

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1994 MTWCC 3**

**WCC No. 9307-6831**

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**CRAIG A. ADELS,**

**Petitioner,**

**vs.**

**CIGNA INSURANCE COMPANY,**

**Respondent/Insurer for**

**WEN DON CORPORATION,**

**Employer.**

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**ORDER COMPELLING DISCOVERY**

The petitioner has filed a motion to compel seeking further identification and an *in camera* inspection of documents which respondent has refused to produce. The motion arises on account of respondent's answers to two requests for production propounded by petitioner. The first request asked respondent to produce its claim file. Respondent produced the file except for those documents which it asserted "are protected by the attorney/client privilege and/or work product privilege." The second request asked petitioner to produce "the results of any investigation of the activities of the Claimant conducted by any person or entity at the request of, or on behalf of, Defendant." The respondent objected to this request in its entirety, citing both the work product rule and the attorney-client privilege. The complete text of the requests and the responses is set out in the margin.<sup>(1)</sup>

The current Court rules provide a specific procedure for objections to the production of a party's file. ARM 24.5.324(3) provides:

(3) If the request is for production of the file of a party and objection is made to such production, the objection will be ruled on only after an *in camera* inspection of such file upon the following conditions:

(a) counsel for the objecting party shall number each document in the file;

(b) counsel for the objecting party shall identify all documents he will concede are not privileged and further classify them on the basis of whether they are relevant or irrelevant, and if objected to on that basis;

(c) counsel for the objecting party shall classify all the remaining documents on the basis of whether each is privileged under the attorney-client privilege, the work-product rule, or both;

(d) counsel for the objecting party shall support his classification of the documents he asserts are privileged with special emphasis on why material purportedly within the ordinary, as opposed to opinion, work-product rule is either;

(i) not substantially needed by the opposing party; or

(ii) if substantially needed by the opposing party, is material he can obtain without undue hardship by other means.

The rule does not specify whether the party seeking production must move to compel after an objection is raised. Under the Montana Rules of Civil Procedure, court review is not automatic. A party seeking a document to which an objection has been interposed must move to compel. Rule 34(b) provides in relevant part:

. . . The response [to a request for production] shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request **may move for an order under Rule 37(a) with respect to any objection** to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. [Emphasis added.]

Rule 37 (a), Mont.R.Civ.P., authorizes a motion to compel production, providing in relevant part:

(a) **Motion for Order Compelling Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

. . .

(2) **Motion.** If . . . a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for . . . an order compelling inspection in accordance with the request. . . .

Since a requesting party may decide that an objection is well taken, automatic court review of objections to production is unnecessary and wastes judicial resources. This Court will

therefore place the burden on the requesting party to move to compel production and will not automatically review materials to which objections have been made.

In this case the requesting party has moved to compel. The matter is therefore properly considered at this time.

The attorney-client privilege is generally inviolate, but issues may arise as to whether it has been properly invoked. The work-product privilege is not inviolate and may be overcome by a showing that the "opposing party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Rule 26 (b) (3), Mont.R.Civ.P. Moreover, disputes may arise as to whether particular materials are in fact attorney work-product. Without further information, it is impossible to determine whether the attorney-client privilege and the work-product rule have been properly invoked or whether there is a basis for overcoming the protection generally afforded work-product.

Under Rule 34(b), Mont.R.Civ.P., when an objection "is made to part of an item or category, **the part shall be specified.**" (Emphasis added.) ARM 24.5.324 contains a corresponding requirement, providing that:

(2) . . . The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. **For a partial objection the part shall be specified.** [Emphasis added.]

Other courts have found that objections based on attorney-client privilege and the work product rule must specifically identify the documents withheld. For example, in **Willemijn Houdstermaatschaap BV v. Apollo Computer**, 707 F. Supp. 1429, 1439 (D. Del. 1989), a federal district court said:

When responding to an interrogatory, claims of attorney-client privilege and work product protection do not excuse a party from specifically identifying the allegedly privileged item. *Scovill Manufacturing Co., v. Sunbeam Corp.*, 61 F.R.D. 598, 603 (D.Del. 1973). As a matter of fact, this Court has stated that a proper claim of attorney-client privilege "requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality." *International Paper Co. v. Fibreboard Corp.*, 63 F.R.D. 88, 94 (D. Del. 1974). Similarly, a party asserting work product protection must "identify the withheld documents with sufficient particularity that the opposing counsel can intelligently argue that the privilege ought not to apply." *Petz v. Ethan Allen, Inc.*, 113 F.R.D. 494, 497 (D. Conn. 1985).

