STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 21-CV-1103

MARC RANCOURT
Plaintiff,

v.

MESSIER HOUSE MOVING & CONSTRUCTION, INC., and NORMAN MESSIER
Defendants.

RULING ON MMG'S MOTION TO QUASH

This is a negligence action. Plaintiff Marc Rancourt alleges that he was voluntarily helping Defendant Norman Messier take down a tree on the property of homeowners, the Gingrases (not parties to this action), who had hired Mr. Messier for that purpose, when Mr. Messier did something negligent with a skidder causing injury to Mr. Rancourt. Though the Gingrases have never been sued, their homeowners insurer, MMG Insurance Company, was notified of the injury and opened a claims file. In the course of discovery, Mr. Rancourt served a subpoena on third-party MMG seeking to depose an MMG representative and for production of the entire claims file. MMG has filed a motion to quash the subpoena.

The deposition

The subpoena instructs MMG to designate an agent for deposition at Mr. Rancourt's attorney's office in Lebanon, NH. MMG seeks to quash because (1) the subpoena was served without the fees for attendance and mileage, V.R.C.P. 45(b)(1); (2) MMG has no agent (much less a records custodian) anywhere near within 50 miles of Lebanon, V.R.C.P. 45(c)(3)(A)(ii); and (3) the subpoena confusingly describes the wrong date of the accident and incoherently describes the location of the property where the injury occurred as "located at 449/16."

As to the deposition, the motion is quashed because, by rule, exceeding the 50-mile distance limit is an express basis for quashing, and the Vermont Supreme Court has held that the failure to pay deposition fees is as well. See V.R.C.P. 45(c)(3)(A); *Watson v. Vill. at Northshore I Ass'n, Inc.*, 2018 VT 8, ¶ 81, 207 Vt. 154 ("[A] failure to provide the fee for one day's attendance and a mileage estimate voids an otherwise valid subpoena."). Moreover, counsel for Mr. Rancourt has admitted that she is not really interested in deposing an agent of MMG, that the subpoena was promulgated only to pressure MMG into complying with the request for the claims file.

The court declines to quash due to typographical errors on the face of the subpoena. MMG understood both the identity of the insured and the injury at issue.

The claims file

As for the claims file, MMG argues that the subpoena should be quashed because its file is protected by the work product doctrine. See *Askew v. Hardman*, 918 P.2d 469, 473 (Utah 1996) (insurer's claims file normally protected by work product rule); *State Farm Florida Ins. Co. v. Marascuillo*, 161 So.3d 493, 496–97 (Fla. Ct. App. 2014) (same). Initially not disputing that the claims file is work product, Mr. Rancourt argued that it nevertheless is no longer protected because no litigation against MMG (or its insured) is "in esse," citing to *Killington, Ltd. v. Lash*, 153 Vt. 628, 647 (1990). It is not "in esse," he claims, because the relevant limitations statute as to the Gingrases has run, so no case can be filed against them. In the alternative, at the hearing on the motion, counsel for Mr. Rancourt represented that the protection has been waived because the Gingrases have executed written waivers preventing MMG from invoking the doctrine in opposition to their subpoena. Finally, Mr. Rancourt argues that MMG has failed to produce a detailed privilege log enabling him to contest work product protection. For the following reasons, MMG's motion is granted as to the claims file.

Must the litigation be "in esse"?

Mr. Rancourt's position that the work product doctrine only applies while litigation is "in esse" is based on a statement in *Lash* that can be interpreted to say as much. He offers no supporting analysis otherwise, however. In a recent public records case, Judge Bent explained the "in esse" reference in *Lash* as follows:

> Requestor emphasizes that work product immunity in Vermont is "narrow" and can only apply to litigation that is "in esse," by which it means already underway. Requestor borrows those insights from *Killington, Ltd. v. Lash*, 153 Vt. 628 (1990). In *Killington*, the Court clarified that work product immunity existed in the common law of Vermont prior to its express incorporation into the civil rules, regardless that there were no reported cases to that effect. The Court also clarified that it protects the work of government lawyers and is within [Public Records Act] Exemption 4. After those essential holdings, the Court further stated in dicta: "We must emphasize that the work product exemption is a narrow one, both under *Hickman* principles and the civil rules. The litigation which serves as the basis for the claim must be *in esse* and not merely threatened."
>
> Narrowness aside, Requestor interprets the *Killington* Court's expression *in esse* to mean that the litigation for which the work product was prepared must be ongoing—not merely anticipated—to invoke immunity. This is a misunderstanding of the *Killington* decision. The *Killington* Court cited to *Grolier Inc. v. F.T.C.*, 671 F.2d 553 (D.C. Cir. 1982), in support of the proposition that the litigation must be *in esse*. *Grolier* never used that expression or included any holding to that effect. The relevant issue in *Grolier* was whether immunity continues after the relevant litigation has

