

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF the Joint Application) REGULATORY DIVISION
of Liberty Utilities Co., Liberty WWH, Inc.,)
Western Water Holdings, LLC, and) DOCKET NO. D2014.12.99
Mountain Water Company for Approval of)
a Sale and Transfer of Stock)

**THE MONTANA CONSUMER COUNSEL’S OBJECTION TO DATA
REQUEST LIBERTY 054, MOTION FOR PROTECTIVE ORDER AND
ALTERNATIVE MOTION FOR EXTENSION OF TIME FOR
PREPARATION OF LISTING OF MATERIALS WITHHELD BASED ON
CLAIM OF PRIVILEGE**

Montana Consumer Counsel (MCC) objects to Liberty Utilities Company (Liberty) data request 054, and moves the Commission for entry of a protective order, or alternatively, for an extension of time in which to prepare a privilege log.

I. Objection

On November 16, 2015, Liberty propounded its data request 054, which seeks the following:

Provide all John Wilson's work papers, notes and correspondence with MCC staff or counsel.

MCC has no objection to producing Dr. Wilson’s work papers in this proceeding. MCC objects to Liberty request 054 to the extent that it seeks correspondence between Dr. Wilson and MCC staff or counsel because the apparent purpose of the request is to obtain access to “core work product” – “the

mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation” – the disclosure of which is specifically prohibited by Montana Rule of Civil Procedure 26(b)(3)(B), made applicable here by A.R.M. § 38.2.3301(1). This type of work product “is virtually undiscoverable.” *United States v. Deloitte LLP*, 610 F.3d 129, 135 (D.C. Cir. 2010), quoting, *Dir. Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997).

This Commission has already determined that the material sought in this data request is attorney work product. See Order 7392l at ¶ 41 and Order 7392o at ¶ 15. This is the law of the case and the Commission must adhere to its ruling regarding work product in this Docket. Further, the Commission has rejected a similar request for communications between MCC and its expert witnesses. See Notice of Commission Action issued May 12, 2014 in D2013.12.85.

The Montana Supreme Court has held that opinion work product or core work product “enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.” *Kuiper v. Dist. Ct. of the Eighth Jud. Dist.* (1981), 193 Mont. 452, 466, 632 P.2d 694, quoting *In re Murphy*, 560 F.2d 326, 337 (8th Cir. 1977). In addition to the Orders cited above, the Commission has expressed comparable views as to the scope of work product protection from discovery. *In the Matter of Qwest Corp.*, Order No. 6889g, 2008 Mont. PUC LEXIS 78 at ¶¶ 42-43 (2008), citing *Palmer by Diacon v. Farmers Ins. Exch.* (1993), 261 Mont. 91, 861 P.2d 895. Notably, Liberty’s request has no temporal

limitations, nor does it even limit the request to this docket. Accordingly, it would be extremely onerous to prepare a privilege log for a request that has no parameters whatsoever.

MCC requests that the Commission enter a protective order pursuant to A.R.M. § 38.2.3301 and the provisions of M.R.Civ.P. 26(c) thereby made applicable, establishing that MCC need not respond to this request. Alternatively, to the extent that the Commission determines to enforce the requirement of Order No. 7392 at ¶ 11 and require MCC to produce a privilege log identifying all materials withheld based on work product immunity notwithstanding the extraordinary volume of material required to be reviewed to prepare such a log, MCC seeks an extension of not less than ten calendar days, in which to submit a privilege log in support of its objection to these requests.

I. ARGUMENT

MCC objects to Liberty's request 054 because it seeks disclosure of MCC's opinion work product, including mental impressions, conclusions, opinions, or legal theories. The request seeks Dr. Wilson's "correspondence with MCC staff or counsel." To the extent that it seeks information that is arguably relevant (as opposed to quotidian administrative details), it seeks to intrude on the theories, strategies and mental impressions of counsel and expert witness. This is not a permissible area for discovery under M.R.Civ.P. 26(c). The request discloses no basis (and MCC is aware of none) for concluding, as to opinion work product it seeks to have produced, that the mental impressions of MCC or its representatives

are at issue in this proceeding and that there is some compelling need to require disclosure. Absent such a showing, there is no legitimate basis for seeking Consumer Counsel's work product.

The Montana PSC's regulations (A.R.M. § 38.2.3301) provide that discovery in proceedings before it is governed in all respects relevant to this discovery issue by the Montana Rules of Civil Procedure.^{1/} M.R.Civ.P. 26(b)(3) codifies the immunity of work product from discovery under Montana law in the following terms:

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule

^{1/} A.R.M. § 38.2.3301(a) provides that:

Techniques of prehearing discovery permitted in state civil actions may be employed in commission contested cases, and for this purpose the commission adopts rules 26, 28 through 37 (excepting rule 37(b) (1) and 37(b) (2) (d) of the Montana rules of civil procedure in effect on the date of the adoption of this rule, and any subsequent amendments thereto. In applying the rules of civil procedure to commission proceedings, all references to "court" shall be considered to refer to the commission; references to the subpoena power shall be considered references to ARM 38.2.3302 through 38.2.3305; references to 'trial' shall be considered references to hearing; references to 'plaintiff' shall be considered references to a party; and references to 'clerk of court' shall be considered references to the staff member designated to keep the official record in commission contested cases.

26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

In *Kuiper v. Eighth Judicial Dist. Ct.* (1981), 193 Mont. 452, 462, 632 P.2d 694, the Court applied the work product rule even to terminated litigation, determining that the rule should be given a liberal interpretation. The court noted that work product may only be discoverable if the requester has substantial need of the materials and is unable without undue hardship to obtain them through other means. Opinion work product, it found, is entitled to substantially greater protection, enjoying “a nearly absolute immunity.” *Id.* at 466, quoting *In re Murphy* (8th Cir. 1977), 560 F.2d 326, 337.

