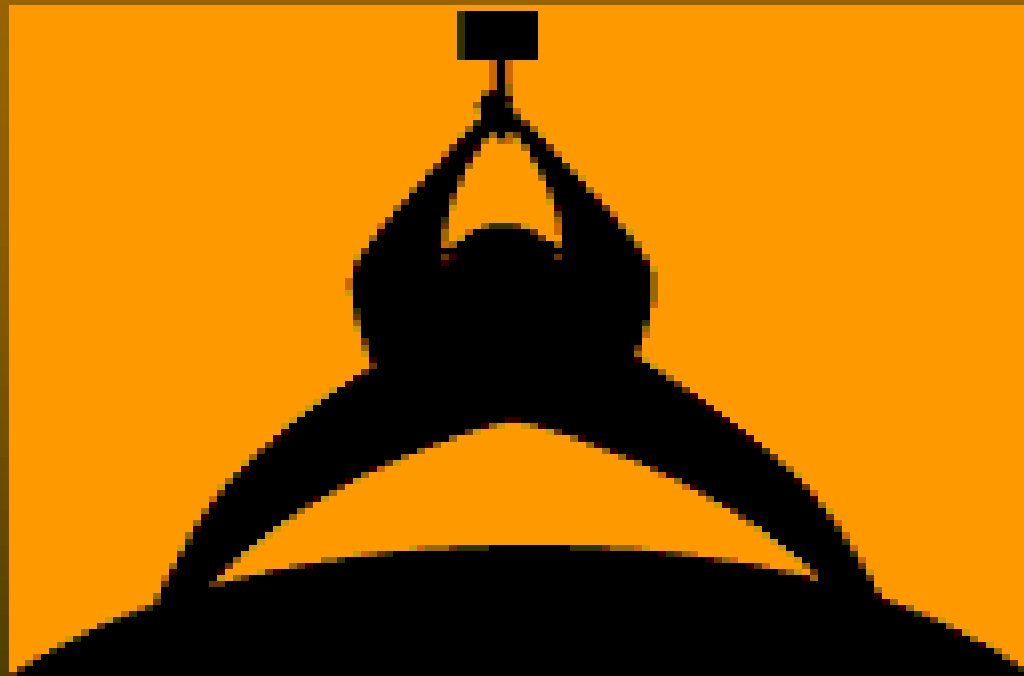


DIGGING FOR GOLD IN THE ACCIDENT BENEFITS FILE



Charles E. Gluckstein

GLUCKSTEIN & ASSOCIATES

BAD FAITH:

Pilot v. Whiten

- ◆ Claims procedures which indicate high-handed malicious conduct will be punished with a severe monetary penalty.
- ◆ Insurer files are now subject to intense scrutiny.

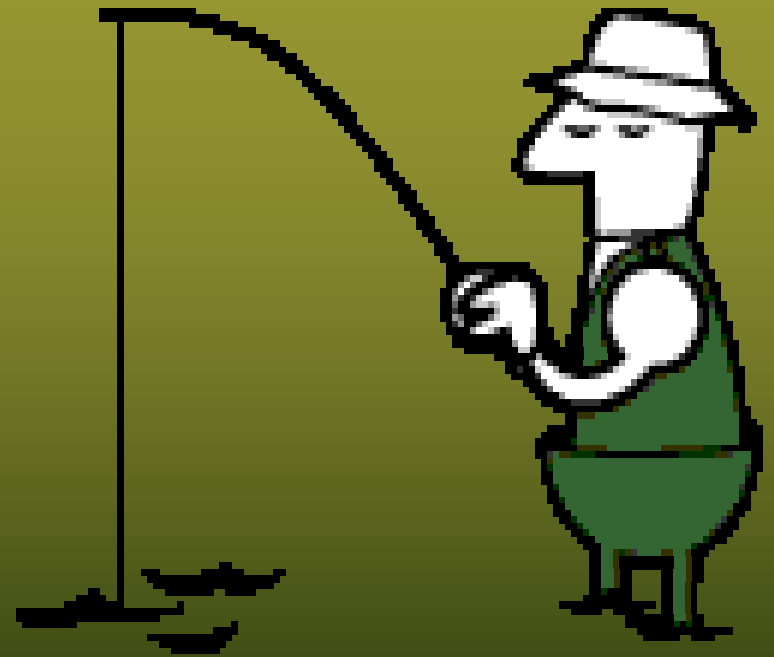


Fishing Expeditions

Santos v Santec

Investments Inc:

