

# *EX PARTE FLOWERS:* The Alabama Supreme Court's Most Recent Decision Shaping the Work-Product Doctrine

By **Teresa G. Minor and  
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Practicing litigators all understand the utility of a timely witness statement. Due to the inevitable delays in the litigation process, depositions sometimes do not take until several years after the relevant events, when a witness's recollection (for better or worse) is not quite what it used to be. Often, a witness statement allows an attorney to safeguard against the unavailability of an important witness at trial and to preserve the testimony of a witness who, for any number of reasons, contracts a bad case of selective memory. Witness statements also can serve as an attractive and cost effective alternative to depositions, especially when an attorney does not know beforehand what the witness's testimony will be. That being said, litigators should be prepared for the discovery fight that typically accompanies these written or recorded statements. Unless such a statement has been obtained from a client, the attorney-client privilege ordinarily does not preclude discovery of the statement by adverse parties. This limits the potential privileges applicable to these statements to the work-product doctrine, a privilege often cited by attorneys but rarely analyzed to ensure its proper application.

Less than three months ago the Supreme Court of Alabama issued its decision in *Ex parte Flowers*, \_\_\_ So. 2d. \_\_\_, 2008 WL 821056 (Ala. Mar. 28, 2008), further clarifying the scope of Alabama's work-product doctrine in the context of witness statements taken by insurance adjusters/claims agents and creating a ripple among the state's legal community. Commentary of this sort seemingly necessitates the next logical question: What is *Flowers* and what does it mean? In order to answer these questions, it is critical to have an understanding of the Alabama's work-product doctrine.

## **Alabama's Work-Product Doctrine**

It has been said that "the work product doctrine exists to protect the integrity of the adversary system by safeguarding the fruits of an attorney's trial preparation materials from discovery by the opposing party." *Fed. Dep. Ins. Corp. v. Cherry, Bekaert & Holland*, 131 F.R.D. 596, 605 (M.D. Fla. 1990) (quoting *In re Subpoena Duces Tecum*, 738 F.2d 1367, 1371 (D.C. Cir. 1984)). Alabama Rule of Civil Procedure 26(b)(3) establishes the scope of discovery in state court and provides the framework for the work-product doctrine:



a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and *prepared in anticipation of litigation or for trial* by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has *substantial need* of the materials in the preparation of the other party's case and that the party is unable *without undue hardship* to obtain the substantial equivalent of the materials by other means.

Ala. R. Civ. P. 26(b)(3) (emphasis added). This language is indicative of the Rules Committee's recognition of the work-product doctrine first announced in the landmark decision of *Hickman v. Taylor*, 32 U.S. 495 (1947), in which the United States Supreme Court refused to extend the attorney-client privilege "to all of the information assembled by the attorney while preparing for his case" but was "unwilling to make discovery proper in all instances." Committee Comments, Ala. R. Civ. P. 26(b)(3). The Alabama Rules of Civil Procedure are patterned after the

Federal Rules of Civil Procedure, *see, e.g., Ex parte BASF Corp.*, 957 So. 2d 1104 (Ala. 2006), including Federal Rule of Civil Procedure 26(b)(3) which "has been described as an accurate codification of *Hickman*". Committee Comments, Ala. R. Civ. P. 26(b)(3).

The Court in *Hickman* held that Federal Rule of Civil Procedure 33 does not permit discovery of "documents prepared by a party's attorney after the claim has arisen". 329 U.S. at 504. The Court further extended this principle in stating that:

[i]t matters little at this late stage whether [the defendant] fails to answer interrogatories filed under Rule 26 or Rule 33 or whether he refuses to produce the memoranda and statements pursuant to a subpoena under Rule 45 or a court order under Rule 34. The deposition-discovery rules crate integrated

procedural devices. And the basic question at stake it whether any of those devices may be used to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation.

*Hickman*, 329 U.S. at 505.

