

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Gross v. Scottsdale Insurance Company

Gross · No. 24-cv-02069-EJD (VKD) · Decided April 15, 2025

OPINION

Gross v. Scottsdale Insurance Company

PER CURIAM.

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4 UNITED STATES DISTRICT COURT

5 NORTHERN DISTRICT OF CALIFORNIA

6 SAN JOSE DIVISION

7 8 TERRY GROSS, Case No. 24-cv-02069-EJD (VKD) 9 Plaintiff,

ORDER RE APRIL 3, 2025

10 v. DISCOVERY DISPUTE RE BREEN

TESTIMONY

11 SCOTTSDALE INSURANCE COMPANY,

et al., 12 Defendants. 13 14 The parties ask the Court to resolve a dispute regarding application of
the the attorney 15 work product doctrine. Dkt. No. 34. The Court finds this dispute suitable for
resolution without 16 oral argument. Civil L.R. 7-1(b). 17 As explained below, the Court
concludes that Mr. Breen may be deposed regarding the 18 Breen report, which has already been
disclosed, and factual information regarding the 19 investigation he conducted.

20 I. BACKGROUND

21 The background to this dispute is described in detail in the Court’s prior order and will not 22
be repeated here. See Dkt. No. 31. As the parties acknowledge, in that order, the Court concluded
23 that the Breen report is not entitled to protection as an attorney-client privileged
communication 24 due to waiver. The parties disagree about whether Mr. Breen may be
questioned about his 25 investigation and his work leading up to preparation of the report.

26 II. DISCUSSION

27 A. Legal Standard 1 tangible things prepared by a party or his representative in anticipation of
litigation or for trial. 2 Fed. R. Civ. P. 26(b)(3); United States v. Sanmina Corp., 968 F.3d 1107,
1119 (9th Cir. 2020) 3 (citation omitted). “To qualify for work-product protection, documents
must: (1) be prepared in 4 anticipation of litigation or for trial and (2) be prepared by or for
another party or by or for that 5 other party’s representative.” United States v. Richey, 632 F.3d
559, 567 (9th Cir. 2011) (internal 6 quotes omitted). The doctrine’s primary purpose is to “prevent
exploitation of a party’s efforts in 7 preparing for litigation.” Admiral Ins. Co. v. U.S. Dist. Ct.,

881 F.2d 1486, 1494 (9th Cir. 1989); 8 see *United States v. Nobles*, 422 U.S. 225, 238 (1975) (“At its core, the work-product doctrine 9 shelters the mental processes of the attorney, providing a privileged area within which he can 10 analyze and prepare his client’s case.”). Typically, work product protection extends to interview 11 notes, memoranda, summaries, and analyses, as well as to verbatim witness statements. See 12 *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *Hatamian v. Advanced Micro Devices, Inc.*, No. 14- 13 cv-00226-YGR (JSC), 2016 WL 2606830, at *3 (N.D. Cal. May 6, 2016). 14 A party asserting work product protection bears the burden of demonstrating that the 15 protection applies. See, e.g., *Visa U.S.A., Inc. v. First Data Corp.*, No. 02-cv-1786 JSW (EMC), 16 2004 WL 1878209, at *5 (N.D. Cal. Aug. 23, 2004). 17 The protections afforded by the work product doctrine are not absolute and may be waived. 18 *Nobles*, 422 U.S. at 239. An express or voluntary disclosure of work product waives the 19 protection where such disclosure is made to an adversary in litigation or where the disclosure is 20 made in a manner that substantially increases the opportunities for potential adversaries to obtain 21 the work product. *Sanmina*, 968 F.3d at 1121 (citing 8 Charles Alan Wright & Arthur R. Miller, 22 *Federal Practice & Procedure* § 2024 (3d ed. 2020)); see also *Nidec Corp. v. Victor Co. of Japan*, 23 249 F.R.D. 575, 578 (N.D. Cal. 2007) (“[T]he work-product privilege may be waived by 24 disclosure to third parties which results in disclosure to an adversary party.”). Work product 25 protection may also be waived implicitly by putting the protected work product at issue, such as 26 by asserting claims that the opposing party cannot adequately dispute unless it has access to that 27 protected work product. See *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003). Moreover, 1 requirements of Rule 26(b)(1) and if the party seeking production shows a “substantial need for 2 the materials to prepare its case and cannot, without undue hardship, obtain their substantial 3 equivalent by other means.” Fed. R. Civ. P. 26(b)(3)(A). Upon such a showing, a court must 4 nevertheless “protect against disclosure of the mental impressions, conclusions, opinions, or legal 5 theories of a party’s attorney or other representative concerning the litigation.” Fed. R. Civ. P. 6 26(b)(3)(B). 7 B. Does Work Product Protection Apply? 8 As the proponent of the work product protection, Scottsdale has the burden to demonstrate 9 that the protection applies. Here, Scottsdale does not assert work product protection with respect 10 to any documents; rather, it asserts that the protection extends to Mr. Breen’s testimony about the 11 investigation that he conducted. Specifically, Scottsdale contends that Mr. Breen may not be 12 questioned about his “work and impressions” leading up to his report. Dkt. No. 34 at 5. Mr. 13 Gross responds that work product protection does not apply because Scottsdale has not established 14 that Mr. Breen’s investigation was conducted in anticipation of litigation. *Id.* at 3. 15 A document is considered prepared “in anticipation of litigation” if it “can be fairly said to 16 have been prepared or obtained because of the prospect of litigation.” *ACLU of N. California v. United States DOJ*, 880 F.3d 473, 485 (9th Cir. 2018); see also *id.* at 486-87 (“We have never held 18 . . . that attorney work product must be prepared in anticipation of specific litigation to be 19 privileged, and we decline to do so here.”). Scottsdale asserts that there is “no dispute” that Mr. 20

