The Attorney-Client Privilege In Insurance Coverage Disputes

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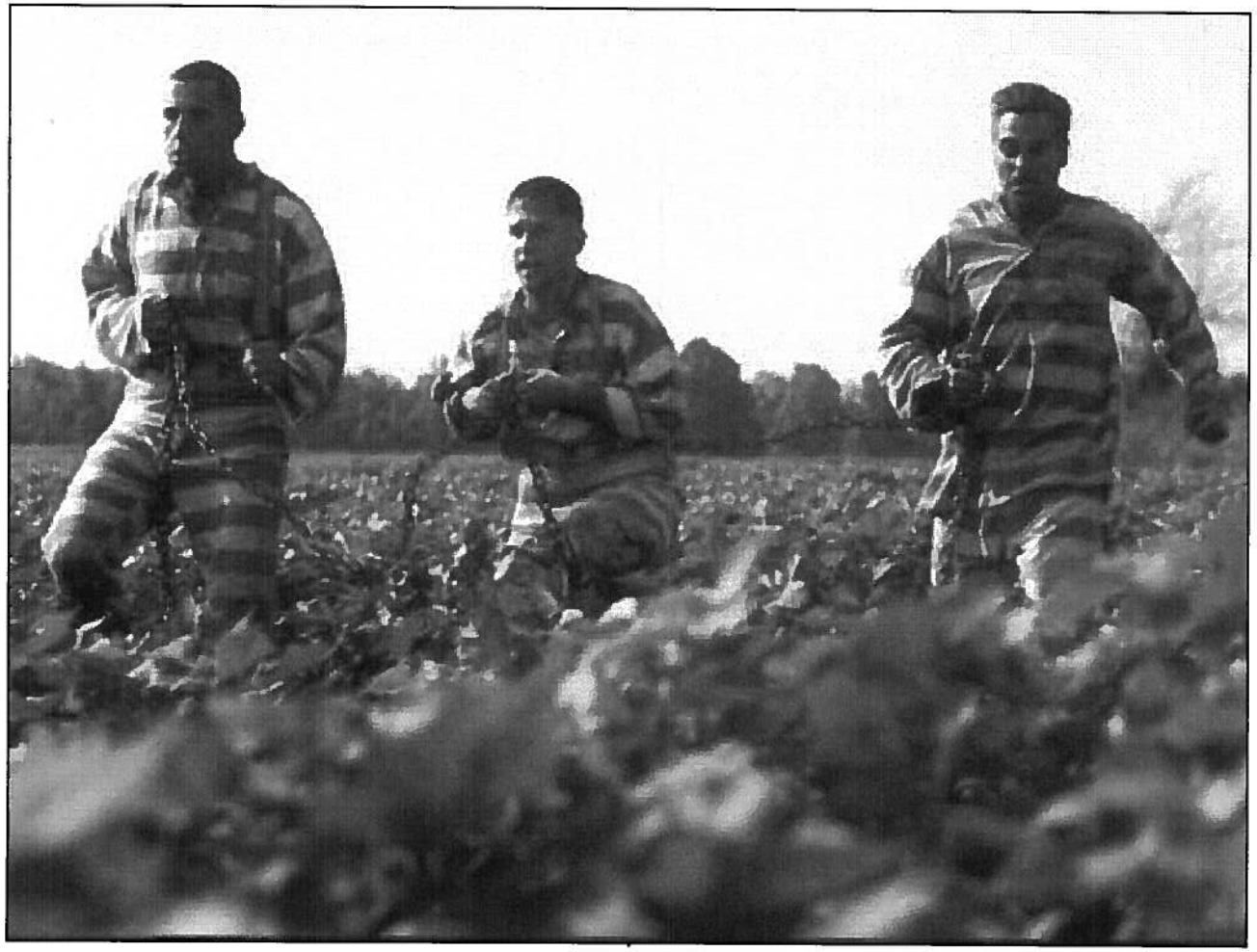
Rule 1.6: Confidentiality

Rules of Evidence v. Search for Truth

Risks of Disclosure



Attorney-Client Privilege

- Where it comes from
- What it takes for it to apply
- Exceptions and waivers

Privileges

- Multiple types – attorney-client; doctor-patient; priest-penitent; husband-wife

- Protected because society has determined that, even at the cost of losing reliable information, open communication in that setting warrants secrecy

Common Law Origins

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)

Currently

- Federal attorney-client privilege still is based on the common law (or judge made) law

- Most states have codified their attorney-client privilege rules in statutes or rules of evidence

General Rule in Ohio

The following persons shall not testify in certain respects:

(A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client.

