JUNE 2016

An Effective Defense

Starts With Understanding Privilege and the Scope of Discovery

BY DAVID R. JOHANSON, *Senior Partner*

MICHAEL W. THICKSTEN, *Associate*

HAWKINS PARNELL
THACKSTON & YOUNG LLP

An understanding of the devices of discovery is vital to the development of a tenable position in modern civil litigation practice. Evaluating and properly contesting an opponent's claims of privilege results in greater access to information and improved odds of a favorable outcome. The process requires thorough analysis by an attorney that understands the permissible scope of discovery under the Federal Rules of Civil Procedure.

On May 27, 2016, David R. Johanson and his team (Douglas A. Rubel and Rebecca D. Takacs) secured a favorable ruling on a motion to compel discovery against the Secretary of Labor in an Employee Stock Ownership Plan and Trust ("ESOP") case pending in the United States District Court for the Eastern District of Wisconsin. *Thomas E. Perez v. Veronica Mueller et al.*, Case No. 2:13-cv-01302-RTR – Dkt. 95.

In this duty of prudence and loyalty and ESOP valuation case, the Secretary of Labor filed a lawsuit on behalf of the participants of an ESOP, alleging that the individual and trust Defendants sold improperly valued company stock to a company-sponsored ESOP in violation of the "adequate consideration" provisions of Section 3(18)(B) of the Employee Retirement Income Security Act of 1974, amended ("ERISA"). Hawkins Parnell Thackston & Young LLP ("HPTY") attorneys, representing the individual and trustee Defendant stock sellers, commenced discovery and propounded requests for production of documents directed to the Secretary of Labor. In response, the Secretary of Labor produced documents along with a privilege log asserting thousands of documents were protected from disclosure under a slew of privileges.

HPTY challenged the asserted privileges by the Secretary of Labor. The Secretary of Labor responded with providing additional documents (a portion in redacted form) and inappropriately maintained its assertions of a number of privileges in a revised privilege log.

The Federal Rules of Civil Procedure ("Rule") 26 entitles parties to civil litigation to obtain from other parties any relevant discovery not otherwise protected by privilege. In the instant case, the Secretary of Labor inappropriately asserted the claimed privileges of attorney-client privilege, work product privilege, governmental deliberative process privilege, and governmental investigative file privilege. Rule 37 permits a party to request the court in which the lawsuit is pending to compel discovery when an opposing party fails to disclose discovery, here, in response to requests for production of documents under Rule 34.

Courts look unfavorably on the narrowing of the scope of discovery and may obtain discovery of relevant nonprivileged information. During the discovery phase of litigation, courts take a broad interpretation of the relevancy of discovery if it is relevant or reasonably calculated to lead to the discovery of admissible evidence.[1] Here, the Secretary of Labor conceded that the withheld documents were relevant but inadequately asserted privilege. The party asserting a privilege has the burden of establishing its elements and a claim of privilege cannot be a general claim. The Secretary of Labor provided two privilege logs that broadly

[1] *MQS Inspection v. Bielecki,* 963 F. Supp. 771, 775 (E.D. Wis. 1995).

claimed privilege without adequate description to establish the privilege elements on a document-by-document basis.

Judge Randa of the Eastern District of Wisconsin noted that Rule 26(b)(1) "was amended in 2015 to 'restore[] the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.' Advisory Committee Notes, 2015 Amendment." *Thomas E. Perez v. Veronica Mueller et al.*, Case No. 2:13-cv-01302-RTR – Dkt. 95, page two.

Judge Randa also noted: "At the outset, the Secretary accuses the defendants of engaging in a fishing expedition. However, the proportionality factors set forth in Rule 26(b)(1) easily tilt in favor of disclosure. The issues in this litigation are important from a public policy perspective, or at least they should be, lest the Secretary be engaging in years of unnecessary litigation at taxpayer expense. Indeed, the transaction at issue was for more than $13 million dollars. Moreover, the federal government has unlimited resources, while the Mueller Defendants are obviously financing their own defense." *Id.*

When a party withholds information otherwise discoverable and asserts a privilege or work product immunity, the party will describe the communications without divulging the protected information in a privilege log. A privilege log should contain a summary of the communication, the date prepared, the author and recipient of the document, the purpose for the document, the privilege(s) asserted, and how the elements of the claimed privileges are satisfied.