- ◆ Claiming punitive damages in a boiler plate fashion will not allow for invasive discovery in every case.



How to Crack Open the Safe



Staving off Claims of Privilege



There are two main kinds of privilege:

- litigation privilege
- solicitor-client privilege

LITIGATION PRIVILEGE

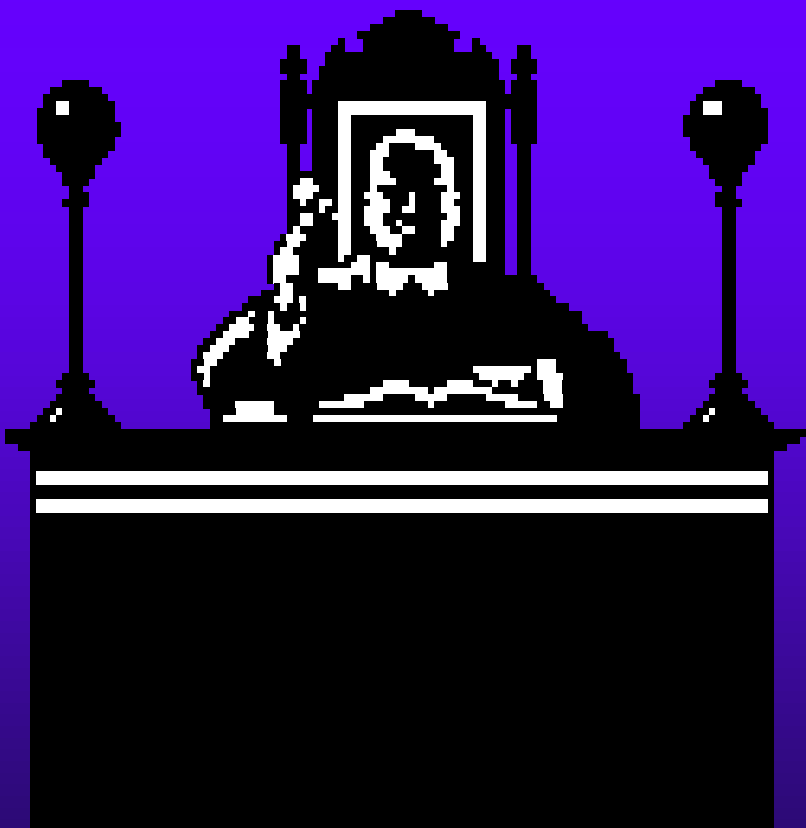
- ◆ Can only arise in the context of pending litigation.
- ◆ The dominant purpose for the creation of the document must have been litigation, actual or contemplated.



DOMINANT PURPOSE TEST

General Accident Insurance Company v. Chrusz:

- ◆ 1st party insurers cannot routinely claim litigation privilege when action is not contemplated.
- ◆ “. . . until something arises to give reality to litigation, the company should be seen as conducting itself in good faith in the service of the insured.”



