Proskauer

The Sound of “Silent Attorneys”: Judge Orders Google to Re-Review Emails Withheld for Privilege to which Counsel Never Responded

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Back in May, we wrote about a pending motion before the U.S. District Court for the District of Columbia, in which the U.S. Department of Justice and several state attorneys general (“DOJ Plaintiffs”) sought to sanction Defendant Google and compel disclosure of all emails withheld for privilege that legal counsel received but never responded to (affectionately referred to as “silent attorney” emails). The DOJ Plaintiffs claimed the silent attorney emails constituted artificial requests for legal advice intended to conceal sensitive business communications from discovery. After the parties briefed the issues, the judge ordered that the parties identify cases in support of their positions on whether the judge had the power to issue sanctions 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.

The same day our blog post was published, the judge made a decision on these motions at a status conference, and the transcript has recently been made public. In short, the judge concluded that he did not have inherent authority to issue sanctions with respect to this particular pre-litigation conduct, but he did order Google to re-review any of the privileged “silent attorney” emails that had not already been re-reviewed for privilege.

The DOJ Plaintiffs identified several cases in which courts have exercised their inherent authority to sanction pre-litigation conduct, while Google identified none that resembled the facts of this case. The court acknowledged that while the cases cited by DOJ Plaintiffs did demonstrate that the judge has inherent authority to sanction pre-litigation conduct, none of the cases would allow him to sanction the particular type of pre-litigation conduct here – that is, the alleged practice of copying lawyers on emails in order to conceal sensitive business information from discovery. The judge grouped the facts in DOJ Plaintiffs' cases into two categories of "bad" but distinguishable pre-litigation conduct: (1) conduct that affects the ability to bring, maintain, or defend the litigation itself (e.g., employee accessing records from employer's server and using those records to bring and prosecute the lawsuit), and (2) spoliation of evidence. The judge noted that the conduct in the present case aligned more closely with the spoliation cases, but emphasized the important distinction that unlike cases in which evidence is spoliated, the documents here are still available, and are in fact being produced to the DOJ Plaintiffs.

The judge also provided an analysis of the random sample of 210 documents produced for *in camera* review, noting that Google ended up de-designating and producing 26 documents out of the 210 that it had previously withheld as privileged. Of the remaining 184 documents, the judge was satisfied that approximately 75% were clearly privileged, while approximately 25% required more context for a full determination of privilege, but did not appear to be designated as such in bad faith.

The judge expressed concern, however, with the fact that 26 of the 210 documents – approximately 12% – were "de-privileged" upon re-review. When the court originally ordered Google to provide a 210 document sample, this number represented 10% of the approximately 21,000 "silent attorney" documents being withheld as privileged at the time. Since then, Google had already re-reviewed and produced an additional 5,000 or so documents, leaving approximately 16,000 still at issue at the time of the court conference.

The judge asked Google whether it had re-reviewed all of the withheld "silent attorney" emails with the same level of scrutiny as the 210 provided to the court. Google's counsel did not provide a clear answer, explaining that some of the documents had already been re-reviewed, while others had not, and that different lawyers might reasonably come to different conclusions regarding privilege. The judge acknowledged that this might be true, but stressed that the court and the plaintiffs should still feel satisfied that all documents are equally scrutinized with respect to privilege. He reasoned that, assuming the remaining documents would be de-privileged at the same rate as the 210-document sample, 12% of 16,000 – 1,920 – documents was not an insubstantial number. Therefore, the judge ordered Google to conduct a re-review of any of the 16,000 documents that had not yet been re-reviewed, using a level of scrutiny that is consistent with the 210-document sample review, and to produce any documents they determine are not privileged.

One takeaway from this case is the need for counsel to take real care when withholding emails on privilege grounds that were sent to an attorney but received no response. Reviewing each email and having consistent criteria for privilege determinations will go a long way to helping avoid drawn-out and expensive discovery.

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