In *Palmer v. Farmers Ins. Exch.* (1993), 261 Mont. 91, 861 P.2d 895, the Court construed M.R.Civ.P. 26(b)(3) to recognize two types of work product. First, “a party can discover ordinary work product ‘prepared in anticipation of litigation or for trial or for another party or by or for that other party’s representative . . . only upon a showing that the party seeking discovery has *substantial need of the materials* in the preparation of the party’s case and that the party is *unable without undue hardship to obtain the substantial equivalent of the*

materials by other means.” 261 Mont. at 115-116 (emphasis supplied). Of greater relevance here, the second type of work product is known as “opinion” work product, which involves “disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation” (*id.* at 116, quoting M.R.Civ.P. 26(b)(3)). *Palmer* holds that “opinion work product is discoverable when the mental impression is *directly at issue* in the case and the need for the material is compelling” (*id.* at 117). The classic example of the circumstance in which Montana courts have found opinion work product to be discoverable is “bad faith” insurance cases, where proof of liability on the part of the insurer under Montana’s Unfair Trade Practices Act (§33-18-201, MCA) turns on whether the insurer had a reasonable justification for refusing payment. See *Dion v. Nationwide Mut. Ins. Co.*, 185 F.R.D. 288, 292-293 (D. Mont. 1998).

The Montana Supreme Court has consistently reaffirmed *Palmer’s* explanation of the work product doctrine, particularly regarding the elevated level of protection from discovery afforded to opinion work product. See, e.g., *Peterson v. Doctor’s Co.* (2007), 2007 MT 264 at ¶ 44, 339 Mont. 354, 367 (“To meet the “compelling need” requirement, the party seeking discovery must demonstrate that weighty considerations of public policy and the administration of justice outweigh the need to protect the mental impressions of the opposing party’s attorneys or its representatives”), quoting *Palmer, supra*, 261 Mont. at 117. Even in the exceptional context of “bad faith” claims over refusal to honor insurance coverage,

the Montana Supreme Court has recognized that protection of work product immunity requires that “fishing expeditions” of the type Liberty’s request undertakes must be prohibited. The Court has held that “requests must be narrowly tailored to lead to discoverable information, and the district courts may well need to prohibit discovery requests which are too broad, given the particular claims and defenses of each case.” *Peterson, supra*, 339 Mont. at 467.

Under this construction of the work product doctrine, drafts of expert reports or testimony or correspondence between counsel and experts are generally not discoverable. Both are opinion work product and enjoy virtually absolute immunity from discovery. *Estate of Moore v. R. J. Reynolds Tobacco Co.*, 194 F.R.D. 659, 662 (S.D. Iowa 2000).

The requirement that a communication for which work product immunity is sought must have been made “in anticipation of litigation” does not require that a proceeding actually have been initiated. Where the ultimate eventuality of litigation is clear, “such protection should be afforded even though litigation is not in progress.” *Kuiper, supra*, 193 Mont. at 462. It is only necessary that “the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” *Clark v. Norris* (1987), 226 Mont. 43, 50, 734 P.2d 182 (citations omitted).

Liberty’s data request seeks to contravene the MCC work product privilege. The Commission should reject Liberty’s attempt to undermine the settled immunity of opinion work product from discovery. Liberty’s data request seeks

MCC's work product, and particularly opinion work product, and this is not a proper use of discovery permitted under A.R.M. § 38.2.3301. In light of the limited prospects of this request leading to the discovery of relevant evidence, and the burden on MCC of separately evaluating numerous correspondence and e-mails (plus attachments and multiple attachments), MCC requests that the Commission enter a protective order under M.R.Civ.P. 26(c), stating that MCC is not required to respond to this request.

M.R.Civ.P. 26(c) provides in relevant part that a tribunal "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including *inter alia* "forbidding the discovery." Here, MCC believes that a protective order is warranted because of the burden and expense involved in the preparation of a privilege log, where the inevitable outcome of that exercise, once completed, is that the discovery sought by Liberty 054 will be found impermissible under Montana's work product doctrine. This is especially so since Liberty's data request does not even limit its request to this docket, or to any particular time frame.

Alternatively, to the extent that the Commission determines to enforce literally the requirement of Order No. 7392 ¶ 11 that a privilege log be prepared in order to support this particular objection to discovery, MCC requests an extension of not less than ten calendar days from the date on which the Commission determines this issue in which to complete an effort to review the requested materials and prepare a privilege log. The burden and expense of this process is

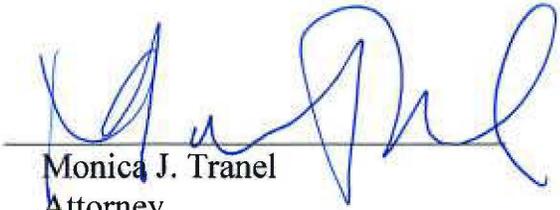
not justified and should be avoided due to the directly objectionable nature of these data requests.

III. Conclusion

The Commission should stand by its earlier decision in this proceeding in Orders 73921 and 73920 regarding work product as the law of the case here and also stand by sound Montana law regarding attorney work product, particularly opinion work product. Liberty's data request 054 should be rejected and the MCC should be relieved from responding and from preparing a privilege log, because there is no productive purpose to be served by the exercise of itemizing both irrelevant, routine administrative correspondence and core work product communications.

Alternatively, should the Commission determine to require the preparation of a privilege log itemizing the correspondence withheld from production on the basis of work product immunity, the MCC requests an extension not less than ten calendar days of the time in which it is required to produce the itemization, due to the requirements of itemization.

Respectfully submitted December 18, 2015.

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