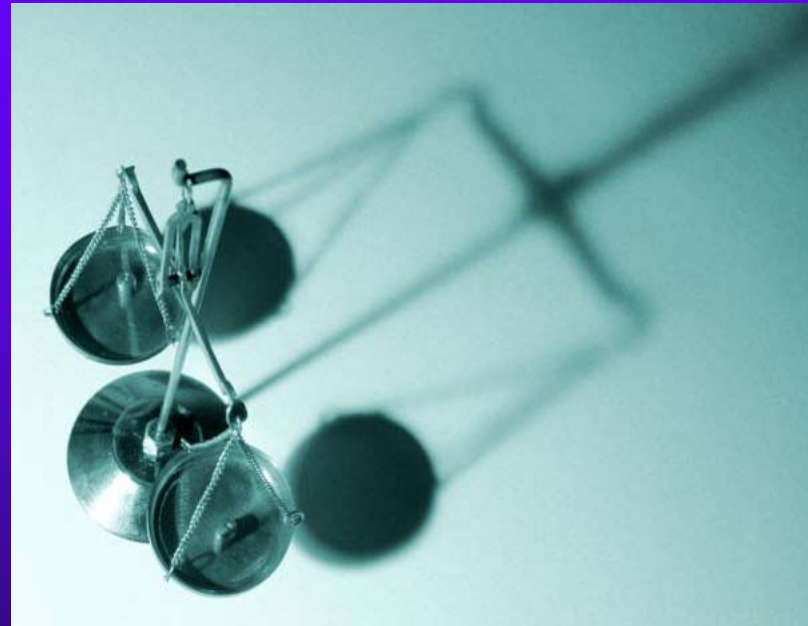
SOLICITOR – CLIENT PRIVILEGE

- ◆ Solicitor-client privilege can arise absent of litigation, so long as there has been an established solicitor-client relationship.

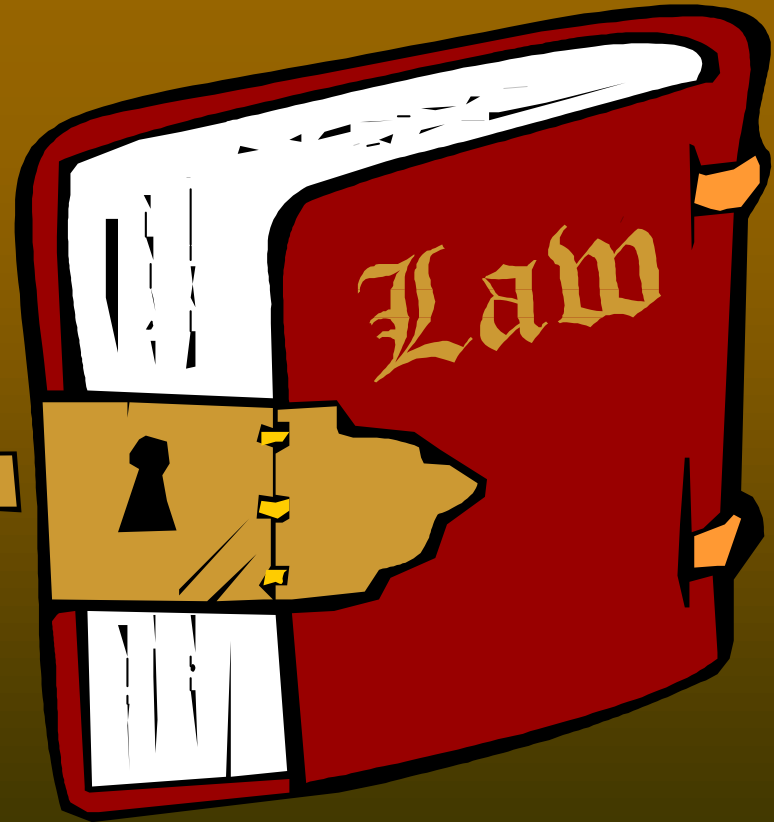
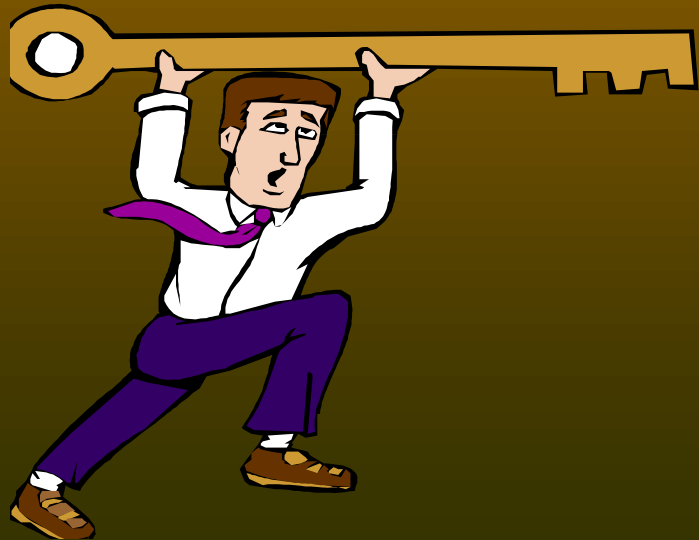