Ohio Revised Code 2317.02

Unif. R. Evid. 502(b) (1974, 1986 rev., 1999)

"A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client … "

- Adopted, often with changes, in about 20 states

When it apples -

Basic Elements

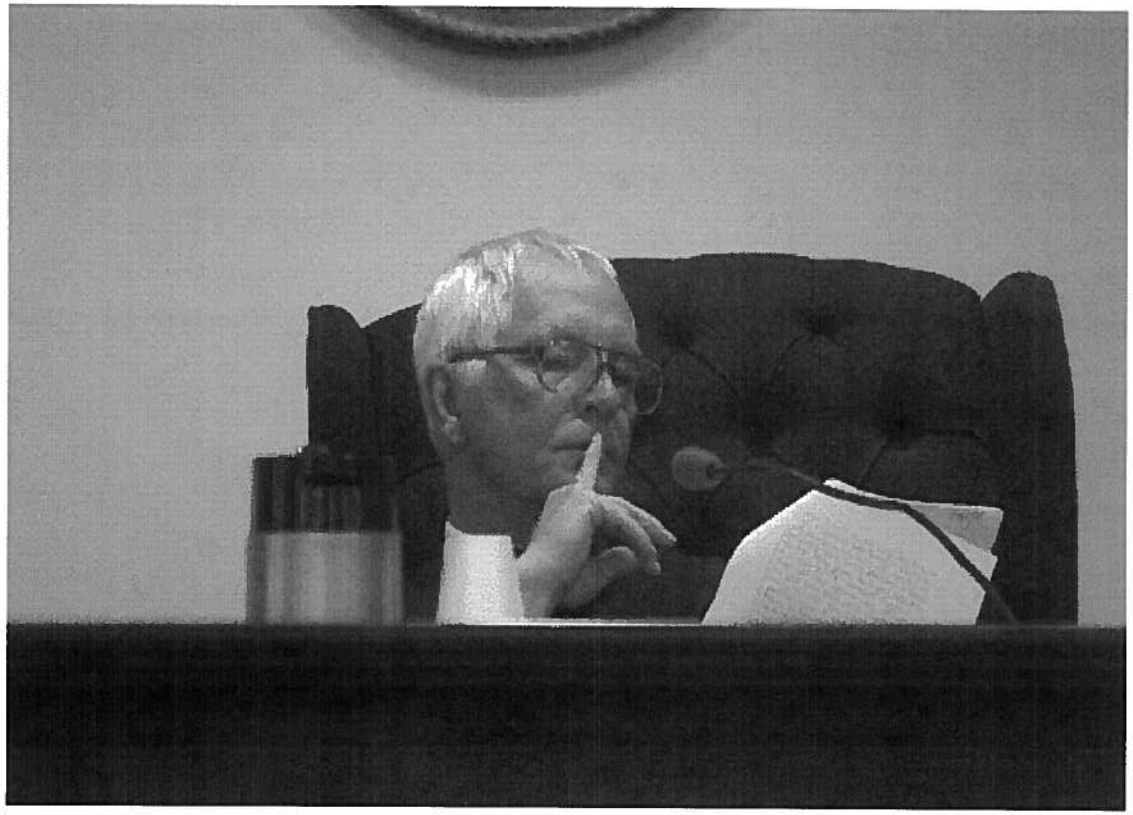
- Communications relating primarily to legal – not business – advice
- Attorney
- Client
- Confidentiality

Complications

- Corporate clients
  - Who in a corporation?
  - Corporation versus employee
  - Former employees
- In-house attorneys
- Copying attorneys
- "Necessary" third parties

Near Absolute Protection When Applies, But . . .

Judicial Review To Assess Privilege Claim



Crime-Fraud Exception

Justice Cardozo's Standard

A client who consults an attorney for advice that will serve him in commission of a fraud will have no help from the law…. "[I]t would be absurd to say that the privilege could be got rid of merely by making a charge of fraud." To drive the privilege away, there must be "something to give colour to the charge;" there must be "*prima facie* evidence that it has some foundation in fact."