These fundamental principles have formed the backbone of the work-product doctrine in both federal and state courts alike, including Alabama appellate courts which have recognized and adopted the rule announced in *Hickman* in crafting Alabama's own work-product doctrine. *See, e.g., Ex parte Alabama Power Co.*, 196 So. 2d 702 (Ala. 1967) (recognizing the work-product doctrine announced by *Hickman* and stating that a lawyer's work product is "discoverable only on a substantial showing of good cause"). In *Ex parte Great American Surplus Lines Insurance Company*, 540 So. 2d 1357,

1360 (Ala. 1989), the Alabama Supreme Court recognized *Hickman* as “[t]he seminal case on the work product doctrine” and stated that the “doctrine announced in *Hickman* remains unimpaired and is clear and definite[.]”

The court quoted extensively from *Hickman*, highlighting the policy concerns underlying the work-product doctrine:

Proper preparation of a client’s case demands that he [the lawyer] assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and heedless interference. That is the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client’s interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though

roughly termed by the Circuit Court of Appeals in this case [153 F.2d 212, 223] as the “Work product of the lawyer.” Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

*Ex parte Great Am. Surplus*, 540 So. 2d at 1360 (quoting *Hickman*, 329 U.S. at 511).

The Alabama Supreme Court has announced the elements necessary to sustain an objection under the work-product doctrine as follows: “(1) the materials sought to be protected are documents or tangible things; (2) they were prepared in

anticipation of litigation or for trial; and (3) they were prepared by or for a party or a representative of that party.” *Ex parte Meadowbrook Ins. Group, Inc.*, 2007 WL 44647191 (Ala. Dec. 21, 2007) (quoting *Johnson v. Gmeinder*, 191 F.R.D. 638, 643 (D. Kan. 2000)). As expected, the requisite burden of proof falls squarely on the party objecting to the discovery to establish the aforementioned elements; however, this showing is required “only if the party requesting the discovery first argues that the discovery was not prepared ‘in anticipation of litigation.’” *Ex parte Garrick*, 642 So. 2d 951, 953 (Ala. 1994) (emphasis in original). In *Ex parte Garrick* the Alabama Supreme Court recognized that the party objecting to the discovery bears the burden of proof but announced that “the objecting party is under no obligation to make any evidentiary showing until the parties are at issue as to whether the document sought was, in fact, prepared in anticipation of litigation.” *Ex parte Garrick*, 642 So. 2d at 952-53. The Court then went so far as to cite Alabama Rule of Civil Procedure 11 to support the

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proposition that through their attorney's signature on their response to plaintiff's motion papers, the defendants certified that "if called upon, they were prepared to prove that [the] statement was prepared in anticipation of litigation and was not discoverable." *Id.* at 953. Because the plaintiff had previously moved to compel disclosure of "any statements" and did not then follow up with a specific challenge to the defendants' motion papers, the court held that the trial court prematurely granted plaintiff's motion to compel since the parties were not "at issue" regarding whether the statement was provided "in anticipation of litigation." *Id.*

Once the parties are "at issue," the objecting party "must make an evidentiary showing" that the documents at issue were in fact prepared in anticipation of litigation. *Ex parte Cummings*, 776 So. 2d 771, 774 (Ala. 2000) (quoting *Ex parte State Farm Auto. Ins. Co.*, 761 So. 2d 1000, 1002-03 (Ala. 2000)). Even if the objecting party satisfies his burden, the discovery still may be ordered if the requesting party makes a sufficient showing that he "has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Ala. R. Civ. P. 26(b)(3) (emphasis added).

### "Prepared in Anticipation of Litigation"

No element of the work-product doctrine receives greater attention or is the subject of more courthouse debate than the phrase "prepared in anticipation of litigation." In *Ex parte State Farm Automobile Insurance Co.* (a case involving statements taken by an insurer), the Alabama Supreme Court first recognized that that "exact meaning of the phrase 'prepared in anticipation of litigation' has never been considered by this Court" and addressed the issue by analyzing various federal precedent construing the phrase. 396 So. 2d 1133, 1135 (Ala. 1980).