Breen's investigation was conducted in anticipation of litigation, see Dkt. No. 34 at 5, but it 21 ignores Mr. Gross's argument that the investigation was merely part of the "routine business of 22 insurance companies" and not in anticipation of litigation, see *id.* at 2. 23 The greater difficulty is understanding what Scottsdale believes remains within the scope 24 of the work product protection, given that Mr. Breen's report on the results of his investigation is 25 not protected. Apart from the abbreviated reference to Mr. Breen's "work and impressions," it is 26 entirely unclear what Scottsdale seeks to protect. 27 C. Has Work Product Protection Been Waived? 1 work product doctrine applies to any portion of Mr. Breen's anticipated testimony, the Court 2 nevertheless considers whether any such protection has been waived in any event, as Mr. Gross 3 contends. 4 Mr. Gross seems to argue that Mr. Breen's investigation and his mental impressions are 5 necessarily at issue because this action involves a bad faith denial of coverage claim. Dkt. No. 34 6 at 3. Citing *Holmgren v. State Farm Mutual Automobile Insurance Company*, 976 F.2d 573 (9th

7 Cir. 1992), Mr. Gross suggests as Scottsdale's agent, Mr. Breen's opinions and mental 8 impressions are "directly at issue." *Id.* Scottsdale responds that its coverage decision "was not 9 based upon Mr. Breen's report," and therefore his work and impressions are not at issue. *Id.* at 6. 10 The parties' cursory discussion of this issue makes it difficult for the Court to assess. The Court 11 discerns no clear connection between Mr. Breen's report and Scottsdale's later denial of coverage 12 to Mr. Stoll and Mr. Robbins; indeed, Mr. Gross's theory seems to be somewhat speculative. See 13 *id.* at 3. As the Ninth Circuit has instructed, "such opinion work product is discoverable only 14 'when mental impressions are at issue in a case and the need for the material is compelling.'" 15 *Sanmina Corp.*, 968 F.3d at 1125 (quoting *Holmgren*, 976 F.2d at 577). Mr. Gross has not made 16 the necessary showing, and the Court declines to find an implied waiver simply because Mr. Gross 17 asserts a bad faith claim. 18 Mr. Gross also argues more generally that any work product protection relating to Mr. 19 Breen's investigation has been waived because the Breen report is not protected and because Mr. 20 Breen did not take steps to keep the conduct of his investigation secret or confidential, but instead 21 discussed what he was doing with Mr. Gross's counsel, Mr. Quadra. *Id.* at 4. Scottsdale does not 22 respond to this argument. See generally *id.* at 5-6. The Court finds Mr. Gross's arguments here 23 persuasive to the extent they concern Mr. Breen's non-opinion work product. Indeed, Mr. Breen 24 has already provided at least some testimony regarding how he conducted his investigation and the 25 preparation of his report, without objection from Scottsdale's counsel. See Dkt. No. 26, Ex. 2 26 (Breen dep. 40:14-42:1). Thus, to the extent any work product protection remains, the Court finds 27 that it has been waived with respect to any matters previously disclosed in the Breen report and the 1 Conversely, Mr. Gross has not established any justification for compelled disclosure of Mr. 2 || Breen's "mental impressions, conclusions, opinions, or legal theories" that have not already been 3 disclosed in the Breen report or otherwise.

4 || I. CONCLUSION

5 For the reasons explained above, the Court concludes that Mr. Gross may question Mr. 6 || Breen
in a further deposition regarding (1) the contents of the Breen report, and (2) factual 7 ||
information regarding the investigation he conducted. As fact discovery has otherwise closed, Mr.
8 Gross may not seek any additional discovery of Mr. Breen. 9 IT IS SO ORDERED. 10 || Dated:
April 15, 2025 11 2 Usinguin®, □□□□□□ Virginia K. DeMarchi 13 United States Magistrate
Judge 15 16 = 17 Z 18 19 20 21 22 23 24 25 26 27 28