October 24, 2019

Privilege Caselaw Developments

In our third in a series of occasional alerts on the law of privilege, we present three recent federal court cases of potential interest. First, *AdTrader, Inc.* v. *Google LLC* serves as a reminder that privilege may be waived by failing to promptly claw back privileged documents produced inadvertently. Second, *Navarro* v. *Proctor & Gamble Co.* demonstrates the importance of serving a timely and complete privilege log, as well as supporting assertions of privilege with evidence, such as sworn statements, when faced with a motion to compel. Third, *Allianz Life Insurance Co. of North America* v. *Muse*, illustrates some of the complex issues that can be raised if a company designates an attorney as a 30(b)(6) witness.

AdTrader, Inc. v. *Google LLC*, No. 17-cv-07082, 2019 WL 4221586 (N.D. Cal. Sept. 5, 2019)

A recent decision in a contract dispute between AdTrader, Inc. and Google LLC concerns the topic of clawing back privileged documents produced inadvertently. Under the Federal Rules of Evidence, disclosure does not constitute a waiver if (1) the disclosure is inadvertent; (2) the privilege holder took "reasonable steps" to prevent disclosure; and (3) upon disclosure, the privilege holder "promptly took reasonable steps to rectify the error." F.R.E. 502(b). The third factor—whether Google acted "promptly"—is at issue in this case.

The underlying case involves Google's platform for bringing together advertisers and online publishers. Compl. at 5–9, *AdTrader, Inc.* v. *Google LLC*, No. 17-cv-07082 (N.D. Cal. Dec. 13, 2017). AdTrader facilitates the placement of advertisements on Google's platform on behalf of smaller advertisers. *Id.* at 9–12. Advertisers pay Google for ads shown to actual users, but not for automated "clicks" which are deemed to be "invalid traffic." *Id.* at 8. Google issues credits to advertisers affected by invalid traffic. *Id.* at 17–18. AdTrader asserted breach-of-contract and fraud claims alleging that only a small portion of such credits were made. *Id.* at 18–24.

In the instant order, the court considered whether Google had waived privilege over an email it produced in **December 2018** as part of a larger production, concerning its efforts to issue such credits. *AdTrader, Inc.* v. *Google LLC*, No. 17-cv-07082, 2019 WL 4221586, at *1 (N.D. Cal. Sept. 5, 2019). The email, authored by a Google product manager, did not include attorneys and was produced without redactions, but "contain[ed] a reference to legal matters" that "reflect[ed] and paraphrase[d] the advice of counsel." *Id.* at *4. AdTrader cited the email in briefing in **February 2019**, describing it by saying that "Google recognized internally . . . that it faced liability for having charged advertisers for clicks it knew . . . were invalid." Pls.' Proposed Sur-Reply Supp. Opp'n Google's Mot. to Dismiss, *AdTrader, Inc.* v. *Google LLC*, No. 17-cv-07082

(ECF No. 122-1) (N.D. Cal. Feb. 25, 2019). Google took no action in response to AdTrader's use of the email in this briefing. *AdTrader*, 2019 WL 4221586, at *1.[1]

Only later, in **August 2019**, when it prepared the email's author for her deposition, did Google claim that portions of the email reflected legal advice from Google's in-house counsel. *Id.* Google attempted to claw back the email and sought a protective order to enjoin AdTrader from using the privileged portions. *Id.*

The court agreed that material in the email was privileged because it "reflect[ed]" and "paraphrase[d]" legal advice from Google's in-house counsel. *Id.* at *2–3. It had to confront, however, AdTrader's argument that, under federal law, Google waived the privilege by not raising the privilege issue promptly when AdTrader quoted from the email in its filings. *Id.* at *1, *3.

On this question, the court found that Google had waived the privilege. The advisory committee notes for Rule 502 require parties to follow up on "any obvious indications" that protected information has been disclosed. *Id.* According to the court, AdTrader's "quotation from and reliance on" specific parts of the email in February 2019 should have put Google "on notice to at least inquire promptly about whether such a reference, in fact, reflected advice of counsel." *Id.* The court noted that there had been other privilege disputes in the case relating to the credit issue that "highlighted the importance of these types of documents and the fact that many of them contain purportedly privileged information." *Id.* at *4 n.4. The court's imposition of an "obligation to investigate" on Google, *id.*, is consistent with the general principle that the party claiming privilege has the burden of establishing it. *See, e.g.*, *United States* v. *Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009).

