

# Privilege and its Perils: Insights and Strategies for Addressing Privilege Issues in Arbitration

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# Attorney–Client Privilege vs. Work Product Doctrine

- ▶ Attorney–client privilege protects confidential communications between a client and its counsel
  - protection is absolute unless it is waived
- ▶ Work product doctrine protects materials that are prepared in anticipation of litigation
  - Work product is potentially discoverable

# The Attorney-Client Privilege



# *“Let’s Play Privilege”* – Round 1:

Pick the **best answer** to complete the following sentence:

- ▶ The purpose of the attorney client privilege is to:
  - (a) Protect damaging information from being disclosed to your adversary during litigation
  - (b) Encourage clients to seek legal advice
  - (c) Encourage the participation of lawyers in business discussions
  - (d) Protect lawyers from malpractice suits

# Correct Answer:

(b) The purpose of the privilege is to encourage clients to seek legal advice



*“Let’s Play Privilege” – Round 2:  
One of these things is not like the  
other. Pick the answer that  
doesn’t fit:*

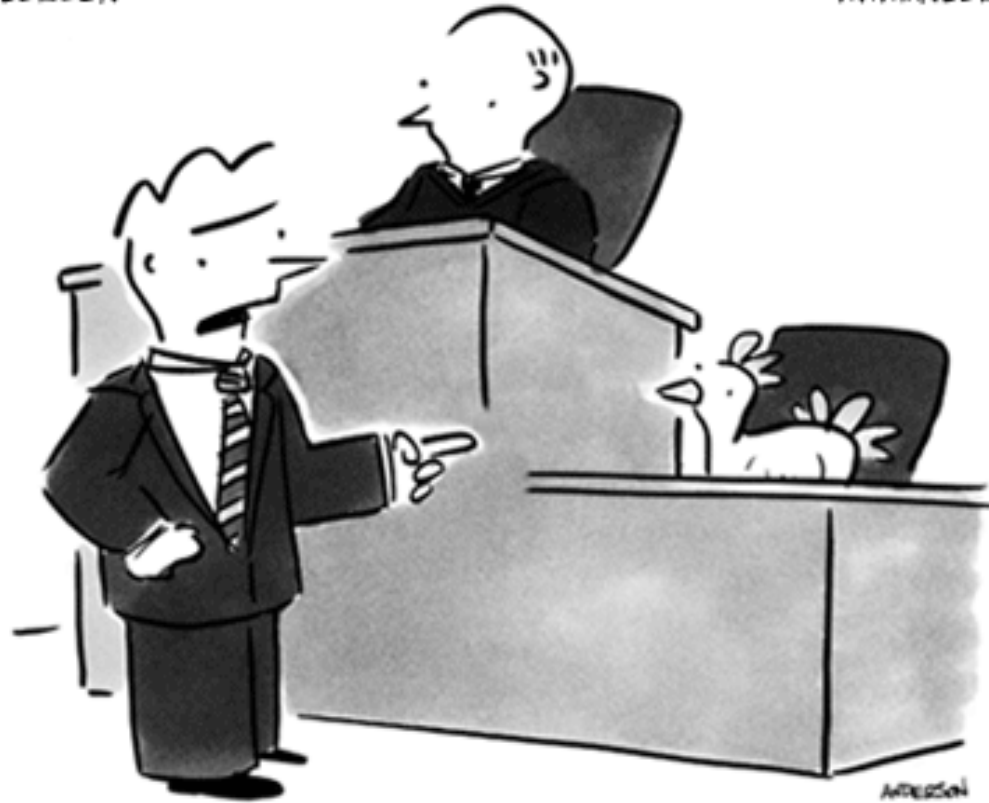
- ▶ The attorney client privilege protects:
  - (a) Requests for legal advice from counsel;
  - (b) Facts;
  - (c) The disclosure of facts to counsel;
  - (d) Requests by counsel to business people for information needed to give legal advice



# Correct Answer: (b) Facts

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"I'll ask you once more, and I remind you that you are *under oath!* Why did you *cross the road?!'*"

# Privilege Basics

- ▶ Protects:
  - confidential communications
  - between lawyer and client
  - that relate to the client's seeking of legal advice or services
- ▶ Privilege must be claimed and not waived to apply
- ▶ Communications to/from in-house counsel protected if elements are otherwise met