Clark v. U.S., 289 U.S. 1, 15 (1933) (cites omitted)

Insurance Bad Faith

The following persons shall not testify in certain respects:

(A) (2) An attorney, concerning a communication made to the attorney by a client … except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications … related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima facie showing of bad faith, fraud, or criminal misconduct by the client.

Ohio Revised Code 2317.02

Waiver – Intentional Disclosure

Waiver Under Ohio's Statute

[I]f the client voluntarily testifies or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject…

Ohio Revised Code 2317.02(A)(1)

Scope of Waiver

- Not always limited to disclosed communications
- "Fairness" is governing rule
- Use in litigation to adversary's detriment

At Issue Waiver

- Privilege holder asserts claim that makes the advice relevant

- *E.g.*, raising "advice of counsel" as a defense

Waiver – Inadvertent Disclosure

When Disclosure Is Not A Waiver: "Sharing With Friends"

Joint Clients & Common Interest Arrangements

Joint Clients

- 2+ clients, same lawyer, same matter
- Exception when become adversaries

Common Interest Arrangements

- Separately-represented parties
- Common legal interests

The Tripartite Relationship

- The relationship created between the insured, the insurer and defense counsel when the defense counsel is hired by an insurer to defend a suit against the insured.

THE TRIPARTITE RELATIONSHIP

Can't they all just get along?

The Duty To Defend

- Insurer typically has the right to control the defense and to settle the case.
- Except in cases of a conflict, the insurer has the right to select defense counsel.
- The insurer will typically select a defense attorney with whom it has an established relationship.

Who Is Defense Counsel's Client In The Tripartite Relationship?

- Majority Rule: The insured and the insurer are considered to be dual clients of defense counsel.
- Minority Rule: The insured is defense counsel's only client.
- Middle Position: The insured is the "primary client" of defense counsel.

Older Ohio Cases Followed The Dual Client Approach

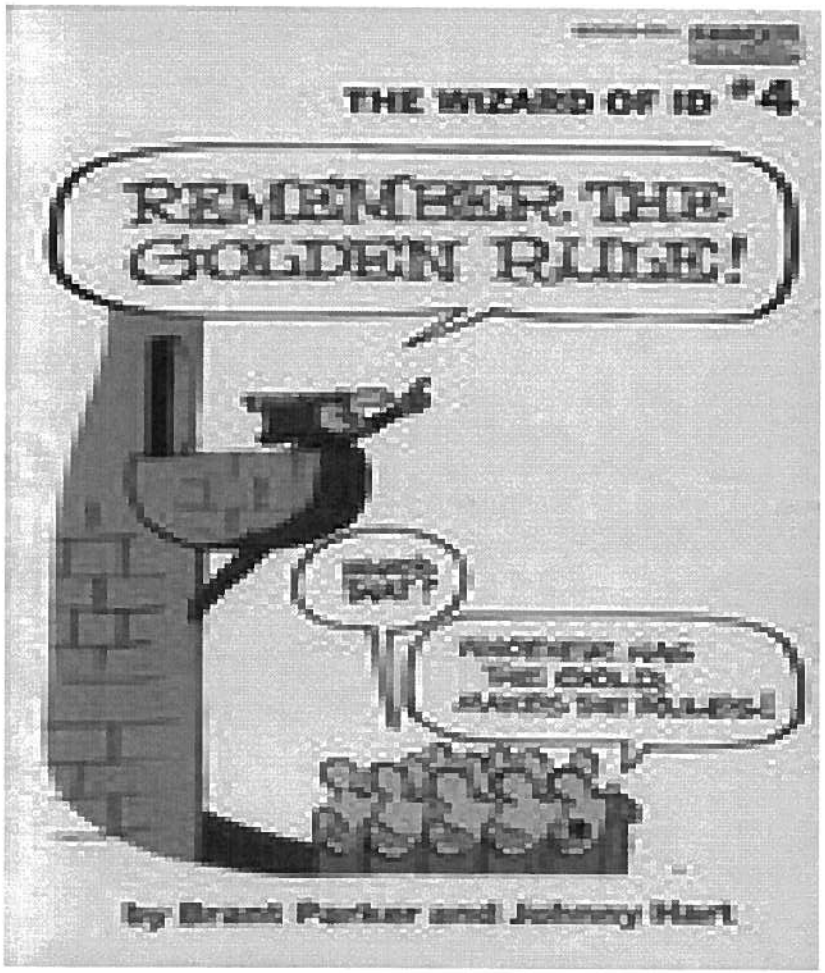
- *Netzley v. Nationwide Mut. Ins. Co.*, 34 Ohio App.2d 65 (Montgomery Cty. 1971) ("We hold that [the insurer] as well as [] its insured were clients of the legal counsel retained by [the insurer].")

