



# WORKERS' COMPENSATION COMMENTARY



September—October 2002

Volume 9 Issue 4

## DEALING WITH DISCOVERY DEMANDS: DEFENDANT'S RIGHTS AND OBLIGATIONS

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One experience that is shared by claims professionals and defense counsel alike is having to weather the constant salvos from applicant's counsel insisting on the immediate disclosure of virtually all filed records, investigations, witness statements and videotapes. They insist that immediate disclosure is required and that dire consequences including the exclusion of this material from evidence will befall the defendant who defies their demands. Well, as usual, applicant's counsel have seized on a few scattered threads of truth running through the whole fabric that governs disclosure of evidence.

We have dealt with this subject in prior issues of our newsletter but felt that it was important to revisit this subject since an understanding of the current rules is crucial to the defendant having the ability to prepare and present a vigorous defense. There are two basic protections that the law affords the party to protect their right to prepare their case with some degree of privacy, Attorney-Client Privilege and Attorney Work Product. There are also rules that govern when evidence that is subject to discovery must be disclosed and, of course, there are plenty of "gray areas" where only common sense can serve to guide a party's practices. Because of the length of this discussion, We will cover the Attorney-Client Privilege and Attorney's Work Product in this issue and rules relating to video evidence will be addressed in the next issue.

The first and most important protection that is afforded evidence arises out of the Attorney/Client Privilege. In the English legal system it was considered to be in the public interest to insist that disclosures made in certain relationships could be held in confidence and could not be discovered

by the government or another party to litigation. These relationships were between a priest and a penitent, a patient and doctor and between an attorney and client. This latter privilege is in place unless waived and the holder of the privilege is the only person who can waive it although both the client and the attorney will assert the privilege.

What does the privilege cover? Here in California, this privilege is expressed in Section 952 of the Evidence Code that defines the type of communication that is subject to the privilege. That code section defines a "confidential communication between client and lawyer" as information that, as far as the client is aware, is given to the attorney to precipitate the receipt of a legal opinion and advice in the course of the relationship. The statute was amended in relatively recent times to indicate that such a communication is still deemed confidential even it is sent by fax, cell phone or other electronic means, i.e. voice mail or e-mail between the client and the attorney.

In 1976, the WCAB made a determination that the evidence code relating to privilege binds the parties involved in a workers' compensation case and if there is any question of this, the citation for that decision is *Hardesty v McCord & Holdrin, Inc.* (1976) [41CCC111].

Now we need to explore several different pieces of evidence and types of communication to determine whether or not the attorney client privilege would attach.

One of the requests made by applicant's counsel is for a copy of the claims file and generally speaking, that includes e-mail messages or file notes kept on an electronic medium even though

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the particular message may not as yet or may never appear in the paper file. In fact, slowly but surely, it appears that our industry is tending toward electronic files and these may soon be the only documents in existence. So, in the production of that claim file the materials must be reviewed to see whether or not the Attorney-Client Privilege can be asserted. Well, if there is an e-mail in that file directed to the attorney or a letter, fax or e-mail transmission that has been sent from the attorney to the client, those would all be privileged and could be "redacted" (erased or eliminated) from the record. Discussions between members of the staff, unless one of the staff members is an attorney and is acting in an advisory capacity within the company, are discoverable as no privilege attaches to such communications. For that reason, it is extremely important to avoid speculating or discussing legal theories and preserving them in writing either on paper or in an electronic format unless that communication is directed toward counsel. Likewise, investigation reports that are commissioned by the defendant and directed to the defendant are discoverable as well.

When witness statements are sought, there are rules that attend their disclosure. In the case of *Chadbourne, Inc. v Superior Court* (1964) [60 Cal. 2d 723] the California Supreme Court outlined the ground rules. Space does not permit a full-fledged discussion of all 11 points that were made in that case and, we would refer you to the case itself for review if disclosure of a witness statement is sought and it is deemed crucial to the case. Suffice it to say that, in general, if a statement is made by a spokesman for a corporation and it is intended for the use of the attorney, it would be a privileged communication. If along with the company the particular witness also was a defendant then any statement made to an attorney representing the witness or the company would be privileged.

A statement made by an employee however, who is effectively "independent" that is, an individual who does not speak for the company and is merely an employee providing information as to an occurrence and this information is presented to the attorney, a communication between them is not privileged. It is important to note also

that if information is not privileged, one cannot make it privilege merely by communicating the information to a lawyer. That concept was expressed in the case of *Greyhound Corporation v Superior Court* (1961) [56 Cal. 2d 355].