The court juxtaposed the apparent majority of federal court decisions that "unless the insurer's investigation was investigated at the request of or under the guidance of an attorney, there is a conclusive presumption that the investigative reports were made in the ordinary course of the insurer's business and not in anticipation of litigation or for trial" against the minority

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position generally accepted by state courts that "reports, statements, memoranda, and the like developed by the insurer during its investigation prior to the employment of counsel are prepared in anticipation of litigation and absent a Rule 26(b)(3) showing by the requesting party are not subject to discovery." *Ex parte State Farm*, 386 So. 2d at 1136; compare *Fletcher v. Meaerne*, 20 F.R. Serv. 2d 202 (D. Mass. 1975); *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367 (N.D. Ill. 1972); *Atlanta Coca-Cola Bottling Co v. Transamerica Ins. Co.*, 61 F.R.D. 115 (N.D. Ga. 1972); *Universal Vendors, Inc. v. Candimat Co. of America*, 16 F.R. Serv. 2d 1329 (E.D. Pa. 1972); with *Almaguer v. Chicago, Rock Island & Pacific R.R. Co.*, 55 F.R.D. 147 (D. Neb. 1972); *Smedley v. Travelers Ins. Co.*, 53 F.R.D. 591 (D.N.H. 1971); *Fireman's Fund Ins. Co. v. McAlpine*, 381 A.2d 84 (R.I. 1978).

*State Farm* was a declaratory judgment action filed by State Farm which paralleled a wrongful death action filed against State Farm's insured. In determining that the requested documents were in fact protected by the work-product doctrine, the court cautioned any general application of its holding, stating that just "[b]ecause a claims agent may state conclusively that his investigation was conducted in 'anticipation of litigation' will not necessarily make it so. Each case must sit on its own bottom." *Id.* at 1136-37. The court's analysis focused on the evidence that:

State Farm's claims specialist testified, by affidavit, that from the very outset of his investigation, it was obvious to him that State Farm's insured was free from liability, and that he prepared all of the documents from eventual litigation. Even though State Farm did not turn over its file to its attorney

until after the lawsuit was filed ... the investigation was conducted in anticipation of litigation. From the nature of the case, a death claim, State Farm's agent could have reasonably concluded that its insured would be sued. This was not the type of fender-bender case where a settlement with the insured would likely occur without a lawsuit.

*Id.* at 1136. The case was remanded so that the plaintiff could be given an opportunity to make a showing of "substantial need" and "without undue hardship" pursuant to Rule 26(b)(3). *Id.* at 1137. Thus, the Court created an *ad hoc* test for witness

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statements obtained by insurers which seemingly required affidavit testimony from the involved representative yet precluded complete reliance on such testimony in order to avoid completely self-serving statements controlling the issue. At the same time the court acknowledged that the work-product doctrine could apply to statements obtained before suite was filed and before an attorney was involved.

As recognized by the Alabama Court of Civil Appeals, affidavit testimony by the party obtaining the statement is not always required. In *Fomby v. Popwell*, 695 So. 2d 628 (Ala. Civ. App. 1996), the plaintiff suffered a broken back while riding in a boat operated by the defendant. The Alabama Court of Civil Appeals determined that the defendant's insurer reasonably anticipated a lawsuit was forthcoming based on the fact that

the plaintiff's mother had written the insurer and requested reimbursement of various expenses after the accident, including lost wages, medical expenses, and pain and suffering. *Fomby*, 695 So. 2d at 631-32. All this despite the fact that both the plaintiff and her mother submitted affidavits that they had not immediately intended to file a lawsuit at the time the defendant's insurer obtained the requested statements. *Id.* at 631. The Alabama Court of Civil Appeals stated in unmistakable language, "Rule 26(b)(3) protects documents and other tangible things prepared 'in anticipation of litigation' by a party or a party's representative, and specifically includes a party's insurer as such a representative." *Id.* The Court of Civil Appeals' holding in *Fomby* is consistent with the court's application in *State Farm* of an *ad hoc* test which focuses not on the individual representations by the statement-taking party, but rather analyzes the totality of the circumstances to determine whether the statement was obtained "in anticipation of litigation."