# Not Privileged:

- ▶ Facts
- ▶ Mere delivery of documents to an attorney
- ▶ Communications relating to non-legal business matters

## *“Let’s Play Privilege” – Round 3:* *Pick the **correct** answer :*

- ▶ The attorney client privilege belongs to:
  - (a) The client alone;
  - (b) The client and the attorney jointly;
  - (c) The client and third parties that share a common interest with the client;
  - (d) The court

Correct Answer:

(a) The client  
alone



# Waiver

# Waiver through Disclosure to Third Parties



# The Common Interest Doctrine – An Exception to Waiver Through Disclosure





# “At Issue” Waiver



# “At Issue” Waiver – Limitations

- ▶ Fact that privileged communication may contain relevant information  $\neq$  waiver
- ▶ Mere assertion that party was not negligent, or did not engage in willful misconduct, or that party acted in good faith  $\neq$  waiver
- ▶ A cedent does not waive the privilege by seeking indemnification from its reinsurers

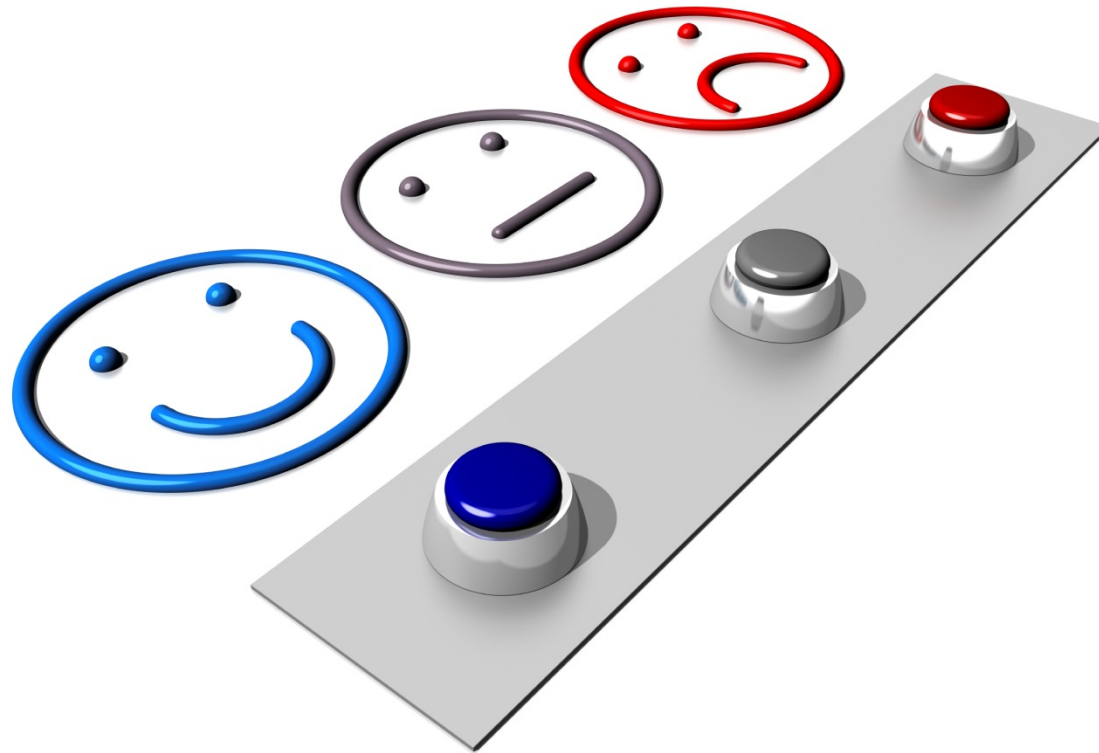
# Standard Reinsurance Clauses: Privilege Implications

- ▶ “Access to Records” clause
- ▶ “Cooperation” clause

# Discussion Points



# Feedback





# Work Product Doctrine



# The Work–Product Doctrine: Limits

- ▶ Protection for work product can be overcome if:
  - The materials are otherwise discoverable and
  - The party seeking discovery shows both
    - A “substantial need” for the discovery and
    - That it cannot obtain their equivalent without “undue hardship”
  
- ▶ BUT . . .

## The Work–Product Doctrine: Limits

- ▶ Even if showing is made, must still “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation” FRCP 26(b)(3)(B)

