurance company’s investigation to determine whether to accept or reject coverage, and to evaluate a claim of loss, are not privileged, even when the investigation is conducted by an attorney. Work product only encompasses documents “prepared by counsel acting as such, and to materials uniquely the product of a lawyer’s learning and professional skills, such as those reflecting an attorney’s legal research, analysis, conclusions, legal theory or strategy.”[3]

[4] The Concept of “Common Interest” Privilege in New York.

The “common interest” privilege is actually a misnomer. It is the attorney-client privilege. The courts adopting the so-called “common-interest privilege” hold that the presence of parties with a “common interest,” and their lawyers does not waive an otherwise privileged communication. Thus, the attorney-client privilege applies to communications between clients and attorneys when there are two or more parties each with different attorneys, but with a common interest in an aspect of the lawsuit.

There is appellate case law to stand for the proposition that the “common interest privilege” applies to civil cases in New York. U.S. Bank National Association v. APP International Finance Co., 33 A.D.3d 430 (2d Dept 2006). This so-called “common interest” privilege, however, applies only to communications that would be subject to the attorney-client privilege. Thus, communications that were “exclusively of a commercial nature and did not concern the rendering of legal advice in pending or reasonably anticipated litigation” were not privileged, merely because those with a “common interest” were present.[4] Moreover, to be subject to the privilege, the communication made in the presence of those with a “common interest” must concern the “common interest” or “joint defense.” Even if the conversation concerns the rendition of legal advice, if the discussion concerns the claims the defendants have against each other, rather than their common interest *vis a vis* the plaintiff, the presence of the co-defendants will waive the attorney-client privilege.

[6] Consider a “Joint Defense Agreement.”

New York allows for multiple defendants to mutually agree to share confidential information where the identity of the defendant is not identical (which is not the subject of this guideline). Merely being a codefendant in a case does not create the shared privilege discussed above (“common interest privilege”) as co-defendants often have differing goals. True co-defendants (again, not just the same entity being sued in two different jurisdictions) can execute a joint defense agreement (which can be formal or informal) to memorialize the intention to share confidential information because the codefendants interests are aligned.

---

[1] Hoffman v. Ro-San Manor, 425 N.Y.S.2d 619 (1st Dept 1980).
[2] Bloss v. Ford Motor Co., 510 N.Y.S.2d 304 (3d Dept 1987).
[3] Brooklyn Union Gas Company v. American Home Assurance Co., 23 A.D.3d 190 (1st Dept 2005).
[4] Matter of Stenovich v. Wachtell, NYLJ, January 9, 2003, p 21, col 2 (Sup Ct NY Co).

[7] Accident Report Are Generally Not Subject to Privilege.

Written accident reports prepared in the regular course of business operations or practices are discoverable. CPLR 3101(g).

The difficulty in applying this rule is in determining whether an accident report is made in the regular course of business, or whether it is made solely for the purpose of expected litigation. A multi-purpose accident report is subject to disclosure. Westhampton Adult Home v. National Union Fire Ins. Co., 481 N.Y.S.2d 358 (1st Dept 1984). If the report is produced for a liability carrier or an attorney, and is not part of the "regular course of business," it is protected. James v. Metro North Commuter Railroad, 560 N.Y.S.2d 459 (1st Dept 1990).

Thus, insurance company investigative reports are generally protected as material created for litigation. Lamberson v. Village of Allegany, 551 N.Y.S.2d 104 (4th Dept 1990).

PART IV. LEGAL DEFENSE BEST PRACTICES – COORDINATING COUNSEL USING MILESTONES.

The following is a list of likely milestones to be reached in each jurisdiction. At each point, consideration should be made as to whether to convene a meeting of necessary stakeholders to decide on a unified course of action. Where a decision does not need to be made, these milestones serve as a marker for a meeting to be held between defense counsel to update as to the progress of each case.

Workers Compensation Defense Milestones.