- *USF&G v, Pietrykowski*, 2000 WL 204475 (Erie Cty. Feb. 11, 2000) ("Here [defense counsel] represented both the insurer and the insured.")

A Recent Ohio Case Suggests That, At Least In Some Cases, The Insured Is The Only Client

- In *Swiss Reins. Am. Corp. v. Roetzel & Andress*, 163 Ohio App.3d 336, 2005-Ohio-4799 (Summit Cty. 2005), the court held that an insurer did not have standing to pursue a malpractice claim against defense counsel because rules of agency negated any claim in that case that the insurer was also defense counsel's client.
- Defense counsel hired by the insurer may be tempted to put the interests of the "client" who pays the bills over the interests of its insured client, with whom it had no relationship.

The Golden Rule



Does Not Always Apply

Rule 5.4(c) of the Ohio Rules of Professional Responsibility

- A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Ohio Ethics Opinions

- **DR 5-107(B).** The Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinion 2000-03. "This Board supports the view expressed by the Cincinnati Bar Association that '[t]he insured, not the insurance company, is the client' of defense counsel."

- The Cincinnati Bar Association Ethics and Professional Responsibility Committee 2008, citing Rule of Professional Conduct 1.8(f)(4), which requires an attorney to submit to the insured a description of the insured's rights, the Committee stated "[w]ere the insurance company a client, none of these requirements would be necessary or appropriate."

"Common Interest" Protection: Sharing Information With The Insurer When There Is No Dual Representation

- Common Interest Rule: A party may share privileged information without waiving that privilege if the party claiming the privilege and the third party have "an identical legal interest with respect to the subject matter of the communication." *Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342, 347-48 (N.D. Ohio 1999) (citing *Duplan Corp. v. Deering Milliken*, 397 F. Supp. 1146, 1164 (D.S.C. 1974))

What If The Insurer Is Defending Under Reservation Of Rights?

- ROR Letter: Insurer agrees to defend the insured but reserves the right not to pay any settlement or judgment

- Does a ROR destroy the common interest?

Effect of Reservation Of Rights

- When a reservation of rights letter raises a true conflict of interest, such as when the outcome of the coverage issue can be controlled or influenced by the way the underlying case is defended, there is no common interest between the insured and the insurer.

Protecting The Insured's Privileged Information From Disclosure To The Tort Plaintiff

- Insurers often want/need access to privileged information even if there is dual representation.
- Before sharing privileged information with the insurer, consider entering into a:
  - "Joint Defense" Agreement (if no conflict); or
  - Agreement with plaintiffs that they will not seek privileged information of the insured disclosed to the insurer.

What Right Does The Insurer Have To Insured's Privileged Information From The Underlying Case In Coverage Litigation?

- The general rule is that privileged information generated while an attorney's two clients have a common interest cannot be withheld in subsequent litigation between them. *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850, 855 (7th Cir. 1974) (applying Ohio law).

If No Dual Representation, Courts Generally Hold That An Insurer Cannot Obtain Privileged Information Under A Common Interest Theory

Exception: In *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 579 N.E.2d 322 (1991), the court held under Illinois law that the insurer can have access to privileged information from the underlying case, even though the parties were adverse in coverage litigation.

No Dual Representation, No Common Interest?

- The majority of states have rejected insurers' attempts to obtain privileged information when there is no dual representation since there is no common interest.

  See, e.g., Rockwell Int'l Corp. v. Superior Court, 32 Cal. Rptr. 2d 153, 159 (Cal. Ct. App. 1994) (holding that *Waste Management* was inconsistent with California law).