In the cited case, a United States District Court in Delaware characterized assertions of attorney-client privilege and work product in answer to an interrogatory requesting information regarding documents as "equivalent of a failure to answer" where the answer

failed to "specifically designate the purportedly privileged documents." *Id.* at 1440. The court ordered the objecting party to "fully respond to these interrogatories."

Some courts have adopted local rules which specify what information must be provided the opposing party whenever a claim of privilege is asserted in response to an interrogatory or request for production. One such rule is set out in **Grossman v. Schwarz**, 125 F.R.D. 376, 386 (S.D.N.Y. 1989):

(2) Where a claim of privilege is asserted in objecting to any interrogatory or document demand, or sub-part thereof, and an answer is not provided on the basis of such assertion,

(i) . . .

(ii) the following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(A) for documents: (1) the type of document; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena *duces tecum*, including where appropriate, the author of the document, the addressee of the document, and where not apparent, the relationship of the author and addressee to each other;

(B) for oral communications: . . . .

A party interposing an objection based on attorney-client or work product privilege has the burden of establishing that the documents are protected from discovery, and 'the burden cannot be "discharged by mere conclusory or *ipse dixit* assertions."<sup>(2)</sup> *Id.* The party requesting the materials cannot determine the validity of the objection or make an informed decision of whether to pursue disclosure unless some information is provided about the nature and character of the document. Requiring the objecting party to provide minimal identifying information does not violate either the attorney-client privilege or work product rule.

Therefore, when objecting to a request for production of documents on the grounds of attorney-client privilege or the work product doctrine, the objecting party must identify the specific documents being withheld. The identifying information must provide sufficient information to enable the requesting party to either conclude that the objection to a particular document is valid or to intelligently argue that the privilege or doctrine does not apply.

The Court presently has under consideration amendments to ARM 24.5.324(3). Pending amendment of the rule and, until further order of this Court, for **each** document withheld by a party on the basis of an asserted privilege or the work product doctrine, the objecting party must state:

- 1) the type of document;
- 2) the number of pages of the document;
- 3) the general subject matter of the document;
- 4) the date of the document;
- 5) where the document is a communication to another, the author of the document, the address of the document, and, where not apparent, the relationship of the author and addressee to each other;
- 6) the specific privilege (including work product) which is being claimed; and,
- 7) whether the objection extends to the entire document or only to portions of the document.

Where the objecting party asserts that this minimal information would encroach on the attorney-client privilege or the work product doctrine, the party must state how disclosure of the information would violate the privilege or doctrine. Since an in camera inspection can be requested by the party seeking production, each document being withheld should be numbered sequentially and that number should be used in connection with the identifying information set forth in the objecting party's response. Where the objection is only to a portion of the document, the portion to which the objection pertains should be redacted and the remainder of the document produced.

Since the responses in the present case did not provide sufficient information to the requesting party,

IT IS HEREBY ORDERED as follows:

1. On or before January 14, 1994, the respondent shall provide petitioner with a list of documents being withheld pursuant to respondent's objections to petitioner's requests for production 1 and 2. The list shall provide the identifying information specified in this Order, and must be **received** by petitioner's counsel no later than January 14, 1994.
2. The petitioner shall thereafter have until January 21, 1994 to move to compel production of specific documents. The motion shall identify each document sought and the reasons for petitioner's contention that the document is not protected.
3. In the event the petitioner moves to compel, the respondent shall within three days provide the Court with copies of the documents sought by the motion.

DATED in Helena, Montana, this 6th day of January, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. James G. Edmiston

Mr. Andrew J. Utick

1.

REQUEST FOR PRODUCTION NO. 1: Produce the entire claims file of the Insurer pertaining to the above-captioned claim.

RESPONSE: A copy of the Insurer's claims file, except for documents that are privileged under the attorney/client privilege and the work product privilege, is attached hereto. The Defendant objects to producing any documents which are protected by the attorney/client privilege and/or the work product privilege.

REQUEST FOR PRODUCTION NO. 2: Produce the results of any investigation of the activities of the Claimant conducted by any person or entity at the request of, or on behalf of, Defendant.

RESPONSE: The Defendant objects to producing such documents on the grounds that any such materials are privileged under the work product rule and/or the attorney/client privilege.

2. Black's Law Dictionary 743 (5th ed. 1979) defines *ipse dixit* as follows: He himself said it; a bare assertion resting on the authority of an individual.