A decision by the carrier to deny the compensability of an alleged injury or formal notice of a claim should trigger the beginning of a workers' compensation claim. In real life, it often does not work out this neatly – often employees finish their shifts, go home, and get medical treatment without alerting the supervisor to an injury or reporting an accident. More commonly, they do not "remember" they had a workplace accident until after they are terminated, after an adverse workplace decision takes place (like a layoff or reduction in force), or after the employer's internal surveillance tapes are routinely erased (for example, where internal surveillance is only kept for a specific number of days). In these cases, and even where there is no eyewitness to the loss other than the employee, the Workers' Compensation Board will routinely rule in favor of the claimant in regards to notice despite the obvious prejudice to the employer in defending such late-reported claims.

Both civil and workers' compensation defense counsel should be notified of:

- Surgery approval.
- Change in medical outcome (i.e., a finding of "maximum medical improvement")
- IME report received.
- Medical depositions.
- Claimant testimony in proceedings.

General Liability Defense Milestones.

When should the stakeholders convene to discuss the shared plan of action and exchange information regarding the joint defense? The following is a list of common milestones where defense counsel should be coordinated. Where appropriate for defense counsel to attend or be supplied with the hearing transcript a notation is made.

[1] Filing of Complaint or Notice of Claim; Time for Answer.

[2] Any jurisdictionally-specific hearing for Public Employers.

[3] Preliminary Conference or court listing.

[4] Disclosure milestones.

Workers' compensation defense counsel should be provided with relevant discovery obtained from the plaintiff in the general liability action, including:

- Depositions.
- Interrogatory responses.
- Any medical records obtained – to compare to the records obtained or provided on the workers' compensation side of the litigation.
- Any testimony obtained.
- Surveillance or covert intelligence information (remember, the presence of covert surveillance or social media information in the workers' compensation file does not have to be provided to the claimant until testimony is completed in that arena.)
- Any other meaningful discovery.

[5] Mediation.

A conference should be held at least one week prior to any scheduled mediation so that defense counsel can coordinate. As a general rule, workers' compensation counsel should be present at or available by phone for mediation proceedings whether to negotiate the global settlement, discuss the reimbursement posture of the employer/carrier in the workers' compensation action, or (often) to explain workers' compensation law to the mediator and opposing counsel. This last point is important as most times the attorney representing the plaintiff in the civil action will have an incomplete understanding of workers' compensation litigation and reimbursement.

PART V. GLOBAL SETTLEMENTS

The general liability and workers' compensation cases generally should be resolved at the same time. Further, defense counsel representing general litigation defendant and workers' compensation claim should be brought together at the time the arbitration, mediation, or other settlement opportunity arises.

[1] When the claimant recovers at law, the carrier/employer usually has the right to reimbursement, subject to certain limitations.

Under the most states Workers' Compensation Law, a worker injured by the negligence of another can collect workers' compensation benefits and then recover in a civil suit against the actual tortfeasor. Under those circumstances, the insurance carrier that paid benefits has a lien on the proceeds of the third-party settlement usually after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery.

[2] The Employer/Carrier has the right to recover compensation benefits issued against the actual tortfeasor.

The carrier paying workers' compensation benefits may have the right to sue the actual tortfeasor in court (subrogation). However, the employer/carrier cannot bring this action unless

Where claims are proceeding in multiple jurisdictions, there are three common outcomes:

- No coordination between the cases. Each actor tries to maximize their outcome. As will be shown below, this nearly always will result in additional exposure or lost opportunity for the employer/carrier.
- The cases settling together and workers' compensation action resolving via Section 32.
- Settlement where lien waiver is offered on the compensation claim.

Example of Settlement Where No Coordination.

Where WC and GL case settle at the same time, but no coordination between resolutions. The civil action is resolved for $1.5M. In the workers' compensation case, medical treatment and lost time compensation (temporary total or temporary partial disability) was issued totaling $50,000. A permanency award is entered, entitling the claimant to an additional $250,000 in benefits, payable over 300 weeks.