Ohio – Common Interest Doctrine Should Not Apply If Parties Involved In Coverage Litigation

- *Owens-Corning Fiberglass Corp. v. Allstate Ins. Co.*, 74 Ohio Misc.2d 174, 181 (Ohio C.P. 1993) ("*Waste Management* is outweighed by authority which states that the common interest doctrine applies "where an attorney actually represents both the insured and the insurer – joint representation – and accordingly both clients are working together with a single attorney toward a common goal. . . . [Here] the parties could not be more at odds, rendering any reference to a "common interest" somewhat laughable.").

Insurers Often Seek Privileged Information In Coverage Litigation Based On The "At Issue" Exception

Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975).

Waiver of the privilege occurs when:

1. assertion of the privilege was a result of some affirmative act, such as filing suit;
2. through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and
3. application of the privilege would have denied the opposing party access to information vital to his defense.

Jackson v. Greger, 110 Ohio St. 3d 488, 2006-Ohio-4968

- Held that Ohio's statute on privileged communication between an attorney and client "provides the exclusive means by which privileged communications directly between an attorney and a client can be waived."

- The "at issue" exception does not exist because it is not found in Ohio's privilege statute, R.C. § 2317.02(A).

Lower Ohio Courts have refused to apply the *Jackson* majority opinion in the pretrial context.

- *E.g., Grace v. Mastruserio*, 182 Ohio App.3d 243 (Ohio App. 1 Dist 2007) ("[O]ur reading *of Jackson* convinces us that the Ohio Supreme Court did not abrogate the common law, and that it sufficiently limited its holding to the facts of that case so that appellate districts may decide for themselves, on a case-by-case basis, whether the common-law doctrine of implied waiver as announced in *Hearn* is applicable.").

Three's Company, Four's a . . .

Disclosing Privileged Communications To The Broker

Communications with the Broker

- Insurers and insureds regularly communicate with brokers about coverage disputes. Are these communications privileged or confidential?

- The answer depends on the facts.

General Rule Regarding Communications to Agents

- Attorney-client information may be communicated to agents (in the generic sense) without waiver of the privilege provided that there is a need to share that information with them for litigation purposes.
- That rule also applies to independent third-parties, but courts will closely scrutinize such disclosures.

Insurers Can Typically Protect Information Exchanged With Outside Claims Adjustors

- *See, e.g., Safeguard Lighting Sys. v. North Am. Specialty Ins.*, 2004 WL 3037974, at *1-2 (E.D. Pa. Dec. 30, 2004) (where insurer had hired outside adjustor to take care of the complex adjustment of the loss and made the adjuster its agent authorized to act on its behalf with respect to the adjustment, the adjustor's communications with the insurer's outside counsel remained privileged).