Descfeaux v. Mierzwinski

- ◆ Legal advice of any kind from a lawyer made in confidence to a client is protected from disclosure by the client and lawyer except if waived.
- ◆ Extended to third parties if direct relationship to client.



GETTING INTO THE FILE





Complete Claims File

- ◆ The file will likely contain adjusters' log notes, either handwritten or electronic, medical records, draft medical reports and DAC reports, amongst other material.
- ◆ In *Bergeson*: "The claims file is a unique, contemporaneously prepared history of the company's conduct."



Adjuster Log Notes and Correspondence



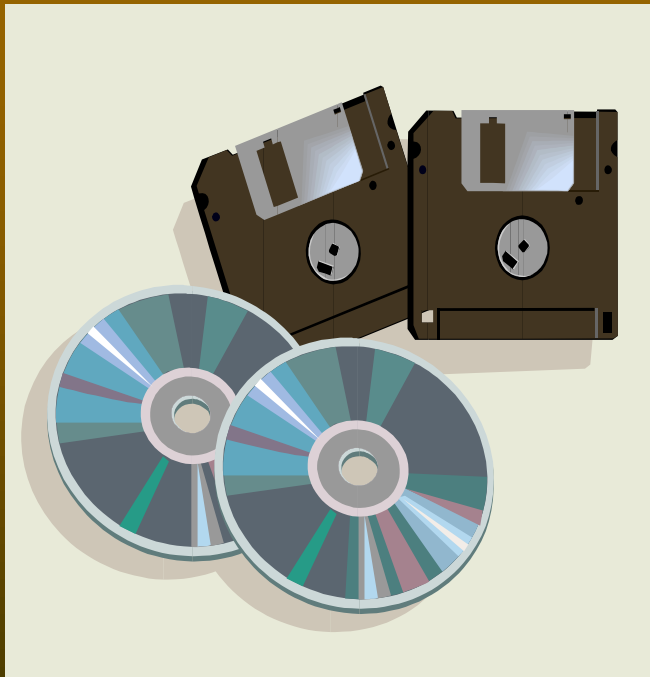
- ◆ Relevance: They deal with the manner in which the claimants and their claims are to be treated.
- ◆ Must produce its notes, memoranda or other documents concerning any decision to deny a specific benefit.



McCullough v. AXA Insurance Company

- ◆ Assertion by the defendant's insurer for privilege on the basis that the dominant purpose of the notes was to obtain information for their solicitors in anticipation of litigation.
- ◆ Justice Stinson: "If material comes into being for a dual purpose, one to find out the cause of the accident, the other to furnish information to the solicitor, it should be disclosed, because it is not then wholly or mainly for litigation."

