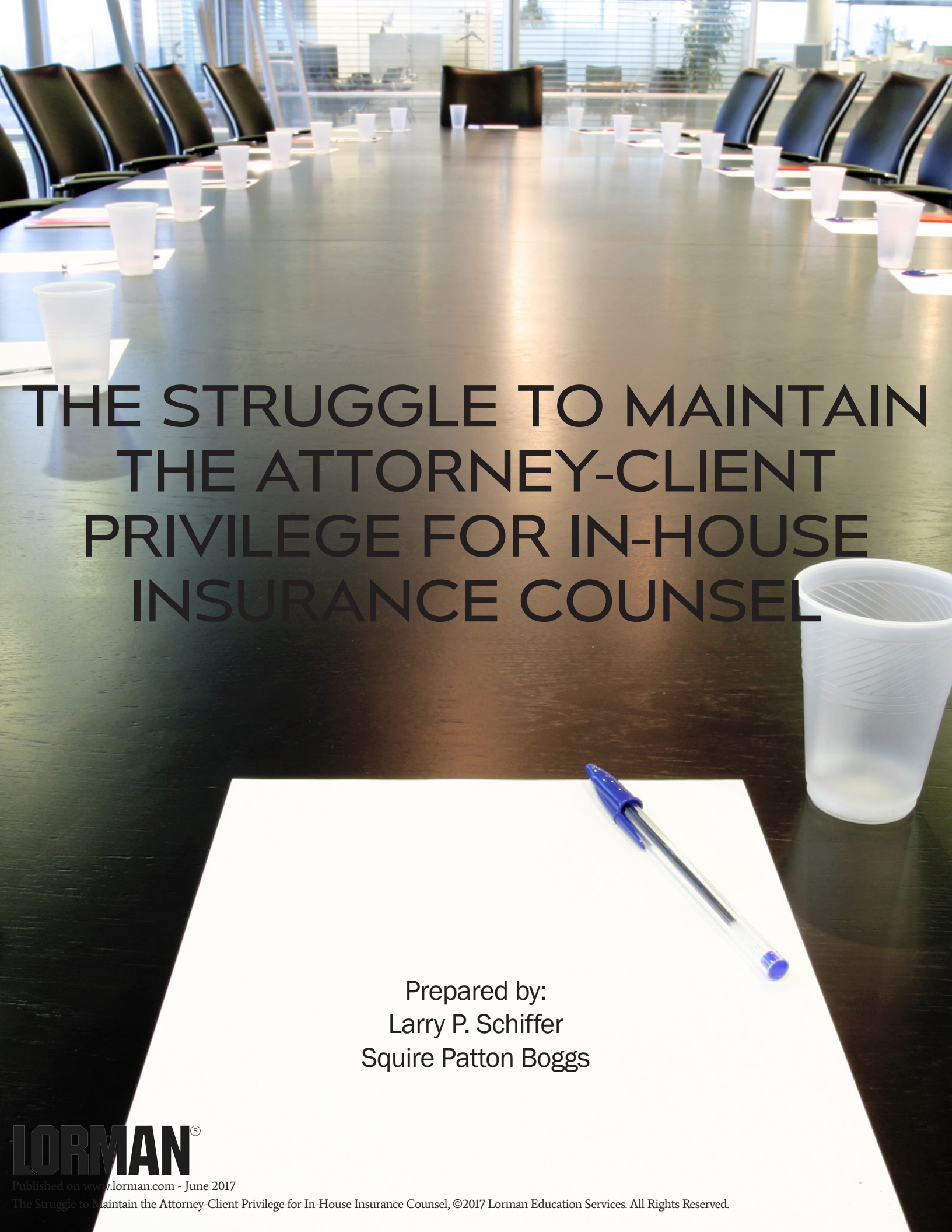

THE STRUGGLE TO MAINTAIN THE ATTORNEY-CLIENT PRIVILEGE FOR IN-HOUSE INSURANCE COUNSEL

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The Struggle to Maintain the Attorney-Client Privilege for In-House Insurance Counsel

By Larry P. Schiffer on March 7, 2017

When an in-house attorney at an insurance company is asked to analyze complex insurance coverage scenarios and their reinsurance implications by a senior business executive, is the written memorandum prepared by in-house counsel protected from disclosure by any applicable privilege or doctrine? That was the question before a federal magistrate judge in ruling on whether an insurer's withholding of the in-house counsel's memo from production was justified.

Where outside counsel is retained to provide legal advice on an insurance coverage issue, it is somewhat easier to assert the applicable privileges. When in-house counsel is asked to prepare an analysis on coverage scenarios that might apply to certain types of claims, the issue is closer because of the claims responsibilities of the insurance company. What makes it even more complicated is when the issue arises various times in various cases and courts refer to the analysis in court opinions. Has the privilege been waived or so diluted that a subsequent request for the document is no longer a risk of breaching the privilege?

In *ITT Corp. v. Travelers Cas. & Sur. Co.*, No. 3:12 CV 38 (JAM), 2017 U.S. Dist. LEXIS 26807 (D. CT. Feb. 27, 2017), a memo prepared by in-house counsel for the insurer on the reinsurance implications of different coverage scenarios for breast implant claims submitted under a certain policy form had been requested by a senior vice president of the insurer's specialty liability group. Given the numerous coverage disputes that have arisen over breast implant claims, this memo was a sought-after commodity by policyholders and claimants.

Although the insurance carrier has sought to protect the memo from disclosure under the attorney-client privilege and the work product doctrine in every case where this issue has arisen, some courts have directed the insurer to produce the memo. According to the court, the Third Circuit discussed the contents of the memo extensively in its opinion in *Travelers Cas. & Sur. Co. v. Ins. Co. of N.A.,* 609 F.3d 143 (3rd Cir. 2010). Additionally, the memo was summarized in witness testimony after having been admitted in evidence.

Given the forced (judicial) production of the memo and the publicly available quotes and summaries of the content of portions of the memo, was the insurer's efforts to keep the memo confidential successful? The answer is, in part, yes and no, but mostly no.

The court had already determined in an earlier decision that the insurance company had failed to establish the basis for a privilege claim. Nevertheless, the court agreed to an *in camera* review before ordering production. As a result of the review, the court agreed that under usual circumstances, the memo would be found to be privileged. The court recognized the general rule that a party does not waive the attorney-client privilege for documents which it is compelled to produce.

Here, however, the court found that because of the public disclosure of the memo's contents, it was impossible to consider the memo as privileged. The court held that under these "extremely unusual circumstances," the insurer must produce a copy of the sections of the memo addressed in the Third Circuit's opinion. But the court agreed that certain items could be redacted, including the name of its insured and the dollar figures and percentages in the memo. The court also ordered that the production was for attorney's eyes only unless otherwise ordered by the court.

This is not the only memo found in an insurance company's files that has become a sought-after piece of evidence in coverage disputes by policyholders and claimants. The lesson here is that insurance companies need to be vigilant to maintain confidentiality and privilege for documents they consider falling within the attorney-client privilege or attorney work product doctrine. While the courts, by compelling production, may weaken, if not eviscerate, the privilege, insurers should still insist on as limited a production as possible for attorney's eyes only.