Attorney-Client Privilege

The attorney-client privilege is indispensable to an attorney's function as advocate because proper legal advice necessitates a client's full disclosure. Discovery disputes stem from the scope of the privilege not whether the attorney-client privilege should exist. The U.S. Court of Appeals for the Seventh Circuit defines attorney-client privilege as follows:

Where legal advice of any kind is sought, (2) from a professional legal advisor 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) except the protection be waived.[2]

Under specific circumstances, the attorney-client privilege shields conversations between prosecutors and agencies within the government acting as clients. Asserting attorney-client privilege to conversations within the government blurs the line whether communications were made in confidence. Each document with a claimed attorney-client privilege must be evaluated to determine whether the confidential information was disseminated to only those authorized to speak or act for the organization in relation to the subject matter. The burdensome task of evaluating communications for disclosure of confidential information and waiver of privilege should be entrusted to experienced counsel with

[2] *United States v. Evans,* 113 F.3d 1457, 1461 (7th Cir. 1997) (citing 8 John Henry Wigmore, Evidence in Trials at Common [4] Law § 2292 (John T. McNaughton rev. 1961).

knowledge of the various forms of privilege. Here, the Secretary of Labor's privilege log asserted that virtually every document revealed attorney-client conversations without providing the senders or recipients of the e-mails.

Work Product Doctrine

In addition to the attorney-client privilege, the work product privilege protects the mental impressions or opinions contained on: (1) a document or tangible things; (2) prepared in anticipation of litigation; and (3) prepared by or for a party, or by or for his representative.[3] An investigation by a regulatory entity is not sufficient to invoke the protection of the work product doctrine.

Executive Privilege

Both the attorney-client privilege and work product doctrine are used in various types of litigation but government agencies and executive branch entities may invoke a more exotic form of privilege recognized by the courts — executive privilege. The governmental investigative file and deliberative process privileges are under the broader canopy of executive privilege. While executive privilege is an extraordinary tool at the government's disposal, the privilege is not absolute and a court will balance the interests of prejudice with the need for discovery.

Deliberative Process Privilege

The deliberative process privilege safeguards deliberations on the policy-making process of governmental agencies. Communications reflecting the decision-making process may be protected if made prior to the adoption of agency policy, and they provide opinions on legal or policy matters for formulation of an official position. In the instant case, HPTY attorneys notified the Secretary of Labor that the deliberative process privilege was asserted indiscriminately across thousands of pages of documents. In the absence of sufficient identification of the documents and explanation as to what policies were adopted, the Secretary of Labor removed a number of the claims.

Investigative File Privilege

The investigative file privilege is a qualified common law privilege available to law enforcement agencies in on-going criminal investigations. The primary purpose of the investigative privilege is to prevent the premature disclosure of information as opposed to preventing disclosure of materials upon completion of an investigation. HPTY argued that the Secretary of Labor failed to demonstrate a nexus between the asserted privileges and an on-going investigation at the U.S. Department of Labor or Employee Benefits Security Administration ("EBSA.") The documents were created as part of an EBSA investigation that was closed prior to the lawsuit.

HPTY attempted to resolve the issues with inappropriate assertions of various privileges in a conference with the Secretary of Labor. After a consensus was not reached, HPTY moved to compel production of discovery based on failure to adequately claim privilege. Ultimately, the Court ruled in favor of HPTY's motion to compel, finding that the Secretary of Labor failed to establish the elements of the claimed privileges and entered an order requiring the Secretary to produce previously withheld and redacted documents.

