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ARE THE KEY PROOFS YOU NEED HIDDEN BY CLAIMS OF PRIVILEGE?

Ideas to Help Plaintiff's Counsel Pull Back the Curtain of the Privilege Claim

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Those of us representing employees know that getting the evidence we need from the employer is key to proving our case. We also know that obtaining the evidence is often easier said than done. The evidence to prove an employer's intent is almost always in the hands of the employer. For these reasons, discovery in employment cases *should* be particularly broad.

> In employment discrimination cases, courts have consistently held that discovery is even broader than that enjoyed in regular civil litigation, and that the imposition of unnecessary limitations on discovery is especially to be avoided in Title VII cases, because the nature of the proofs required to demonstrate unlawful discrimination may be indirect or circumstantial.

Smith v. Bayer Material Science, LLC, 2013 WL 3153467 at *4 (N.D. W. Va. June 19, 2013)(quotations and citations omitted). Still, when the theory of liberal discovery meets the reality of contentious litigation, obtaining the discovery you need is not so simple.

Getting behind a claim of privilege can be especially challenging, and especially important. The documents that have been "cc'd" to in house counsel may be the most interesting potential evidence in the case, but obtaining them often requires persistence and planning.

This paper will discuss some of the key practice tips for the employee's lawyer, and recent cases that will help frame your arguments.[1]

1. The Privilege Log: Demand the Detail You Need

An employer that withholds documents on a claim of privilege is required to provide a privilege log that will allow the employee's attorney to evaluate claims of privilege. Fed. R. Civ. P. 26(b)(5)(A) requires that the description in the privilege log must "describe the nature of the documents . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."

Even if there is no doubt that the privilege log is required, the reality is that it is very common to receive a written response to a request for production that includes either boilerplate or specific objections based on privilege, but without the required privilege log. It is easy for the busy plaintiff's practitioner to jump right in to reviewing the documents that *were* produced, and to forget to find out about what was withheld based on the claim of privilege.

- Practice Tip: Make it a habit to check every document production. If there is an objection based on privilege (and there almost certainly will be), and the production is not accompanied by a privilege log (as it often will not be), demand that the privilege log be provided right away.

Once the privilege log is in hand, look at it carefully and critically. You are entitled to the detail needed to evaluate the claim of privilege. For every document, the log should (a) identify the name of the author of the document, and that person's role in the organization; (b) identify every person who received the document, and the role of that person in the organization; (c) provide the date the document was drafted and the date of any dissemination; (d) provide a description of the purpose and content of the document sufficient to evaluate the claim of privilege; (e) provide an equally detailed description of any attachment to the document; and (f) identify documents that contain or incorporate *nonprivileged* underlying facts that are discoverable. *See, e.g.*, *Graff v. Haverhill North Coke Company*, 89 Fed. R. Evid. Serv. 1165, 2012 WL 5495514 at *1 (S. D. Ohio Nov. 13, 2012).

Watch for red flags in the privilege log. A long list of cc's may mean that the communication was disseminated in a way that will waive the privilege (see section 5 below). An attachment or a forward may indicate that a non-privileged document was later forwarded to counsel. A vague description ("communication seeking legal advice") will require a demand for more detail. A privilege log in which the same description is

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[1] This paper assumes a basic understanding of the law of attorney-client privilege and work product. For a thorough treatment of these topics, I highly recommend Epstein, The Attorney-Client Privilege and the Work-Product Doctrine, published by the ABA, Section of Litigation.

[2] The "defense comprises two necessary elements: (1) that the employer exercised reasonable care to prevent and promptly correct harassing behavior and (2) that the plaintiff employee unreasonably failed to

repeated for numerous documents may raise a question of whether the description is actually accurate or meaningful. Documents created before litigation began should not be subject to the work product privilege (see section 6 below). Documents created before litigation began for the purpose of an investigation may not be privileged (see section 2 below).

- Practice Tip: Take a careful look at the privilege log, and see whether you need to demand greater detail or more complete information to evaluate the privilege claims. Take note of matters that you will want to explore in depositions or requests for admissions (such as the identity and role of each recipient of a communication).

