Defendants hiding behind privilege in employment litigation

Overcoming bogus privilege objections – one at a time

By Eduard Meleshinsky

It is no secret that the discovery process in an employment case, as in many other contexts, frequently devolves into a long, drawn-out slog – the more so if an employee's claim is clearly meritorious and evidence supporting their strong claim resides exclusively with the employer. Corporate defendants, well aware of the inevitable information asymmetry, deploy an array of tricks to obscure, delay, limit, and thwart the production of documents or information necessary to prove an employee's claim. One of the most insidious obstructionist tactics is bad-faith assertion of the attorney-client privilege (ACP). This article explores how to overcome the common methods by which employers misuse the ACP in the employment litigation context.

As a quick refresher, the ACP is an evidentiary privilege that may be used to prohibit the disclosure of documents or information if such documents or information meet four requirements:

1) a communication[1],
2) made between an attorney and a client,
3) that is made in confidence, and
4) made for the purpose of seeking, obtaining, or delivering legal advice.[2]

The burden is on the party asserting the privilege to establish "the preliminary facts necessary to support its exercise."[3] However, unlike some privileges, which the court may order disclosed for in camera review to prove or disprove the "preliminary facts"[4] of the privilege, a California court or a federal district court sitting in diversity over California state-based claims cannot order the production of documents or information that a party claims is covered by the ACP in order to rule on whether the documents or information are actually covered by the ACP.[5] A federal district court not sitting in diversity, while authorized to compel the production of materials claimed to be covered by the attorney-client privilege under certain circumstances[6], likely will be reluctant to do so for public policy reasons (at least in the first instance).

Accordingly, you have three options to defeat a claim of ACP: (1) show that defendant did not establish the "preliminary facts" of the ACP without reviewing the privileged material, (2) demonstrate that the ACP was waived, and (3) argue that an exception to the assertion of the ACP applies. All three of these strategies rely principally on first obtaining a privilege log from defendant.

Obtaining a privilege log is key

Reviewing a defendant's privilege log is not a glamorous task. But, a dutiful review of the privilege log[7] is critical to getting ultimately the evidence you need to prove your case, and more specifically, to establish the ACP does not apply, any privilege was waived, and/or an exception to the ACP applies.

Neither the CCP[8] nor the FRCP[9] requires a party to produce a privilege log every time a party withholds documents or information on account of privilege. However, both sets of rules require the party claiming the ACP to "provide sufficient factual information for other parties to evaluate the merits of that claim,"[10] and if the ACP is asserted over a broad class of documents, a privilege log becomes the only practical way of satisfying this requirement.

The purpose of the privilege log, ultimately, is to "permit a judicial evaluation of the claim of privilege" without requiring disclosure of the underlying documents. (*Best Products, Inc. v. Superior Court* (2004) 119 Cal.App.4th 1181, 1188-89.) So, what does a judge need to see in the privilege log to determine if the privilege applies, if the privilege has been waived, or an exception applies?

Federal and California state courts typically order the holder of the privilege to provide the following information in a good-faith privilege log[11]:

• Identity and role of senders and recipients of purportedly privileged document/information;
• Description of each document/information withheld or redacted;
• The specific ground for withholding each document/information, e.g., ACP, work-product, constitutional right of privacy, etc.

If defendant fails to produce a privilege log after making a claim of privilege, then you should immediately send a meet and confer letter demanding one. Do not agree to any privilege log that lacks one of the three requirements above. At the same time, do your best to obtain a privilege log of some kind informally. Otherwise, when you bring your motion to compel production of documents, the court likely will only order defendant to produce a privilege log. However, if you already have a deficient privilege log in hand, then you can move to compel further responses, thereby potentially saving on needless motion practice and reducing delay created by defendant's obstructionism.

Moreover, a deficient privilege log, produced after a court order compelling a sufficient privilege log, provides you with grounds to request monetary sanctions, issue sanctions, evidentiary sanctions, or terminating sanctions.[12]

After you obtain an adequate privilege log, determine whether the ACP applies in the first instance.