As a practice pointer, this case highlights that a privilege review should also embrace communications that do not involve counsel but do appear to reflect legal advice or comment on legal claims; establishing privilege over those claims will often require follow-up with document authors to confirm whether communications with counsel were the basis for their statements regarding legal claims. *AdTrader* also reflects the duty on practitioners to diligently review their opponent's briefs with an eye towards potentially privileged information and to follow up with custodians where the context of communications is ambiguous.

Navarro v. *Proctor & Gamble Co.*, No. 1:17-cv-406, 2019 WL 3997375 (S.D. Ohio Aug. 22, 2019)

From time to time, courts review documents *in camera* to determine whether a party has correctly asserted the attorney-client or work product privilege. In *Navarro*, Proctor & Gamble ("P&G") failed to produce a timely privilege log, and, in the face of a motion to compel, failed to adequately support its privilege

[1] Notably, several months after the February 2019 briefing, there was "a separate dispute about privileged redactions Google had previously made in documents that also discussed the possibility that Google would issue credits or refunds to advertisers," a point which the court noted in concluding that Google did not exercise sufficient diligence. *Id.* at *4 n.4

assertions with evidence, as opposed to conclusory, unsworn assertions. The court thus undertook an *in camera* review of the allegedly privileged documents alongside P&G's newly submitted sworn statements and largely upheld the assertions.

For more than a decade, P&G has obtained limited licenses to reproduce some of Annette Navarro McCall's copyrighted images on its product packaging for specific Olay products. In 2017, Navarro and the holder of the image copyrights (collectively, "Navarro") sued P&G for allegedly reproducing Navarro's copyrighted images beyond the scopes of P&G's limited copyright licenses.

P&G did not produce a privilege log until five months after it was served with discovery. Thereafter, Navarro filed a motion to compel production of all of the documents on the privilege log. The court held that P&G's privilege logs were deficient and that, in response to briefing, P&G had failed to "advance competent evidence in support of its claims of privilege"; it did not, however, order immediate production of the documents. ECF No. 188 at pp. 8–18. Recognizing that "the disclosure of (potentially) privileged information is a serious matter," the court instead ordered P&G to submit the documents for an *in camera* review to determine whether P&G's privilege assertions had merit. *Id.* at pp. 18–19. The court further ordered P&G to submit a revised privilege log following completion of the court's *in camera* review. *Id.* at p. 8.

Pursuant to the court's order, P&G submitted the documents along with sworn affidavits describing the basis for its privilege claims. When the court reviewed P&G's documents in light of its sworn affidavits, it agreed with most of P&G's assertions of privilege.

Communications not including attorneys. First, P&G's sworn affidavit stated that certain communications "'involve legal advice sought from or given by P&G's attorneys/legal team" or were created at the direction of P&G's attorneys. *Navarro*, 2019 WL 3997375, at *5, *6. The court agreed that the communications involved legal advice even when they did not include an attorney because they discussed or reflected an attorney's advice. *Id.*

Attorney work product. Second, P&G's affidavit stated that various documents were attorney work product because they were created in response to an email exchange in which Navarro, according to the court, "threatened an aggressive response to P&G's alleged Copyright infringement," which caused the P&G employee to contact P&G's attorneys for legal assistance. *Id.* at *8 (internal quotation marks omitted). The court agreed the email exchange "triggered a subjective anticipation of litigation that was objectively reasonable," and found that the work product privilege attached to the documents because they were "created in response to Navarro's legal contentions." *Id.*

Mixed communications with in-house counsel involving "primarily" legal advice. Third, the court even upheld P&G's privilege claims over communications between in-house counsel and employees for which its affidavit was insufficient for representing only that each entry in this category "involves legal

advice," rather than "involves primarily legal advice." *Id.* at *6 (emphasis in original). Nonetheless, the court found that all but one of the entries "involve[d] primarily legal advice—on their face." *Id.*

A number of lessons can flow from *Navarro*. Produce your privilege log in a timely manner. Include descriptions that provide sufficient information to substantiate the privilege assertions—including specifying which mixed business and legal communications with in-house counsel "primarily" involve legal advice. In the face of a motion to compel, provide sufficient sworn statements to justify invocation of a privilege. While the court was reluctant to compel production as a sanction for initially insufficient support for privilege assertions, it was "not pleased that it was required to dive into a discovery dispute that could easily have been avoided." *See id.* at *9.