2. Waiver of Privilege: The Faragher-Ellerth Defense

Nearly every defendant in a sexual harassment case raises a defense under *Faragher-Ellerth*.[2] It is important for the employee's counsel to nail down the factual basis of this defense as early in the litigation as possible. (Consider an *Iqbal/Twombly* motion, which some courts have held require an affirmative defense to be supported by a pleading of plausible facts.)

The existence of the *Faragher-Ellerth* defense may open the door to discovery of all communications that relate to the validity of the defense. To the extent that the defense is based on an investigation in which counsel participated, the privilege is certainly waived. Having raised the defense, the employer should not be allowed to then shield the communications with counsel from discovery.

This issue was addressed at length by the court in the much-publicized litigation involving Paula Deen. *Jackson v. Deen*, 2013 WL 2027398 (S.D. Ga. April 3, 2013). In the *Jackson v. Deen* case, the defendant pled a defense under *Faragher/Ellerth.* The plaintiff then sought to subpoena the records of the defendants' outside counsel. Defendants objected, stating that they had only *preserved* the right to raise the defense, but that they did not intend to present outside counsel as a witness or to rely on any of his documents to defend their case. *Id.* at *6. The court agreed with plaintiff that once the defendant opened the door with this defense, the plaintiff should not be limited to the evidence cherry picked by the employer. *Id.* at *7. "Where an employer fuses his attorney's role as a legal adviser with that of an investigator/monitor, then the attorney-client privilege and work product privileges are waived as to any evidence relevant to that attorney's investigation and monitoring of compliance with the company's *Ellerth-Farragher* procedures (including documents counsel generated, and his personal recollection testimony)." *Id.* at *7.

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[2] The "defense comprises two necessary elements: (1) that the employer exercised reasonable care to prevent and promptly correct harassing behavior and (2) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer, or to otherwise avoid harm." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), *interpreting Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

Thus, the employer may not use the fact of an investigation as a defense without opening the door to full discovery of the investigation, including the attorneys' files and communications between the attorney and client. *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 1094 – 97 (D.N.J. 1996); *see also Payton v. New Jersey Turnpike Authority*, 292 N.J. Super. 36 (App. Div. 1996).

Moreover, once a party has disclosed attorney advice to support a defense such as *Farragher-Ellerth*, the party may then be required to also disclose communications from other attorneys on the same subject. *Gingerich v. Sandia Corp.*, 165 P.3d 1135, 1142 (New Mexico Ct. App. 2007). The defendant who raises an investigation as a defense also waives any work-product doctrine protection that might otherwise attach to its attorneys' notes. *See also*, *In re Intel Corp. Microprocesor Antitrust Litigation*, 258 F.R.D. 280, (D. Del. 2008).

- Practice Tip: Be on the lookout for any affirmative defense grounded in *Faragher/Ellerth*. Demand all otherwise-privileged communications relating to the defense. In the alternative, demand that the defense be stricken.

- Practice Tip: If a pre-litigation investigation was conducted by outside counsel and a *Faragher/Ellerth* defense is raised, subpoena that counsel's entire file, and seek the deposition of counsel.

3. Waiver of Privilege: Claims of Good Faith

Under both the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., (FLSA), and the Family and Medical Leave Act, (FMLA), the employer may seek to avoid liquidated damages by demonstrating that it acted in good faith. When the employer seeks to prove its defense of good faith by asserting that management consulted with counsel, the privileged is waived. Counsel for the employee should be permitted to inquire into the communications with counsel (to determine what facts were communicated to counsel) and the communications from counsel (to determine what opinions were conveyed from counsel). *McLean v. Garage Management Corp.*, 2012 WL 1358739 at *7 (S.D.N.Y. April 19, 2012)(defendant may not rely on consultation with counsel for good faith defense in FLSA case unless defendant waives attorney-client privilege); *see also, Kadden v. VisualLex,* 2012 WL 3031480 at *2 (S.D.N.Y. July 25, 2012).