COMPUTER NOTES



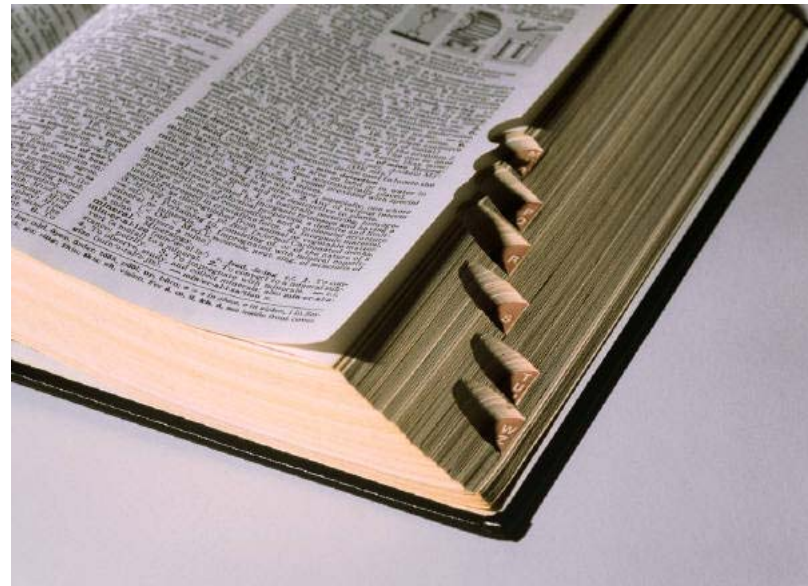
- ◆ Computer version of adjuster notes (argument of relevance is the same).

Perigny v. Royal Insurance:

- Such file documentation was not produced for the sole or dominant purpose of litigation until the Statement of Claim herein was delivered, and therefore privilege does not attach to shield it.

Claims Adjusting Manuals, Policy Directives or Training Materials

- ◆ Relevance: to show how the company instructs its adjusters and to compare it to the actual handling of your client's claim.
- ◆ Compare the manner in which the company manual required the claim to be adjusted and the way the adjuster actually adjusted your client's claim.





Production of Claims Manual:

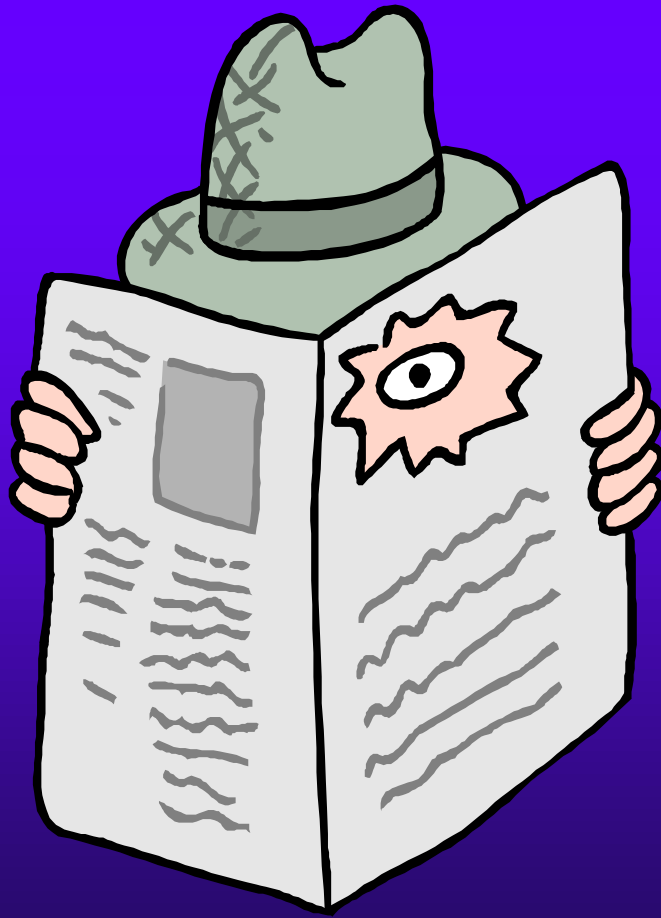
- ◆ *Samolia v. Prudential of America General Insurance Company (Canada) and Truman Leacher*;
- ◆ *Sharpe v. Co-operators (May 18, 1998), Court File 841-95, (Gen. Div)*;
- ◆ *McCullough v. AXA Insurance Company (July 21, 2000), Toronto File #99-CV 16703 (Gen. Div.)*;
- ◆ *Sandhu v. Allstate, Toronto Court File #98-CU-161320*