The other defense provided by the law to block discovery is a good deal more limited than the attorney/client privilege and that is the Attorney's Work Product protection that is provided under California Code of Civil Procedure §2018. That code section along with some key judicial decisions defines the limited protection that is afforded the Attorney's Work Product.

The "work product" protection is a relative thing because the protection is being afforded so that one party to a lawsuit cannot ride on the coat-tails of the other and take advantage of the time, effort and money expended by that other party to prepare their case. Also, as the code section points out, an attorney should be able to prepare a case by considering not only the evidence that is favorable, but also that which is unfavorable without having to alert the other party. The protection is limited, however, and for any of a number of reasons, the courts have allowed the other party to obtain information that was gathered through the work of their opponent. These circumstances generally fall into one or the other of two categories.

1. If the denial of discovery would prejudice the other party unfairly and result in an "injustice". *Hardesty v. McCord and Holdern, Inc.* (1976) [41 CCC 111].
2. If any information has been gathered by an investigator or the claims adjuster, someone who was not the agent of the attorney, particularly in the case where such information was obtained before counsel was retained, the "work product" protection will not be present. *Wilson v. Superior Court* (1964) [226 Cal.App.2d 715].

On the other hand, the protection of the work product is absolute under circumstances where another party is seeking a writing that contains an attorney's opinions, theories, conclusions, or research. Work product is not protected against

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discovery by the State Bar or in proceedings between an attorney and a client or former client where an issue of breach of duty, etc is being raised. The principal area in which applicants' counsel attempt to set aside the protection concerning work product is with regard to the statements of witnesses. These, of course, are statements that would not have protection under the attorney client privilege.

In the *Hardesty* case, the court distinguished between statements that were taken by an investigator hired by a claims adjuster as opposed to an investigator who was hired by and reports to an attorney. In the former case the statements are always discoverable, in the latter case they would constitute part of the attorney work product and would only be discoverable under the circumstance where it would create an unfair prejudice with regard to the other party or an injustice would be perpetrated.

Specifically and more recently in the workers' compensation venue, in the panel decision of *Moreno v. City of Los Angeles* 21 CWCR 108 (1992) the issue of witness statements obtained by an investigator was raised. In that case, the Board panel held "in workers' compensation proceedings, the applicant's attorney cannot afford to take the deposition of defense witnesses as there is no provision for deposition fees and witnesses. In addition, to hire an investigator to take their statements, would again be expensive. Because of the limited attorney's fees . . . it would be prohibitive to have applicant's counsel either take the deposition of the witnesses or hire an investigator to take [their] statements." For these reasons, the Board decided that denial of disclosure would unfairly prejudice the applicant in the preparation of his case. It would be an injustice to require the attorney to try the case without any idea as to what the defense witnesses were going to say. On the other hand, statements taken by an attorney directly from a witness are never discoverable.

*Ed: Just as an aside, for most of the time that workers' compensation has been in existence, from 1917 to around the mid 1970's, applicant's counsel were not paid to sit in on their client depositions. They were like any other personal injury lawyer, having to represent their client for a pure contingency fee. With the value of cases accelerating*

*and the percentage of recovery going from a very standard ten percent of the P.D. recovery in the 1960's to 15 percent today, it would seem to me that deposing defense witnesses would just be something they should expect to do if they want to be prepared.*

In our next newsletter, we will be covering the subject of disclosure of videotapes and take a look at some of the new decisions that have come down since the topic was last addressed in our newsletter.

**RUSSELL SHUBEN  
JOINS  
LISTER, MARTIN & THOMPSON**

We are pleased to announce the association of Russell Shuben, Esq. with our firm effective October 14, 2002. Mr. Shuben has over 12 years experience in the workers' compensation field and will be an invaluable resource, not only to our clients but also to the other attorneys in our firm who have spent their careers almost exclusively as defense counsel. Yes . . . Mr. Shuben is coming over from the "other" side! We don't hold it against him, we believe this provides him with a unique perspective and a familiarity relative to the tactics and direction developed by the applicant's counsel in pressing their cases. Additionally, Mr. Shuben has been a vocational rehabilitation counselor, a claims adjuster, Hearing Representative and software technician, so, he offers a depth and breath of experience that most attorneys with twice his time in service cannot touch. He is intimately acquainted with public entity work having been associated with Lewis, Marenstein, Wicke & Sherwin. We are quite excited to welcome him aboard.

*This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any fact situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that direct contact with an attorney be sought.*