When elements of ACP are not met

As a threshold matter, only "communications" to an attorney or at the direction of an attorney are covered by the ACP. A party cannot cloak the underlying factual matter of a communication to an attorney in privilege merely because it was transmitted to an attorney after the fact.[13] For example, just because an attorney at some point reviewed a policy governing a witness's job duties does not enable an employer to preclude that witness from testifying as to how he regularly does his job in defendant's employ.[14] Similarly, the time, date, and general nature of legal representation are not protected by the ACP, because such information is not a communication.[15] Examine the privilege log for any similar withheld documents, and also record each instance such information is shielded during deposition on the basis of ACP.

Next, examine the privilege log for the recipients and senders of the purportedly privileged documents and note any communications between non-attorneys that are claimed to be covered by the ACP. Unless there is information provided in the log explaining why a communication between two non-attorneys falls under the ACP, e.g., the non-attorneys are transmitting information between each other at the direction of an attorney, the privilege holder has failed to establish that the communication is covered by the ACP.[16]

Some corporate and government defendants, knowing that courts either cannot or are hesitant to compel disclosure of documents or information purportedly covered by the ACP, copy legal counsel on routine e-mails and communications as a general policy, thereby blurring the line between which communications and documents are for the purpose of seeking, obtaining, or delivering legal advice as opposed to solely for a business purpose, such as negotiating a deal. As one court observed, in a dispute about whether to compel disclosure of communications by an attorney hired to engage in collective bargaining, extending the ACP to routine business communications such as these "unfairly reward[s] those organizations able to hire attorneys as their negotiators because their communications concerning pending negotiations would be protected, whereas the communications of organizations with lay negotiators would not receive protection."[17]

To deal with these types of communications where the purpose of the communication is obscured, both federal and California state courts have adopted a "primary" or "dominant" purpose test to determine whether a communication purportedly covered by the ACP actually satisfies the "preliminary facts" necessary to establish the ACP.[18] For example, if an attorney is hired to perform a task that could be performed by a non-attorney, e.g., handling labor negotiations, and no legal analysis is performed by the attorney, then the ACP is inapplicable.[19]

Accordingly, develop a factual record to show that the attorney – who should be identified in the privilege log – was hired as a negotiator, trustee, etc., rather than someone that provides legal advice. For example, use the descriptions of the withheld documents to argue that the documents sent are not for the purpose of legal representation. Analyze the To:/From: lines to see if the attorney is actually responding to any e-mails, or is merely being copied on emails by non-attorneys. If redacted e-mails were produced, then identify if different versions of the e-mail chain were produced – some versions of the e-mail chain may have less redaction than others, thereby revealing the lack of any legal advice sought or provided. In addition, in depositions, ask about any practice or policy of copying legal counsel as a matter of course on all communications. These are only some of the ways by which you might be able to establish that the dominant purpose of a relationship between two individuals is not attorney-client or protected by the ACP.

Once you have completed your analysis of the privilege log, relevant discovery, and your own investigation file, you must decide whether you are convinced that the relevant documents are covered by the ACP. If it appears that the documents you seek are legitimately covered by the ACP, at least initially, do not despair. The privilege might still have been waived, or an exception might apply.

If the privilege log checks out, consider waiver

Even if the "preliminary facts" establishing the ACP have been met, you should determine if the ACP has been waived for a particular document or communication. A party can waive the ACP in a variety of ways, but the essence of waiver is that a party has explicitly or implicitly consented to the disclosure of the purportedly privileged document or information.[20] Examples include:

• Allowing a non-represented third party to be present at a meeting or to be copied on correspondence between a client and an attorney, unless the third party is reasonably necessary to the representation;[21]
• Copying individuals on purportedly privileged communications who did not need to know the information, including employees within the defendant entity;[22]
• Failing to object timely to a request for privileged documents or information, including at the administrative exhaustion phase;[23]
• Failing to file a motion to strike pleadings if the purportedly privileged information or documents appear in your complaint;[24]
• Putting the contents of the privileged documents at issue in the case;[25] and
• The privilege holder asking about the contents of the privilege documents/information at your client's deposition.[26]

Each of these examples, while not exhaustive of the many ways a party can waive the ACP, are grounds to assert that the purportedly privileged material must be produced even if the "preliminary facts" of the ACP are met.