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## Recent Developments Preceding *Ex parte* *Flowers*

In 2004, the Alabama Supreme Court decided cases in consecutive months which further shaped Alabama's work-product doctrine and were extensively relied on more recently by the Court in *Flowers: Ex parte Norfolk Southern Railway Co.* and *Ex parte Nationwide Mutual Fire Insurance Co.*

In *Ex parte Norfolk Southern Railway Co.*, 897 So. 2d 290 (Ala. 2004), the plaintiff's husband was killed when his dump truck collided with a train operated by Norfolk Southern at a grade-crossing. During discovery, plaintiff requested "that the railroads produce any written statements prepared by investigators relating to the collision." *Ex parte Norfolk*, 897 So. 2d at 291. The railroad objected on the grounds that the statements were protected by the work-product doctrine and submitted an affidavit of a Norfolk Southern claims agent who testified that:

his department is a part of the legal department at Norfolk Southern and that he reported to both house counsel and outside counsel. The claims agent stated that he had

investigated the accident made the basis of the action, that at the time he was investigating the accident he knew a death had occurred as a result of the accident, and that he expected that a wrongful-death benefit claim would be asserted on behalf of the estate of the decedent. The claims agent then stated that in anticipation of litigation he took a recorded statement from the conductor of the train, that the purpose of taking the conductor's statement was to assist the attorneys for the railroads, and that when he took the statement he expected that the statement would be confidential.

*Id.* After an *in camera* review, the trial court ordered Norfolk Southern to produce the statement. *Id.* On appeal, plaintiff argued that the statement was obtained in the ordinary course of business and analogized the witness statement to an incident report, held to be discoverable by the Alabama Supreme Court in *Sims v. Knollwood Park Hospital*, 511 So. 2d 154 (Ala. 1987). The court directed

the trial court to set aside its order requiring production of the statement, stating that preparing an incident report because an incident "might result in some legal action" was not the same as in this case, where a "likelihood of litigation exists." *Id.* at 295. In an 8-0 opinion, the court held that a recorded statement taken by a claims agent is work product where "the claims agent testifie[s] that based upon his experience and training as a claims agent, when a fatality or serious injury occurs in a grade crossing accident, there is likely to be litigation regarding the accident." *Id.* at 295. In so holding, the Court stated "[t]his case is governed by *Ex parte State Farm* ... in which this Court quoted with approval from *Almaguer v. Chicago, Rock Island & Pacific R.R.* ... as follows:

Statements taken by a claim agent immediately after an accident are taken in anticipation of litigation. ... The anticipation of the filing of a claim against a railroad, when a railroad employee has been injured or claims to have been injured on the

job, is undeniable, and the expectation of litigation in such circumstances is a reasonable assumption.

*Id.* Furthermore, the court reiterated that "the involvement of an attorney as the person taking the statement is not a prerequisite to the qualification of the statement as work product, because Rule 26(b)(3), Ala. R. Civ. P., extends its protection to activities of a party's 'representative' and expands on that term with illustrative references to a party's 'attorney, consultant, surety, indemnitor, insurer, or agent.'" *Id.*

In *Ex parte Nationwide Mutual Fire Insurance Co.*, 898 So. 2d 720 (Ala. 2004), an 8-1 opinion issued just a month after *Norfolk*, the Alabama Supreme Court again issued a writ of mandamus directing the trial court to vacate its order requiring the insurer to produce a written statement of the insured. The insured defendant was involved in a vehicle accident with the plaintiff. *Ex parte Nationwide*, 898 So. 2d at 722. A month after the accident (but before suit had been filed) an adjuster for the insured's carrier contacted the insured to ascertain the details of the accident. *Id.* About 20 minutes after speaking with the insured, the adjuster also spoke with an adjuster for the plaintiff's carrier who reported that the plaintiff was having knee surgery related to the accident and had suffered approximately \$300 in property damage to her vehicle. *Id.* Four days later, after determining that the claim would be litigated due to the plaintiff's physical injuries, the adjuster took a recorded statement from his insured in furtherance of his investigation of the plaintiff's

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...“it is not necessary that statements be made solely in anticipation of litigation to be treated as privileged work product.”

claim and in order to document the insured’s account of the accident for use in any future litigation. *Id.*

After the plaintiff brought suit against the insured, the plaintiff had a subpoena issued to the insured’s carrier seeking “everything that was in its claims file before [the carrier] was notified that [the plaintiff] had retained counsel.” *Id.* The carrier moved to quash the subpoena on the grounds that the information was protected by the work-product doctrine and supported the motion with an affidavit from the adjuster, stating in part that the adjuster “interviewed [the insured] after concluding that litigation by [the plaintiff] against [the insured] was likely to

occur.” *Id.* at 723. The affidavit also stated that the adjuster’s conclusion “was based upon information indicating to him that [the insured] was free from liability, that [the plaintiff’s] vehicle had sustained little damage, and that [the plaintiff] had allegedly sustained a serious knee injury.” *Id.*

On appeal, the plaintiff argued that the adjuster’s “degree of certainty regarding the likelihood of litigation and his anticipation of eventually handing documents over to counsel [were] completely irrelevant ... because an insurer cannot claim the materials are work product unless it can show that the materials would not have been prepared *but for* the litigation.”

