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Read it and weep

Inadvertent disclosure of privileged documents during discovery


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By Miles B. Cooper

The lawyer read in disbelief. The memo, on defendant's letterhead, crucified the defense. It was part of defendant's production responses (and for reasons that will be discussed later, the fact that it was not electronically stored information is significant). The document had also been floating around for years. The defendant gave it to the police during the initial investigation. The police gave it back to the defense team when the defense asked for a copy of the police file. The defense produced it to the plaintiff. And, because it was responsive to a discovery category, the plaintiff produced it back to the defense.

Later in the litigation, a deposition took place. At the deposition, the plaintiff's lawyer used the memo. Shortly afterwards, he received a clawback letter. The defense lawyer stated there were other names on the memo – corporate counsel names – that indicated the memo was privileged.

Ethical duties

A lawyer has an ethical duty when a document is patently privileged. Written on law firm letterhead? Marked with an "Attorney Work Product" stamp? Email the other side to confirm the production was intentional.

There's more subtlety to the document in our example. No law firm letterhead; no "privileged" stamps. In that case, the plaintiff's lawyer is unlikely to be able to identify the privilege from the document itself. But once the defense lawyer claims a privilege, it becomes a problem. The issue of whether the privilege is blown needs to be resolved. The plaintiff's lawyer cannot use the document in earnest until clearing up the issue.

Your move

Let's ignore electronically stored information (ESI) for the moment. A dispute over privilege arises. Who moves the court to resolve the issue? The answer – either side. The party invoking the privilege carries the burden. But in the interim, the other side cannot use the document. Using the document after privilege is invoked might result in ethical issues – the fruit of the poisonous tree. More on that later. Fortunately, the party wishing to use the document can move for a privilege determination to break the logjam.

Special considerations for electronically stored information

California adopted a variant of the federal rules related to disclosure of privileged electronically stored information. Code of Civil Procedure section 2031.285 outlines the clawback procedure particular to electronically stored information. There is a public policy background to this. Sometimes thousands, if not hundreds of thousands or millions, of documents are produced in response to electronically stored information discovery requests. With the gigabyte expansion in discovery responses comes the likelihood that privileged material will slip through the cracks.

As a result, California changed its electronically stored information rules. In essence, a party may issue a clawback request for inadvertently produced electronically stored documents. The burden then shifts. The party receiving the clawback request is then obligated to stop using the electronically stored material and seek a determination of the privilege within 30 days of receiving the notice. This is different than the usual standard. Under the normal privilege standard, the party invoking the privilege typically seeks the protective order.

Fruit of the poisonous tree

If you receive a clawback letter, your best course would be to tread lightly. (Right, Heisenberg?) *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807 is an extreme example. The case is pretty entertaining for a discovery dispute case. It holds that a lawyer who continues to use a document after being informed it is privileged – including purposefully disseminating to all his experts – can be disqualified from the case. That disqualification extends to the experts as well. There is more to the case than this, but I'll leave it to you to read it in your vast quantity of spare time. (All kidding aside, set this down and Google the case – you won't be sorry). The important point: while others can take over the case, you will lose the ability to litigate it. Disqualification and a completely new battery of experts are expensive and time consuming. Better to avoid that path.

Waiver of a joint privilege

An additional complication arises when the privilege involves more than one defendant. Think two corporations. Or a doctor and a hospital, jointly advised, in a medical malpractice case. In that situation, there is a jointly-held privilege. Waiver by one defendant does not directly translate to waiver by the other. What this means is that the doctor can waive privilege over a joint counsel meeting, but if the hospital does not, any memos or testimony about that meeting remain the hospital's privilege. Tricky, but worth being aware of.

Order, order

In most of my columns, the last paragraph talks about the outcome. In this case, I can't provide that just yet. While

I remain cautiously optimistic, the defendant's motion will be heard after deadline. So tune in next month for Pigs in Space (or for you Dancing fans, we'll call it the "results show.")

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