- Practice Tip: Use deposition testimony or requests for admission to determine whether good faith defense includes an assertion of consultation with counsel. Demand all otherwise-privileged communications relating to the defense. In the alternative, demand that the defense be stricken.

4. These Communications Aren't Privileged: When In-House Counsel Has a Dual Role

In house counsel frequently perform a variety of roles in an organization. While a defendant may in a knee jerk way designate every communication with in house counsel as "privileged," this is a misuse of the privilege. Simply copying an attorney on an email does not make it privileged. The court will need to conduct an analysis of the "hat" in house counsel was wearing to determine whether the attorney was acting as a business advisor (not privileged) or providing privileged legal advice. *Gomez v. Metropolitan District*, 2013 WL 2489138 (D. Conn. June 20, 2013). When legal advice and business advice are intertwined, as they often are, the court will need to determine whether the legal purpose of the communication outweighs the business purpose. *Bhandari v. Artesia General Hosp.*, _P. 3d _, 2013 WL 4499152 at *5 (New Mexico Ct. App. July 16, 2013). In *Bhandari*, the court held that a memorandum was not privileged when it contained talking points for the termination interview of plaintiff, even though memorandum was drafted by counsel and labeled "attorney-client privilege". *Id*. at *6. The court noted that counsel was acting in a dual capacity as general counsel, and as Senior Vice President. *Id.*

The defendant employer will have the burden to show that the purpose for sending copies of documents to counsel was to solicit legal advice. Thus, in *Craig v. Rite Aid Corp.*, 2012 WL 426285 at *20 (M.D. Pa. Feb 9, 2012), the court held that internal communications involving changes to leadership structures were not privileged even though legal considerations regarding collective bargaining agreements were recognized and discussed. Similarly, in *Johnson v. Board of Pensions of the Evangelical Lutheran Church in America*, 2012 WL 5985600 at * 4 (D. Minn. September 5, 2012), the court held that communications regarding the under-funded status of a pension fund were not privileged because the general counsel was not copied in order to seek specific legal advice.

- Practice Tip: Make your record. Before the question of privilege has been explicitly raised as a "big deal" issue, use depositions of non-attorney witnesses to nail down the various roles played by in-house counsel. Watch for clues in terms of in-house counsel's job responsibilities and title. Follow up with Requests for Admissions aimed at these roles. You may later use this discovery in a motion to compel production.

- Practice Tip: At depositions, ask about the purpose of the document at issue. (Although the assertion of privilege may stop you from asking about the content of the document, the deponent's understanding of the "purpose" is not likely to invade the alleged privilege.) Get as much detail as you can about the purpose of the document. You are likely to find that at least one purpose involves a business or technical decision or strategy.

5. These Communications Aren't Privileged: When Outsiders Get Involved

The attorney-client privilege may be waived if the communication is in the presence of a third party. *Egiazaryan v. Zalmayev*, 290 F.R.D. 421 (S.D.N.Y. 2013). Communications with accountants, independent contractors, and public relations firms may not be privileged, unless the third party was brought into the conversation to facilitate communications between client and counsel. In *Egiazaryan v. Zalmayev*, 290 F.R.D. 421 (S.D.N.Y. 2013), the court considered an assertion of privilege as to communications between outside counsel and a public relations firm retained by the client. The court held that sharing litigation strategy with the public relations firm was not privileged, noting that "a media campaign is not a litigation strategy." Moreover, the work product doctrine does not extend to public relations activities because the purpose of the work product doctrine is to create a zone of privacy about the conduct of litigation, not for strategizing about the effects of the litigation on public relations. The court in *Egiazaryan* found a privilege only as to those communications relating to the response by the public relations firm to a subpoena, holding that those particular communications involved an attorney-client relationship between the outside counsel and the public relations firm.

- Practice Tip: Make your record. Find out the identity and role of every person to whom a document is copied or forwarded. Be on the lookout for anyone who is not an employee of the defendant employer.

