

From The Bench

legal news of interest

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BRINEY & FORET
Attorneys at Law

413 Travis Street
Post Office Drawer 51367
Lafayette, Louisiana 70505
337-237-4070
FAX 337-233-8719
Website: www.brineyforet.com

Q Are investigative materials obtained in the course of investigating a claim, or in the prosecution or defense of a lawsuit, discoverable by an opposing party?

a. Yes, if they are tangible items or were not obtained or prepared by the adverse party, his attorney, surety, indemnitor, expert or agent in anticipation of litigation or in preparation for trial.

Q Is an insurer covered within the express language of Louisiana's work-product privilege, as an adverse party, surety, indemnitor or agent?

a. No, unless the insurer has been named as a party to the lawsuit. The question remains whether a non-party insurer's work-product, prepared before it becomes a party to a suit, is protected by the work-product rule.



Louisiana's Work-Product Privilege

by Richard R. Montgomery

In Louisiana, any relevant matter, not privileged, is discoverable. One of the exceptions to this general rule is found in *LSA-C.C.P. Art. 1424* which sets forth the work-product rule, as follows:

The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, expert, or agent in anticipation of litigation or in preparation for trial. . . . The court shall not order the production or inspection of any part of the writing that reflects the mental impressions, conclusions, opinions, or theories of any attorney or an expert.

It is well-settled that the work-product privilege applies to writings, only, and does not protect tangible items such as videotapes, films or photographs.¹ The "mental impression" portion of the statute does not encompass written opinions of those who are neither an attorney nor an expert.²

In *Landis v. Moreau*,³ the Louisiana Supreme Court held audiotapes of witness interviews obtained by an investigator were discoverable. First, the court observed audiotapes are tangible items, and therefore, they are discoverable. Second, the court found because the investigator was not an attorney or expert, his mental impressions, conclusions, opinions, or theories recorded on the audiotapes would also not be protected from disclosure under the work-product rule.

Subsequently, the Fourth Circuit Court of Appeal, in *Whittenburg v. Zurich American Insurance Company*,⁴ decided whether the transcription of statements, taken by a field investigator, were discoverable. The case concerned a workers' compensation death benefits' claim, and the statements were taken of co-employees shortly following the death of claimant's spouse. The workers' compensation insurer refused to produce the transcribed statements and the claimant filed a *Motion to Compel*. The trial court granted the motion.

On appeal, the Fourth Circuit held in order for the transcribed writings to be immune from discovery, the insurer was required to show *both*: 1) the writings were prepared by an adverse party, his attorney, surety, indemnitor, expert, or agent, and (2) the writings were prepared "in anticipation of litigation or in preparation for trial." The court answered both questions in the negative, holding in pertinent part:

First, . . . the items sought were not obtained or prepared by the adverse party, his attorney, surety, indemnitor, expert, or agent. The writings

sought by Mrs. Whittenburg in this case are transcripts of recorded statements, taken by the company providing workers' compensation insurance. . . . No attorney, surety, indemnitor, expert, or agent was involved; statements taken by insurers are not covered by the express language of LSA-C.C.P. Art. 1424. . . . Second, nothing . . . indicates that the items were obtained or prepared in anticipation of litigation or in preparation for trial. . . . The statements were taken as a part of Zurich's investigation of [the claim], not in anticipation of litigation or in preparation for trial. [emphasis supplied]

To establish the attorney-client privilege, several elements must be proven: 1) the holder of the privilege is, or sought to become a client; 2) the communication was made to an attorney or to his subordinate in a professional capacity; 3) the communication was made outside the presence of strangers; 4) the communication was made to obtain a legal opinion or services; and 5) the privilege has not been waived.⁵

Consequently, these recent decisions suggest all writings prepared by a non-party insurer prior to the attorney-client relationship are not immune from discovery.

What remains at issue, however, is whether a named party insurer is obligated to produce writings which were prepared before the insurer was made a party to the litigation. The courts may well find the protection afforded by the work-product rule is time specific, i.e., it does not apply to writings prepared before the insurer became a party. Additionally, the court may hold the writings were not prepared in anticipation of litigation.

¹*Wolford v. JoEllen Smith Psych. Hosp.*, 96-2460 (La. 5/20/97), 693 So.2d 1164.

²*Ogea v. Jacobs*, 344 So.2d 953 (La. 1977).

³*Landis v. Moreau*, 2000-1157 (La. 2/21/01), 779 So.2d 691.

⁴*Whittenburg v. Zurich American Insurance Company*, 2000-2697 (La. App. 4 Cir. 4/18/01), 786 So.2d 163.

⁵*Cacamo v. Liberty Mutual Fire Insurance Company*, 1999-1421 (La. App. 4 Cir. 10/10/01), 798 So.2d 1210.



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Recent Decision on Agent's Liability

The Third Circuit in *Graves v. State Farm Mut. Auto. Ins. Co.*, 2001-1243 (La. App. 3 Cir. 6/26/02), 821 So.2d 769 recently rejected an insured's attempt to impose liability upon the agent because the insured did not obtain adequate liability coverage. The court held the agent owed no affirmative duty to inquire about the insured's financial condition or to recommend the amount of coverage. Moreover, the agent did not hold himself out as an advisor; the insured sought no guidance from the agent and there was no agreement to render advice.



Briney & Foret

Patrick J. Briney	Shannon J. Gremillion
Charles J. Foret	Gary J. Delahoussaye
Katherine M. Loos	Richard R. Montgomery
Michael P. Corry	Matthew D. McConnell
Deanne B. McCauley	Crystal D. Burkhalter
Kevin S. Frederick	

Christopher L. Zaunbrecher*
* of counsel



For additional information on the contents of this newsletter or if you would like to be on our mailing list for other topics, please contact Emily DeSalvo at 337-237-4070 or desalvo@brineyforet.com.

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