[3] *Menasha Corp. v. United States DOJ,* 707 F.3d 846, 847 (7th Cir. 2013)

Judge Randa described his ruling against the Secretary of Labor in the following words at the end of his May 27, 2016, Decision and Order:

"The Court agrees with the defendants that the Secretary's invocation of privilege is improper. 'The claim of privilege cannot be a blanket claim; it 'must be made and sustained on a question-by-question or document-by-document basis.'' *United States v. White,* 950 F.2d 426, 430 (7th Cir. 1991) (citing *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983)). Here, for example, the Secretary's revised privilege log states that 1,163 pages of emails from SOL to CRO contain 'thoughts and opinions of the agency in preparation of litigation' and 'reveals content of attorney-client conversation.' The log states the same regarding 663 pages of emails from SOL to CRO EBSA and 356 pages of internal CRO EBSA emails. These assertions makes (sic) it impossible to evaluate the claims of privilege because there is no way of knowing how many emails are included within those pages, much less the nature of each separate communication. Ultimately, it is the Secretary's burden to establish the elements of the asserted privileges. *White*, 950 F.2d at 430. He failed in that regard." *Thomas E. Perez v. Veronica Mueller et al.*, Case No. 2:13-cv-01302-RTR – Dkt. 95, page three.

Not satisfied with this result, the Secretary of Labor filed a Motion for Clarification or Reconsideration of the Court's May 27, 2016, Decision and Order on June 10, 2016. *Thomas E. Perez v. Veronica Mueller et al.,* Case No. 2:13-cv-01302-RTR – Dkt. 100. The individual and trustee Defendants will oppose the Secretary of Labor's Motion.

David R. Johanson, *Senior Partner (Napa, Los Angeles, San Francisco, New York)*

djohanson@hptylaw.com | 707.299.2470

David R. Johanson is Partner-in-Charge of the Napa office and also has offices in San Francisco, Los Angeles, and New York to cover his national practice. David assists clients across the country in general corporate matters and in employee ownership, benefit, ERISA, and related business matters, with an emphasis on executive compensation, equity incentive plans, non-qualified deferred compensation, employee stock ownership plans (ESOPs), ESOP transactions, mergers and acquisitions (and related tax planning), and business succession and estate planning. David has served as outside general counsel to numerous corporate clients over the past 28 years. He also frequently appears on behalf of clients in business and employment-oriented defense litigation in state and federal courts throughout the country, before regulatory agencies (e.g., U.S. Department of Labor, California Labor Commissioner, and the U.S. Equal Employment Opportunity Commission), in tax controversies before the Internal Revenue Service and comparable state regulatory agencies, and in dispute resolutions of various kinds. David represents corporations in shareholder and non-competition disputes.

David has defended ERISA fiduciaries, plan sponsors, selling shareholders, and investment advisers in ERISA litigation matters involving ESOPs and business transactions in federal and state courts throughout the country in a wide range of controversies covering ERISA fiduciary responsibilities, ESOP valuation disputes, disclosure obligations, investment issues, and tax matters. He has extensive experience in negotiating ESOP, ERISA, and other issues with government regulatory agencies and in representing ERISA fiduciaries in litigation.

Michael W. Thickisten, *Associate (Dallas)*

mthicksten@hptylaw.com | 214.780.5177

Michael advises private and publicly-traded corporations in corporate governance, employee benefits, ownership and related business matters involving the Employee Retirement Income Security Act (ERISA), employee stock ownership plans (ESOPs), tax planning, and business succession. Additionally, he assists in mergers and acquisitions, securities, and related tax issues. Michael is involved in all phases of litigation from inception through trial and appeal. He defends employers, fiduciaries, shareholders, and plan administrators in federal and state courts involving breach of contracts, trade secrets, non-compete agreements, fiduciary responsibilities, ESOP valuation disputes, and disclosure obligations.

ABOUT HAWKINS PARNELL THACKSTON & YOUNG LLP

Hawkins Parnell Thackston & Young LLP is a national litigation firm with more than 150 lawyers in nine offices located in Atlanta, Austin, Charleston, Dallas, Los Angeles, Napa, New York, St. Louis and San Francisco. As national leaders in their fields of expertise, our Employee Benefits, M&A, Tax & ERISA group brings extraordinary depth in perspective when advising clients in connection with retirement plans, equity incentives, executive compensation, shareholder issues, fiduciaries, mergers and acquisitions, and employment and benefits litigation throughout the country.