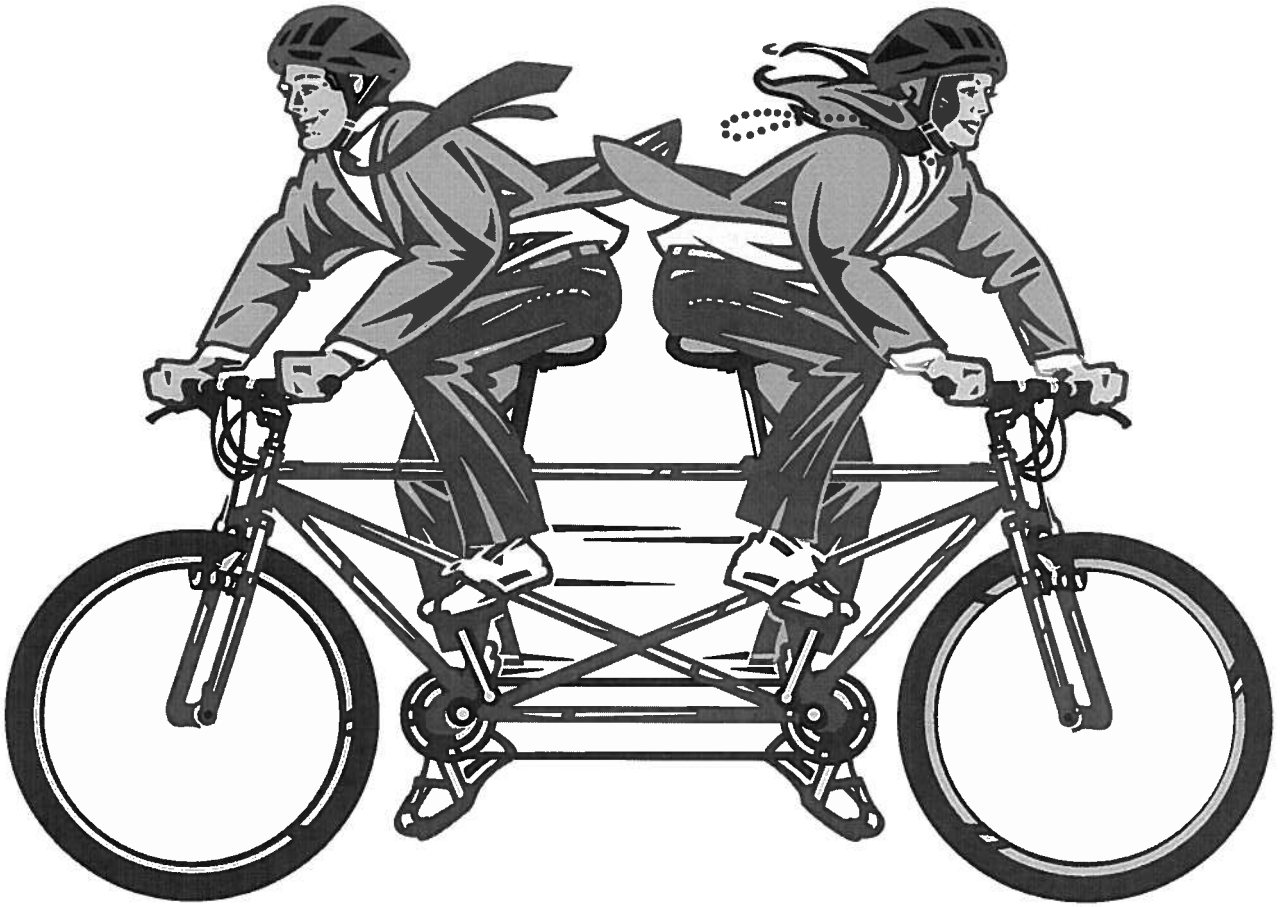
The Broker Must Be Assisting Counsel Or The Insured In The Litigation

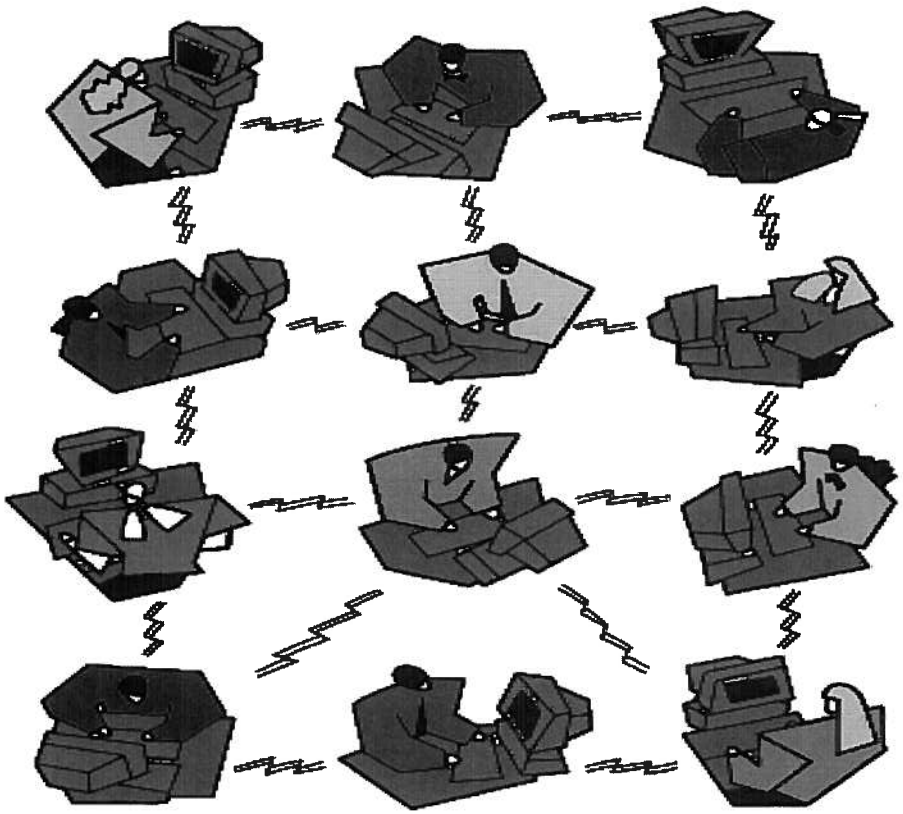
- *See Cigna Ins. Co. v. Cooper Tire & Rubber*, Inc., 2001 WL 640703 (N.D. Ohio May 24, 2001)