> terminated, not whether immunity can apply in the case of anticipated litigation. The *Grolier* court ruled that "attorney work-product from terminated litigation remains exempt from disclosure only when litigation related to the terminated action exists or potentially exists." [B]ut see U.S. D.O.J., Exemption 5 Attorney Work-product Privilege, 2014 WL 2441143, at *3 (explaining that on review of the *Grolier* case, the U.S. Supreme Court "resolved a split in the circuits by ruling that the termination of litigation does not vitiate the protection for material otherwise properly categorized as attorney work-product"). This appears to be what the *Killington* Court was referring to, albeit confusingly. More importantly, the *Killington* Court clearly was adopting the conception of work product immunity as described in *Hickman v. Taylor*, 329 U.S. 495, which arose out of a controversy about witness statements taken in anticipation of litigation, not after a lawsuit had already been filed. It also expressly referred to work product immunity in Rule 26, which also plainly applies to material "prepared in anticipation of litigation." V.R.C.P. 26(b)(4). *Work product immunity in Vermont extends to materials prepared in anticipation of litigation, not merely those materials prepared after a lawsuit has been filed, and it continues following the termination of the litigation.*

Energy Policy Advocates v. Atty. General's Off, No. 173-4-20 Wncv, 2021 WL 4189795, at *5 (Vt. Super. Ct. July 16, 2021) (emphasis added). The court adopts this analysis from *Energy Policy Advocates* for purposes of this case. *Lash* does not prevent work product immunity from applying in the circumstances of this case.

Who holds the privilege?

At the hearing on the motion, Mr. Rancourt insisted that the insured holds the privilege exclusively, and thus the insurer cannot invoke it if the insured has waived it. Counsel for Mr. Rancourt represented that both Mr. and Ms. Gingras executed written waivers of work product protection as to the claims file, and thus MMG should be estopped from challenging its production. Asked by the court whether counsel had any authority for the asserted position, counsel said she had never researched the matter.

The court has found no Vermont cases addressing this specific issue. Out of state cases addressing it are no monolith and arise in quite varied circumstances. However, the case law generally reflects the view, implicit in the basic concept of work product, that the doctrine operates to protect the professional who generated it, either exclusively or in a shared capacity with the client, and where shared, a client's waiver does not bind the professional.[1] See *In re Doe*, 662 F.2d 1073, 1079 (4th Cir. 1981) ("The ability to protect work product normally extends to both clients and attorneys, and the attorney or the client, expressly or by conduct, can waive or forfeit it, *but only as to himself*." (emphasis added, citation omitted)); *In re Grand Jury Proceedings*, 604 F.2d 798, 801 (3d Cir. 1979); *Harris v. Drake*, 65 P.3d 350, 359–60 (Wash. Ct. App. 2003); *State Comp. Ins. Fund v. Superior Court*, 91 Cal.App.4th 1080, 1091 (2001).

Thus, at a minimum, MMG can raise the doctrine for its own benefit, and any

[1] There are nuanced exceptions, but none that would appear to apply in the circumstances of this case.

waiver by the Gingrases does not bind it.

Privilege log

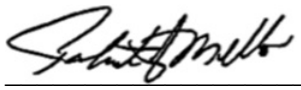
Finally, Mr. Rancourt argues that without a detailed privilege log documenting the specific contents of the claims file, he has no way to challenge MMG's assertion that the contents fall within the scope of the doctrine. Rule 45(d)(2)(A) required third party MMG, in objecting to production, to describe "the nature of the documents, communications, or things, not produced that is sufficient to enable the demanding party to contest the claim." MMG did so, though not with a detailed privilege log. MMG described the nature of the materials, all clearly work product, and the court relies on the candor of counsel on that point. See 9A Wright & Miller, Fed. Prac. & Proc. Civ. § 2458 (3d ed.) (court may "rely on the candor of counsel in their representation as to the nature of the material for which privilege is claimed").

The court declines to order any more detailed log of the withheld materials. Mr. Rancourt's request is for production of the entire claims file without any explanation as to what he may be looking for, and certainly without having attempted any showing that any withheld work product material might nevertheless be discoverable due to Mr. Rancourt's "substantial need and undue hardship." *In re PCB File No. 92.27*, 167 Vt. 379, 380 (1998).

Order

For the foregoing reasons, MMG's motion to quash is granted.

SO ORDERED this 26th day of December, 2022.



Robert A. Mello
Superior Judge