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The Sound of “Silent Attorneys”: DOJ Alleges Google Fakes Attorney-Client Privilege by CCing Lawyers Who Never Respond

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If a request for legal advice goes unanswered, is it really a request for legal advice? According to the U.S. Department of Justice and several state attorneys general (“DOJ Plaintiffs”) in an antitrust action against Google, United States, et. al. v. Google, in the U.S. District Court for the District of Columbia, the answer to this question should be “no,” at least where the unanswered request for legal advice is part of an internal company practice intended to conceal sensitive, non-privileged documents from discovery.

The DOJ Plaintiffs’ recent motion to sanction Google and compel disclosure alleges that in a program called “Communicate with Care,” Google trains its employees to create the illusion of attorney-client privilege by instructing employees to include an attorney, a privilege label, and a generic request for legal advice in ordinary course business communications, even where legal advice is not actually needed. According to the DOJ Plaintiffs, the in-house counsel copied on these emails often do not respond to these “artificial” requests for legal advice. The DOJ Plaintiffs claim that the program’s purpose is to shield sensitive business communications from discovery by abusing the attorney-client privilege, and that Google specifically engaged in this process to improperly withhold communications and agreements directly relevant to the instant action. The DOJ Plaintiffs have moved for sanctions and to compel disclosure of emails to which legal counsel never responded, which would indicate that “any request for legal advice was most likely a pretext.”

Google responded that the DOJ Plaintiffs have taken a slideshow presentation describing the "Communicate with Care" program out of context, and that "the slides provide legitimate guidance to Google employees about how to communicate with in-house counsel to request legal advice on subjects with obvious legal implications." Google alleges that the slideshow (and the company's practice generally) advises employees on how to properly safeguard privileged communications by labeling genuine requests for legal advice as privileged and by including in-house counsel on the emails. According to Google, it had already produced in its initial production about 98,000 "silent attorney" emails in which an attorney remains on the CC line throughout an email chain without responding. Thereafter, pursuant to meet and confer discussions, Google agreed to conduct a re-review of "silent attorney" emails and produced an additional 10,000 documents. The DOJ Plaintiffs now ask that Google produce all withheld or redacted communications "where an in-house attorney was included but did not respond in the chain of communications with non-attorneys," which apparently would require another re-review by Google of approximately 21,000 documents. But according to the DOJ Plaintiffs' reply, the fact that Google has produced "tens of thousands" of previously withheld or redacted "silent attorney" emails "merely confirms the existence, persistence and extent of Google's privilege abuse."

The judge issued an order shortly after the conclusion of the parties' briefing requesting more information before ruling on the motion, and "question[ing]" whether he had the power to sanction Google for actions that predate the lawsuit. For now, the judge has ordered the parties to identify cases in support of their positions on whether sanctions can be issued for pre-litigation conduct, and further ordered Google to produce a random sample of 210 of the 21,000 "silent attorney" emails for the court's in camera review. We will continue to monitor this case and report on its progress.

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