Does an exception to the ACP apply?

Even if you are satisfied that a withheld or redacted communication satisfies the "preliminary facts" of the ACP, and no waiver argument is apparent from your review of the privilege log, discovery produced to date, and your own investigation of the case, you should still consider whether an exception to the ACP applies. Several exceptions to the ACP bear reviewing for applicability to your particular case, e.g., the crime-fraud exception to the ACP.[27]

Ask for sanctions for privilege abuse

The California Code of Civil Procedure provides a statutory basis for requesting sanctions[28] on account of "misuses of the discovery process,"[29] including "[m]aking, without substantial justification, an unmeritorious objection to discovery." This includes meritless objections based on the purported applicability of the ACP.[30]

Because courts reserve issue and terminating sanctions for repeated discovery misuse and/or disobedience with prior court orders, it is vital to keep pushing for supplementary privilege logs and declarations as to the basis of the ACP. Give the court an adequate record to fashion the stringent remedies you are seeking.

Conclusion

Clients need to be able to speak frankly and openly with their attorneys, but that should not be a blank check for defendants to cover up wrongdoing. With these tips in mind, we encourage you to continue the struggle to realize dignity in the workplace – by overcoming one bogus privilege objection at a time.

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Endnotes:

[1] As discussed below, neither the underlying facts of a communication nor the circumstances surrounding a communication such as time and date fall under the ACP. See *State Farm Fire & Cas. Co. v. Superior Court*, 54 Cal.App.4th 625, 639, 641 (1997), *as modified* (May 1, 1997) (The ACP "only protects disclosure of *communications* between the attorney and the client; it does not protect disclosure of underlying facts which may be referenced within a qualifying communication. … Therefore, to the extent that [defendant's employee] has knowledge about the practices and procedures of [defendant], or the existence of claims manuals and other documents which are normally utilized by [defendant] in the operation of its business, the information is not privileged.")

[2] Fed. R. Evid. 501; Cal. Evid. Code, § 954. The elements for the ACP under federal common law and California state law are essentially the same although the federal rule deconstructs the elements into additional subparts. See *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) ("(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.")

[3] *Costco Wholesale Corp. v. Superior Court*, 47 Cal.4th 725, 733 (2009); *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) (same).

[4] E.g., Cal. Evid. Code, § 915 (allowing for *in camera* review of purportedly confidential information held by a public official, trade secrets, and fact/qualified attorney work product).

[5] *Costco Wholesale Corp. v. Superior Court*, 47 Cal.4th 725, 739 (2009) ("a court may not order disclosure of a communication claimed to be privileged to allow a ruling on the claim of privilege."); *Cf. United States v. Zolin*, 491 U.S. 554, 566-67 (1989) ("The Rule does not provide by its terms that all materials as to which a "clai[m] of privilege" is made must be excluded from consideration. In that critical respect, the language of Rule 104(a) is markedly different from the comparable California evidence rule, which provides that 'the presiding officer may not require disclosure of information *claimed to be privileged* under this division in order to rule on the claim of privilege.'" … There is no reason to read Rule 104(a) as if its text were identical to that of the California rule."); Fed. R. Evid. 501("But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.")

[6] *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1149-50 (9th Cir. 2005).

[7] Alternatively, if opposing counsel fails to produce a privilege log, then immediately send a meet and confer letter pointing out this defect. Recall, you only have forty-five days to move to compel under the CCP. Cal. Civ. Proc. Code, § 2031.310 (c).

[8] Cal. Civ. Proc. Code, § 2031.240(c)(1) ("If an objection is based on a claim of privilege or a claim that the information sought is protected work product, the response shall provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log.")

[9] Fed. R. Civ. Proc. 26(b)(5)(A)(ii) ("When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must…(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.")

[10] Cal. Civ. Proc. Code, § 2031.240(c)(1); Fed. R. Civ. Proc. 26(b)(5)(A)(ii).