- Practice Tip: If your case has received media attention, ask whether a public relations firm has been retained.

- Practice Tip: Ask questions in discovery about third parties who may be providing information to counsel about the litigation. Depending on the facts of your case, ask about accountants, public relations firms, payroll providers, and consultants. Consider a subpoena to these third parties and ask specifically about communications with the defendant employer's counsel.

6. These Papers Aren't Work Product: Establishing When the Threat of Litigation Began

The work product doctrine only protects documents prepared in anticipation of litigation. Although the doctrine may apply before suit has been instituted, it does not apply when there is merely a vague, amorphous prospect of litigation. The simple fact that a business decision may have legal ramifications does not mean that the documents about that decision were produced in anticipation of any specific litigation. *Johnson v. Board of Pensions of the Evangelical Lutheran Church in America*, 2012 WL 5985600 at * 5 (D. Minn. September 5, 2012). "While legal risks may ripen into litigation, not all

risk management qualifies as anticipation of litigation. Generalized steps to avoid non-specific litigation are not accorded work product protection." *Chen-Oster v. Goldman, Sachs & Co.*, __*F.R.D.*__, 118 Fair Empl. Prac. Cas. 1567, 2013 WL 3009489 at *3 (S.D. N.Y. June 18, 2013). Data collected to avoid litigation is not work product. *Id.*

- Practice Tip: Keep an eye on the date of any documents on the privilege log, watching for documents that pre-date the first communications with defendants about legal claims.

- Practice Tip: In depositions about the decision at issue, ask the decision makers whether they were concerned that their decision was likely to lead to litigation, and (if so) who they thought may be likely to sue. In most cases, the decision makers will not be likely to state that they anticipated specific litigation – because this admission will tend to show that they had concerns that their decision might be crossing the legal line. Once you have established that specific litigation was not anticipated, you will have undercut any assertion of work product privilege.

- Practice Tip: Nailing witnesses down to a date on which they anticipated the threat of litigation is helpful because the answer can be used as a double-edged sword. If litigation was anticipated beginning on May 1, the employer may be able to prevent you from discovering the May 2 memo on the grounds that it was prepared in anticipation of litigation. However, you will also be able to argue that everything that the employer did after May 1 was in anticipation of litigation. So, you now have the ammunition to argue at trial that the comments in that May 15 performance improvement plan were written with an eye toward litigation, and did not reflect the genuine appraisal of the employee's performance.

7. These Papers Aren't Work Product: Not Prepared at the Direction of Counsel

The work product doctrine may protect documents drafted at the direction of counsel to furtherance of litigation objectives, but the defendant employer must demonstrate that the documents were created at the direction of counsel. *Johnson v. Board of Pensions of the Evangelical Lutheran Church in America*, 2012 WL 5985600 at * 5 (D. Minn. September 5, 2012).

- Practice Tip: In depositions, ask the authors of documents allegedly withheld as work product about why the documents were created. Do not accept a blanket answer of "at the direction of counsel." Instead ask what the purpose of the document was, who the deponent discussed the document with (and when), who it was disseminated to (and how it was disseminated) and how the deponent thought that the conclusions would be used. Ask who specifically asked that the document be created and

what that person said the purpose was. Ask whether preparation of this sort of document was part of the deponent's normal duties. If you can find that the direction came from a non-attorney supervisor or that this was a type of document that the deponent had created before in a non-litigation context, you may be well along the road of demonstrating that the document was not prepared for litigation.

7. Making Your Record

All of the good legal arguments in the world won't help you get the discovery you need unless you are tenacious and begin to lay the groundwork from the beginning. In every stage of discovery, think about what important information might be hiding behind the claim of privilege, and think about what each witness can tell you about whether the claim is valid. It is easy for a court to uphold a privilege claim and to deny you the discovery you need. Ordering production of allegedly privileged documents requires the court to do extra work, to make credibility determinations, and often to review documents *in camera.* It may even invite an interlocutory appeal. These are all reasons why the challenge to the privilege needs to be carefully thought out, using the building blocks established during the discovery process.

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