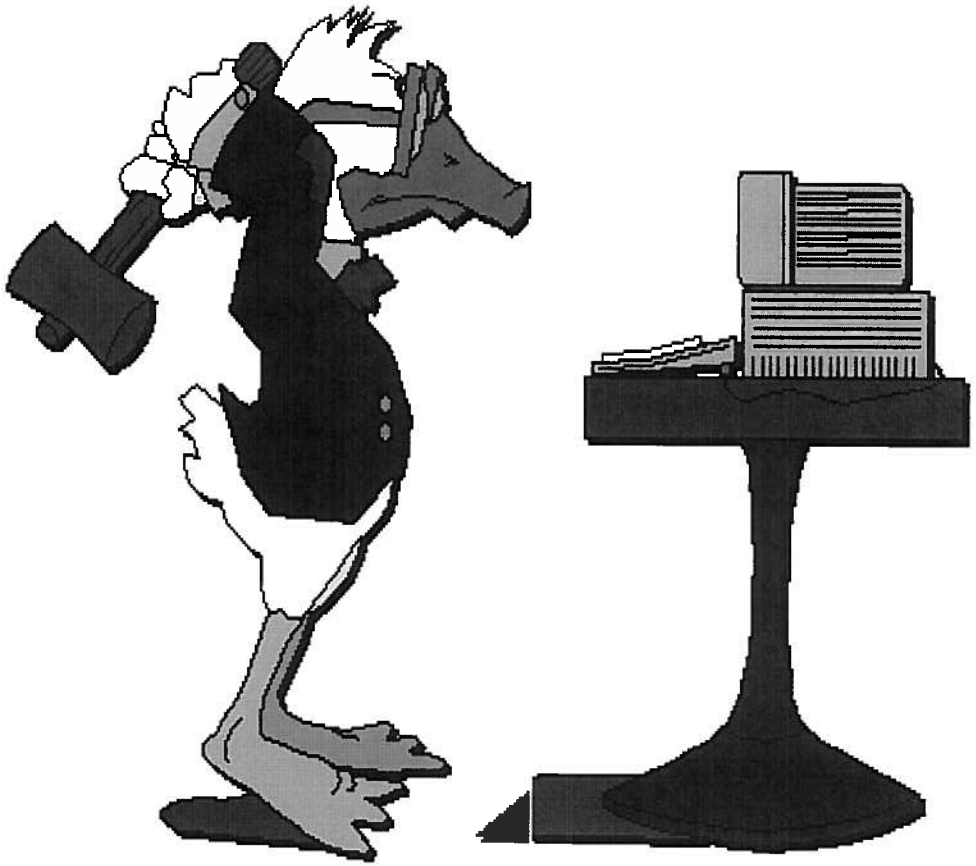
  Insured waived privilege associated with an investigative report prepared for the insured's outside counsel when it gave the report to the insured's broker. The court held the "common interest" extension of the attorney-client privilege did not apply where the broker played no role in the insured's development or presentation of the insured's defense in the underlying matter.

When Disclosure To A Broker Does Not Waive Privilege

- *E.g., Atmel Corp. v. St. Paul Fire & Marine Ins. Co.*, 409 F. Supp. 2d 1180, 1182 (N.D. Cal. 2005) (refusing to compel production of attorney-client privileged and work product material insured had sent to its broker; the privilege was not waived because the broker was assisting the insured and furthering its interests and acted as a "necessary advisor" to the insured).







Q. & A.