[11] See, e.g., *Catalina Island Yacht Club v. Superior Court*, 242 Cal.App.4th 1116, 1130 (2015) ("[A] privilege log typically should provide the identity and capacity of all individuals who authored, sent, or received each allegedly privileged document, the document's date, a brief description of the document and its contents or subject matter sufficient to determine whether the privilege applies, and the precise privilege or protection asserted; *Wells Fargo Bank v. Superior Court*, 22 Cal.4th 201, 205 (2000) (same); *Friends of Hope Valley v. Frederick Co.*, 268 F.R.D. 643, 651-52 (E.D. Cal. 2010) (privilege log must be complete in all columns, "shall reveal the identity and position of all senders/creators and addressees/recipients," must "provide a description of each communication or document withheld with sufficient detail that [party opposing privilege claim] can readily assess the claim of privilege….This is especially important where the communications are among non-attorneys and it is entirely unclear from the present descriptions that these communications were in furtherance of an attorney-client communication or in response to a query by [party asserting privilege's].")

[12] *Doppes v. Bentley Motors, Inc.*, 174 Cal.App.4th 967, 996 (2009) (trial court erred by failing to issue terminating sanctions against defendant for misuse of discovery process); Cal. Civ. Proc. Code, § 2023.030(a)-(d); see also *New Albertsons, Inc. v. Superior Court*, 168 Cal.App.4th 1403, 1428 (2008) (The CCP "authorize[s] an evidence or issue sanction only if a party fails to obey an order compelling a further response or an order compelling an inspection.").

[13] See *State Farm Fire & Cas. Co.*, 54 Cal.App.4th at 639, 641; *Costco Wholesale Corp.*, 47 Ca1.4th at 735 ("[k]nowledge which is not otherwise privileged does not become so merely by being communicated to an attorney.") (*quoting Greyhound Corp. v. Superior Court*, 56 Cal.2d 355, 397 (1961)); *Coito v. Superior Court* 54 Cal. 4th 480, 494 (2012) (a statement independently prepared by a witness does not become protected work product simply upon its transmission to an attorney); *See Upjohn Co. v. U.S.*, 449 U.S. 383, 395-96 (1981) (ACP only protects communications from client to attorney, and not disclosure of underlying facts by those who communicated with the attorney)

[14] *State Farm Fire & Cas. Co.*, 54 Cal.App.4th at 639, 641; *Ins. Co. of N. Am. v. Superior Court*, 108 Cal.App.3d 758, 770 (1980) (distinguishing between "legal advice (which is confidential) and discussion of corporate policy (which is not)").

[15] *State Farm Fire & Cas. Co.*, 54 Cal. App. 4th at 639, 641; *Mitchell v. Superior Court*, 37 Cal.3d 591, 601 (1984) (date upon which attorney first met client is not privileged).

[16] See, e.g., *Friends of Hope Valley v. Frederick Co.*, 268 F.R.D. 643, 651 (E.D. Cal. 2010) (ordering augmented privilege log with possibility of order compelling disclosure of document because privilege log provided "very little information that would permit the court or [opposing party] to assess why these communications among non-attorneys is subject to the attorney-client privilege or work product protection" and rejecting explanation "that all of these non-attorney communications 'relate directly to forming a response to a query provided by an attorney or precede and relate to forming a communication to an attorney" without more detail).

[17] *Montebello Rose Co. v. Agric. Labor Relations Bd.*, 119 Cal.App.3d 1, 32 (1981).

[18] *Clark v. Superior Court*, 196 Cal.App.4th 37, 51 (2011) ("[T]o determine whether a communication is privileged, the focus of the inquiry is the dominant purpose of the relationship between the parties to the communication. Under that approach, when the party claiming the privilege shows the dominant purpose of the relationship between the parties to the communication was one of attorney-client, the communication is protected by the privilege.")

[19] *Montebello Rose Co.*, 119 Cal.App.3d at 32; *In re Perkins' Estate*, 195 Cal. 699, 710 (1925); *Cf. Aetna Cas. & Sur. Co. v. Superior Court*, 153 Cal.App.3d 467, 475-76 (1984); *Zurich Am. Ins. Co. v. Superior Court*, 155 Cal.App.4th 1485, 1504 (2007) ("It is established that otherwise routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is 'copied in' on correspondence or memoranda.").