*Id.* (quoting plaintiff’s brief) (emphasis in original). In support of her argument, the plaintiff contended that *Ex parte State Farm, supra*, had been implicitly overruled. *Id.* The Supreme Court of Alabama disagreed, citing the Court’s recent reliance on *Ex parte State Farm* in its holding in *Ex parte Norfolk Southern Railway, supra. Id.* at 724.

Justice Johnstone was the lone dissenter, arguing that the Court’s holding in *Ex parte State Farm* focused on the severity of the death claim in that case and therefore was neither dispositive nor persuasive to the facts at hand, a simple car wreck involving non-serious injuries. *Id.*

### ***Ex parte Flowers***

On March 28, 2008, the Alabama Supreme Court, relying extensively on *Norfolk* and *Nationwide*, issued its 8-1 opinion in *Ex parte Flowers*, 2008 WL 821056 (Ala. Mar. 28, 2008). In *Flowers*, the Court firmly established that “it is not necessary that statements be made solely in anticipation of litigation to be treated as privileged work product.” 2008



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WL 821056 at \*6. Further, the Court held that whether or not witness statements are work-product “when there are several motivating causes, other than anticipated litigation, for preparing them turns on whether it was reasonable ... to assume, in light of circumstances, that litigation could be expected.” *Id.* (quoting *Ex parte Alabama Dep’t of Youth Servs.*, 927 So. 2d 805 (Ala. 2005) (applying the same rationale to investigative reports)).

The plaintiff’s mother in *Flowers* was injured when a “deluge of water from the defective roof of the [defendant’s] restaurant” poured down on the plaintiff causing her to break both her legs and suffer injuries which eventually led to her death. *Id.* at \*1. In the course of discovery the plaintiff requested that the defendant produce various statements taken by the defendant’s insurance agent and subsequently filed a motion to compel after the defendant failed to produce the statements. *Id.* The defendant opposed the plaintiff’s motion with an affidavit from the agent which stated that after receiving a letter from plaintiff’s counsel she “initiated an investigation, which she believed to be in anticipation of litigation.” *Id.* The agent stated that she anticipated that there would be litigation “[b]ased on [her] experience and training as a claims agent, when a fatality or severe injury occurs in a premise liability action and the claimant has retained counsel, there is likely to be litigation regarding the accident.” *Id.*

The trial judge ordered the defendant to produce the statements and the defendant

appealed. The Alabama Supreme Court, recognizing the persuasiveness of *Norfolk* and *Nationwide*, held that the agent’s knowledge that the decedent allegedly suffered severe injuries on the defendant’s premise coupled with the fact that the plaintiff was represented by counsel was “sufficient to establish that [the agent] could have reasonably foreseen that her insured would be sued.” *Id.* at \*6. Although the court pointed out that a claims agent’s conclusive statements in an affidavit that an investigation was “conducted in anticipation of litigation” do not necessarily make it so, such statements predicated on an agent’s experience and information regarding a specific claim can satisfy the burden necessary to sustain an objection on the grounds of the work-product doctrine. The court also recognized that “the possibility of usefulness to opposing counsel is not a factor in the initial determination of whether a statement qualifies as work product.” *Id.* at \*6, n.2 (disputing Chief Justice Cobb’s dissenting opinion).

The fallout from *Flowers* appears to be that witness statements (and investigative reports)—even when not prepared solely in anticipation of litigation—can be treated as work-product when there are factors present which make it reasonable to assume litigation can be expected. Furthermore, in order for the privilege to apply, it is not necessary that an attorney be involved (*State Farm*), that suit have been filed (*State Farm*), or that the accident resulting in litigation result in “serious” injuries (*Nationwide*). ▲▼▲



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