	Workers' Compensation	**Civil Action**
PAID	Medical $25,000 Indemnity $25,000 Permanency $250,000	$1,500,000
Attorney's fees and COL	$30,000 (paid by claimant from award)	$500,000 plus $0 in costs = 33.3% COL
Reimbursement/offset	$33,300 reimbursement, then weekly benefit reduction for 300 weeks	
Total Exposure to employer/carrier both jurisdictions.	$1,500,000 PLUS $83,333 paid at $277.78 per week for 300 weeks, Plus unreimbursed medical & temp costs $16,700 = $1,600,033 PLUS open medical moving forward (at COLA rate)	
Total cash received by claimant at global settlement	$983,300 PLUS $83,333 (the LWEC award of $277.78 per week for 300 weeks) = $1,066,633 PLUS open medical moving forward (at COLA rate)	

Example: Workers' Compensation Claim Resolved Via Lump Sum Dismissal (Waiver and release).

Where WC and GL case settle at the same time, and some coordination between resolutions. The civil action is resolved for $1.5M. In the workers' compensation case, medical treatment and lost time compensation (temporary total or temporary partial disability) was issued totaling $50,000. A permanency award is entered, entitling the claimant to an additional $250,000 in benefits, payable over 300 weeks. Parties then agree to Section 32 lump-sum dismissal of the permanency award. There is no Medicare eligibility or entitlement.

	Workers' Compensation	**Civil Action**
PAID	Medical $25,000 Indemnity $25,000	$1,500,000

	LUMP SUM DIMISSAL $250,000	
Attorneys fees / COLA	$30,000 (paid by claimant)	$500,000 plus $0 in costs, 33.3% COLA
Reimbursement/offset	$200,000 reimbursement	
Total Exposure to employer/carrier both jurisdictions.	$1,600,000, <u>no future medical exposure</u>.	
Total Received by Claimant at settlement	$1,100,000	

In this scenario, almost the exact same "cash" moves to the claimant at the time of settlement of both matters, BUT there is no future medical exposure to the employer/carrier AND the claimant gets the money all at once (versus scenario one, where a portion of the money pays out over a number of weeks). Note that both attorneys get paid a fee for their representation of the claimant/plaintiff.

Example Where Workers' Compensation Claim Is Extinguished by Lien Waiver.

Where WC and GL case settle at the same time, and some coordination between resolutions. The civil action is resolved for $1.5M. In the workers' compensation case, medical treatment and lost time compensation (temporary total or temporary partial disability) was issued totaling $50,000. A permanency award is entered, entitling the claimant to an additional $250,000 in benefits, payable over 300 weeks. Parties then agree to a lump-sum dismissal of permanency award, but instead of money moving, a lien waiver is negotiated (whole lien). There is no Medicare eligibility or entitlement.

	Workers' Compensation	**Civil Action**
PAID	Medical $25,000 Indemnity $25,000 Waiver of current reimbursement, which is the permanent disability value ($250,000 over 300 weeks) in exchange for "no pay" waiver and release.	$1,500,000
Attorneys fees / COLA	$0 (This can be a barrier)	$500,000 plus $0 in costs, 33.3% COLA
Reimbursement/offset	Waiver of $200,000 reimbursement	
Total Exposure to employer/carrier both jurisdictions.	$1,600,000, no future medical exposure.	
Total received by claimant at settlement.	$1,100,000	

Practical Advice for Global Settlements.

Practical advice:

- Consider whether a Medicare Set Aside Allocation is necessary (exceeds the scope of this document).
- Where a Set Aside Allocation is necessary, be mindful of attorneys fees calculated using Set Aside Allocation as a basis. Attorneys fees should not be calculated on set aside allocations in workers' compensation cases, which may make increased payments in that arena more palatable.