SURVEILLANCE

- searches and other background checks
- copies of videotapes, still photographs, negatives, notes of investigators, letters to investigators
- production of surveillance tapes



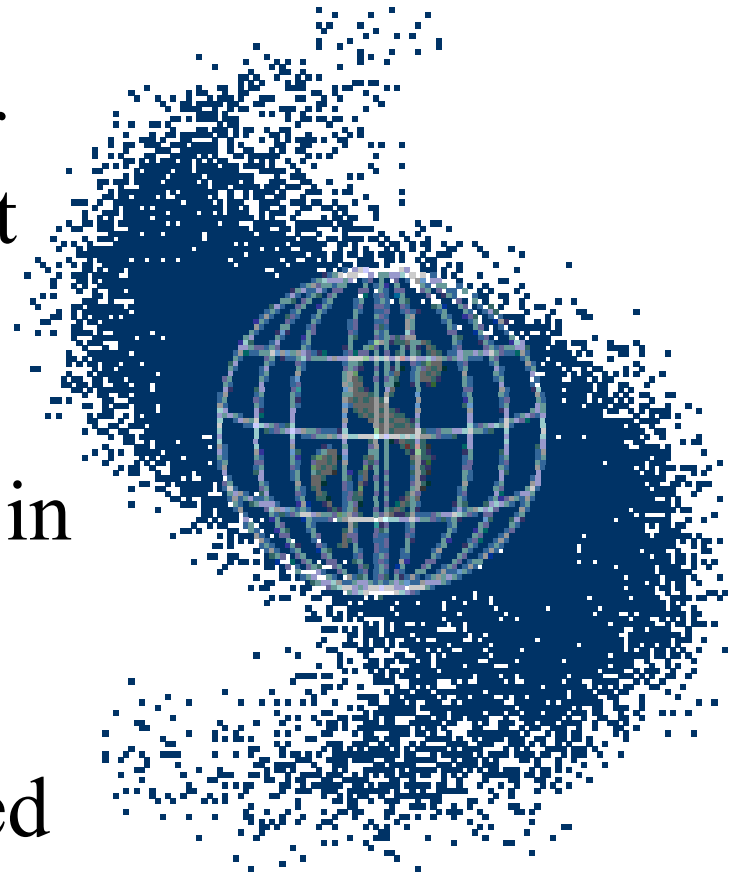
Production of Surveillance (unedited), notes and photos (and negatives)



- ◆ *Cappadocia v. Canadian General Insurance;*
- ◆ *Perigny v. Royal Insurance;*
- ◆ *Campeau v. Liberty Mutual;*
- ◆ *Puljic v. Zurich Insurance Company*

RESERVES

- ◆ FSCO requirements: insurers can lose their license if there are not enough reserves to cover claims.
- ◆ Disclosure will assist in settlement.
- ◆ Evidence of how the insurer has disregarded its policies to treat the insurer fairly.





Cases forcing disclosure of reserves

Sheikh v. The Personal :

- "In view of the plaintiff's claim that the defendant stopped paying the benefits out of bad faith, I am persuaded that the reserve numbers should not have been blacked out in the adjuster's notes. The numbers could not be said to have been generated in contemplation of litigation."

Campeau v. Liberty Mutual



Disclosure of Legal Opinions



- Failed to obtain a legal opinion.
- Denial of coverage cases:
 - ◆ *Samolia v. Prudential of America General Insurance Company and Truman Leacher*
 - ◆ *Hartford Accident and Indemnity Co. v. Maritime Life Assurance Co*

CONCLUSION

