



What Do You Mean That's Discoverable?

Developments in Discovery Obligations and Reminders on Privilege

David Gouzoules, Procopio
Andrew MacFarlane, Psych Plus

Discovery: In-House Counsel's Nightmare

- Time-consuming
- Delay
- ESI
- Expensive
- Privilege issues
- Verifying discovery responses

Goals Today:

- 1. Develop Strategies to Minimize the Cost of Compliance with Code of Civil Procedure § 2016.090
- 2. Refresh on key aspects of attorney-client privilege for in-house counsel who wear multiple hats

California State Court - Initial Disclosures

- Code of Civil Procedure § 2016.090 – effective 1/1/2024
- Modeled after FRCP
- Previous regime in CA – parties could opt in to initial disclosures
 - Now mandatory – at least until January 1, 2027

California State Court - Initial Disclosures

- High Level Summary:
- Within 60 days, each party shall provide:
 - Witness information
 - Copy or description of documents
 - Contracts or insurance policies re: insurance/indemnity
- Impeachment excluded – but be careful

Initial Disclosures – Potential Issues

- Breadth/Scope – “that the disclosing party may use to support its claims or defenses, or that is **relevant to the subject matter of the action** or the order on any motion made in that action...”
- Indemnification contracts – confidentiality, deeper pocket
- Must disclose based on information “reasonably available”

Initial Disclosures – Potential Issues

- Early discovery costs
- Enforcement – by the court or party on motion to compel
 - Motion in Limine
- Verification required – sort of

Initial Disclosures – Gray Area re: Trigger

- Subsection (a)(1) – “Within 60 days of a demand by any party”
- BUT – court may enforce CCP 2016.090 on its own.
- Expect active judges in busy jurisdictions to raise this at CMCs

Initial Disclosures - Strategies for Complying

- Subsection (a) – “The following shall apply in a civil action ***unless modified by all parties to the action***” – so stipulate!
- Subsection (a)(1)(B) – description by category and location
 - High-level, but sufficient to comply with obligations
- Redactions to contracts with indemnification provisions
 - “only those provisions of an agreement that are material...are required to be included....”

Initial Disclosures – In Practice

- Underutilized, but not surprising.
- Audience experience?
- Sunset in 2027 – legislature likely to solicit feedback from bar

Attorney Client Privilege/Work Product

- In-house counsel– is every email you send/receive within the company privileged?
 - **Not necessarily**
- Is a communication not privileged if it doesn't involve an in-house attorney?
 - **Not necessarily**

Privilege/WP – When Business/Non-Legal is at Issue

- *Southern California Edison Company v. Superior Court*, 102 Cal.App.5th 573 (2024)
 - Subrogation lawsuit arising out of Creek fire
 - Motion to compel production of 108 internal documents, including claims department emails on which no attorney was copied, and emails between claims department employees and other non-legal employees.

Southern California Edison

- Trial court ruling – granted motion to compel. The court found that “none of the documents was sent to or from SCE Counsel” and that none of the documents involved opinions or impressions of any attorney.
- Trial court found that the documents “were related to legal compliance, which it characterized as a business purpose” and which was the main purpose, rather than anticipated litigation

Court of Appeal to the Rescue

- SCE filed writ petition
- Notwithstanding the exacting “abuse of discretion” standard, the Court of Appeal reversed, holding that there was “substantial evidence” that the documents were prepared “as part of an attorney led internal investigation.”
- SCE’s in-house counsel had “directed Claims employees to obtain information from employees” in other departments, which thus protected those subsequent communications

Court of Appeal to the Rescue

- The Court likened the claims department employees' communications to witness statements, and held they were entitled to qualified attorney work product protection.
- As for the purpose of the communications – “Counsel’s involvement here to ensure corporate compliance with legal reporting requirements was a legal role, not a non-legal one....”

Court of Appeal to the Rescue

- “California companies are faced with myriad statutory and regulatory reporting and disclosure obligations under both federal and state law. To comply with those obligations and avoid unnecessary liability they often seek advice from attorneys....A company’s need to comply with a public reporting requirement does not eviscerate work product protection; if it did, much of what a lawyer does” would lose work product protection.

Court of Appeal to the Rescue

- “California companies are faced with myriad statutory and regulatory reporting and disclosure obligations under both federal and state law. To comply with those obligations and avoid unnecessary liability they often seek advice from attorneys....A company’s need to comply with a public reporting requirement does not eviscerate work product protection; if it did, much of what a lawyer does” would lose work product protection.

Southern California Edison

- Punted on the harder question – whether attorney client privilege applied.
- “We do not express any opinion on whether the court abused its discretion in finding the documents were not protected by the attorney-client privilege.”

Legal vs. Business/Policy Advice

- California courts distinguish between “legal advice, which is privileged, and discussion of corporate policy, which is not.” *Zurich American Ins. Co. v. Superior Court*, 155 Cal.App.4th 1485 (2007)
 - Discussion of “what business policies the corporations should pursue in light of counsel’s advice” would not be privileged.
- “Attorney-client privilege is inapplicable where the attorney...gives business advice or otherwise acts as a business agent.”

Wearing Many Hats – Keep Them Separate

- “Straw’s actions as CTI legal counsel were so intertwined with activities which were wholly business or commercial that a clean distinction between the two roles became impossible to make. This merging of business and legal activities jeopardizes the assertion of the attorney-client privilege, since the attorney and the client have in effect become indistinguishable.” *Chicago Title Ins. Co. v. Superior Court*, 174 Cal.App.3d 1142 (1985)

Privilege – But Corporate Counsel was Copied!

- Mere presence of a in-house counsel on an email thread does not carry the day for attorney-client privilege.
- “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.” *Zurich*, 155 Cal.App.4th at 1502.

Privilege – But Corporate Counsel was Copied!

- Prominent tech company created “Communicate with Care” program.
- Employees were trained and directed to add an attorney, privilege label, and a generic request for advice to shield sensitive business communications, even when no legal advice was actually being sought.
- In-house counsel routinely did not even respond.
- Judge referred to this practice as “eyebrow raising”

Privilege – Hypothetical #1

- Courtney, VP of Mergers and Acquisitions for Sandwich Inc., emails Gwen, General Counsel. Subject line: “Attorney Client Privileged”
 - “Gwen, what do you think about Between the Bread as a target? Their sourdough is great and the EBITDA is even tastier.”
 - Gwen writes back: “Courtney, their CEO is retiring soon and the board is a mess – let’s stay away from them for now.”
- Privileged?

Privilege – Hypothetical #2

- Ciara in accounting sees some possible mistakes in the books and is worried past SEC filings might be incorrect. Ciara emails Sabrina, corporate counsel:
 - “Sabs – I know we just went public last year and I’m a little worried about the reporting obligations as I’m looking at the Q4 numbers. What should we do about the write offs?”
- Privileged? WP?

Suggestions and Reminders

- Pick up the Phone!
- Be clear in your written communications to officers and employees when you are giving or seeking legal advice, as opposed to business.
- If corresponding/writing regarding an investigation or litigation, reference it clearly, and weave in work product.

THANK YOU!

- Questions?
- Comments?
- Concerns?

WWW.ANDERZTOONS.COM



"On advice of counsel I'm going to shut the hell up before I make things worse."