***Allianz Life Insurance Co. of North America* v. *Muse*, No. 17-cv-1361, 2019 WL 3976854 (W.D. Okla. Aug. 22, 2019)**

An opinion from the Western District of Oklahoma gets added to the body of law regarding the circumstance of having an attorney as a 30(b)(6) witness. That court reiterated that parties cannot avoid a properly noticed Rule 30(b)(6) deposition by asserting (a) that an attorney is the only employee with knowledge of the noticed subjects, and (b) that the attorney could not testify without disclosing information protected by the attorney work product doctrine. During the course of argument, the court permitted the party seeking the deposition to refine the scope of the initial request to avoid requests for testimony reflecting legal strategy, and instead to focus on facts, even if they were allegedly only known by an attorney. *Id.* at *2.

The plaintiff in the case, Allianz Life Insurance Company of North America ("Allianz"), sued policyholder Gene Muse for allegedly committing insurance fraud by submitting claims for home care benefits for which he did not qualify.

Defendants sought to take a deposition of an Allianz corporate representative pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Allianz sought a protective order to block the deposition, arguing that the notice sought, among other things, testimony on the "specific evidence [Allianz] will offer to support the allegations" in a number of its claims. *Id.* at *1. Allianz argued that the defendants were "improperly attempting to discover information that is covered by attorney work-product protections" because the notice requested that the corporate representative "identify the evidence [Allianz] will offer in this case," which Allianz characterized as a request for "legal strategy." The court acknowledged that the request for "specific evidence you will offer" suggested a "broader inquiry" than appropriate. *Id.* at *2. However, because the defendants explained that they were "seeking testimony regarding the basis for the factual allegations raised against them, not the specific evidence to be offered at trial," the court rejected Allianz's characterization given that a party has a right to seek testimony regarding "the basis for the claims." *Id.*

Allianz also argued that Allianz's counsel would be the only corporate representative able to answer such questions, which the attorney could not do without disclosing information protected by the work product

rule. *Id.* at *2. As the notice sought testimony regarding facts rather than legal strategy, the court concluded that Allianz's attorney work product objection was "unfounded." *Id.* The court reasoned that Allianz could not block a Rule 30(b)(6) deposition by claiming that the requested information is "known only by its trial counsel." *Id.* Because personal knowledge is not required to be a 30(b)(6) witness, the court reminded Allianz that it "'is under no obligation to choose an attorney' to prepare and to testify as to Allianz' lawsuit." *Id.* at *3 (quoting *Spring Commc'ns Co., L.P.* v. *Theglobe.com, Inc.*, 236 F.R.D. 524, 529 (D. Kan. 2006)).

Allianz highlights the tricky issues that may arise when a company offers up an attorney as a 30(b)(6) witness—a subject we touched on in our Privilege Law Case Developments Alert dated May 21, 2019, discussing ***Barker* v. *Insight Global, LLC*, No. 16-cv-07186, 2019 WL 1890042 (N.D. Cal. Apr. 25, 2019)**. *Allianz* also highlights the importance of framing 30(b)(6) notices as requests for facts rather than legal strategy. The case serves as another reminder that the attorney-client privilege cannot shield factual information in the 30(b)(6) context that would be otherwise protected from disclosure by the attorney-client privilege or work product doctrine.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Robert A. Atkins
+1-212-373-3183
ratkins@paulweiss.com

Craig A. Benson
+1-202-223-7343
cbenson@paulweiss.com

Jessica S. Carey
+1-212-373-3566
jcarey@paulweiss.com

Yahonnes Cleary
+1-212-373-3462
ycleary@paulweiss.com

Udi Grofman
+1-212-373-3918
ugrofman@paulweiss.com

William B. Michael
+1-212-373-3648
wmichael@paulweiss.com

Jane B. O'Brien
+1-202-223-7327
jobrien@paulweiss.com

Jacqueline P. Rubin
+1-212-373-3056
jrubin@paulweiss.com

Liza M. Velazquez
+1-212-373-3096
lvelazquez@paulweiss.com

Associates Benjamin Bergmann, Kirsten Dedrickson, Stefan Geirhofer and Laurence Tai contributed to this Client Memorandum.