[20] Cal. Evid. Code, § 912(a) (The ACP is "waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has legal standing and the opportunity to claim the privilege."); Fed. R. Evid. 502

[21] Cal. Evid. Code, § 952 (ACP not waived by presence of third party only to extent "disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted"); *Cohen v. Trump*, No. 13-CV-2519-GPC WVG, 2015 WL 3617124, at *13 (S.D. Cal. June 9, 2015) ("Where the presence of a third person is indispensable in order for the communication to be made to the attorney, the policy of the privilege will protect the client, that is, his presence is required in order to secure the client's subjective freedom of consultation. When the presence is merely for convenience, the privilege is removed from whatever communications are made. Communications made by the client to such a third party in the presence of the attorney are not within the privilege.") (internal quotation marks and citation omitted).

[22] See, e.g., *Zurich Am. Ins. Co.*, 155 Cal.App.4th at 1503 ("If it is determined that the document reflects legal advice or opinions and is thus privileged, the court must determine whether Zurich waived the privilege by distributing the advice within the corporation.")

[23] See Cal. Evid. Code, § 912(a) (consent to disclosure of privileged material by not claiming ACP includes "any proceeding in which the holder has legal standing and the opportunity to claim the privilege," not solely litigation).

[24] This idea was recently suggested by a superior court judge as an additional basis for waiver in a case where our client blew the whistle while the governmental entity's counsel was in the room. The complaint filed to initiate the lawsuit alleged the substance of the protected statements from the critical meeting. Defense counsel tried to argue that all statements during the meeting, including our client's own protected disclosures, could not be used to support his claim because they were covered by the ACP. The court was not persuaded, in part because of defense counsel's failure to immediately file a motion to strike the purportedly privileged statements in the written complaint.

[25] See, e.g., *S. Cal. Gas Co. v. Pub. Utilities Com.*, 50 Cal.3d 31, 40 (1990) ("[T]he person or entity seeking to discover privileged information can show waiver by demonstrating that the client has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action."); *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal.App.4th 110, 128 (1997) ("If a defendant employer hopes to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation, then it will have put the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy. The defendant cannot have it both ways. If it chooses this course, it does so with the understanding that the attorney-client privilege and the work product doctrine are thereby waived."); *Maciel v. City of Los Angeles*, 569 F. Supp. 2d 1038, 1053 (C.D. Cal. 2008) ("Based on Defendants' refusal to waive the attorney client privilege, Defendants were prohibited from asserting any advice of counsel defense."); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) ("The privilege which protects attorney-client communications may not be used both as a sword and a shield").

[26] See Cal. Code Civ. Proc., § 2025.460(a) ("The protection of information from discovery on the ground that it is privileged . . . is waived unless a specific objection to its disclosure is timely made during deposition."). See also *Scottsdale Insurance Co. v. Superior Court,* 59 Cal.App.4th 263, 275-76 (1997) (attorney, in declining to assert the privilege in the first instance, "made tactical choices which did not yield the results he expected," and could not later seek relief from that waiver). See generally *People v. Haskett*, 52 Cal.3d 210 (1990), cert. denied 112 S.Ct. 83 (psychotherapist-patient privilege was waived when defendant called psychiatrist to testify and failed to object to any of his testimony); *In re Rindlisbacher*, 225 B.R. 180 (9th Cir. BAP 1998) (under California law, where client is present at proceeding, consults with counsel, and then testifies about confidential information, attorney-client privilege ordinarily is waived).

[27] Cal. Evid. Code, §§ 956-962; *see U.S. v. Zolin*, 491 U.S. 554, 563 (1989) (recognizing crime-fraud exception to the ACP).

[28] Cal. Civ. Proc. Code, § 2023.030.

[29] Cal. Civ. Proc. Code, § 2023.010(e).

[30] See, e.g., *Lopez v. Watchtower Bible & Tract Soc'y of New York, Inc.*, 246 Cal.App.4th 566 (2016) (approving sanction short of termination in part because of failure to produce privilege log after assertion of ACP).