Are Employer Surveys in Employment Class Actions Subject to Discovery?

by Aashish Y. Desai

Oftentimes in wage and hour class actions, attorneys for the employer will conduct a survey of the putative class members to obtain data concerning the hours of work and duties at issue. Naturally, when putative class members have helpful information for the defendant employer, defense counsel will ask the employee to sign a witness statement supporting the employer's position in the litigation. Questions, however, frequently arise on whether these witness statements are subject to discovery by class counsel.

Surveys are Not Privileged Attorney-Client Communications

The attorney-client privilege attaches only to a confidential communication made within the scope of an attorney-client relationship. *Evidence Code* §952; *Wellpoint Health Networks v. Superior Court*, 59 Cal.App.4th 110, 112 (1997). In this scenario, the employer could not possibly provide a basis for establishing attorney involvement in the gathering of the statements. Typically, a representative from the employer's Human Resources department along with an attorney for the employer will conduct "interviews" and obtain the survey results. Of course, it is clear that the putative class members are not, by any stretch of the imagination, clients of the employer's attorneys. *See, e.g., Koo v. Rubio's Restaurants*, 109 Cal.App.4th 719, 729 (2003) (noting that disqualification of defense counsel is proper when defense counsel has an attorney/client relationship with the putative class members).

Defense counsel may argue that because the class members are employees and were directed by their employer to make the statements in anticipation of litigation, the surveys become privileged. However, it is well settled that when an employee is neither a co-defendant nor the natural person to speak for the employer, his or her statements are not privileged just because they are transmitted to the employee's attorney in preparation for litigation. *Martin v. Workers' Comp. Appeals Board*, 59 Cal.App.4th 333, 347 (1997).

Putative class members are generally not co-defendants, and they certainly do not speak for the employer on the issue of hours worked as they are suing the employer over that very issue. Nor can the employer's lawyers honestly claim that the witness statements or surveys are incident reports or statements by co-defendants, which some courts have held to be privileged. *Martin*, 59 Cal.App.4th at 343. Rather, the surveys are more properly characterized as signed witness statements made by putative class members that should be produced under the *Discovery Act*.

The Witness Statements and Surveys are Not Privileged as Work-Product

The work-product doctrine is also inapplicable. The work-product doctrine provides qualified protection for work product as derivative of the attorney's thought process. *See Code of Civil Procedure* §2018.030(a). The work-product privilege provides absolute protection to work product that contains any attorney's "impressions, conclusions, opinions or legal research or theories." *Id.* However, witness statements and surveys often contain purely evidentiary information and contain neither derivative work

product, nor opinion work product.

California law holds that statements independently compelled by witnesses are neither absolute nor qualified work product. *Nacht & Lewis Architects, Inc. v. Superior Court*, 47 Cal.App.4th 214, 216 (1996); *Kadelbach v. Amacal*, 31 Cal.App.3d 814, 822 (1973). Defense lawyers may—and often do—argue that the questions on the survey could reveal their legal theories or opinions. However, statements made in response to an attorney interview are discoverable, *Kadelbach*, 31 Cal.App.3d at 822, and the form of the question, i.e., oral or written, does not change that result.

Moreover, a very good argument follows that an employer's attorneys have waived any work-product protection in the questions that might have existed by disclosing the questions to the putative class members. Such a disclosure is wholly inconsistent with the purpose of the work-product doctrine, which is to safeguard the attorney's work product in trial preparation and thus constitutes a waiver. *Raytheon Co. v. Superior Court*, 208 Cal.App.3d 683, 689 (1989); 2 *Jefferson, Cal. Evidence Bench Book*, §41.2 (2d Ed. 1982) (work product is waived by disclosure to one with no interest in maintaining its confidentiality); *BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal.App.3d 1240, 1261 (1988).

The Equal Access Argument

Employers routinely miscast the qualified work-product issue as whether class counsel has the same "comparative ease of access" to the survey information that the employer does. In fact, class counsel does not have comparative access to such information as they cannot replicate the mandatory workplace survey defense lawyers' conduct. Thus, even if the qualified work-product privilege were to apply (it does not), the surveys should still be subject to discovery to avoid unfair prejudice and injustice.

In fact, there is only a "conditional" or "qualified" protection cloaking "work product" that does not contain an attorney's impressions, conclusions or opinions; such "work product" must be produced upon a showing of "good cause." *National Steel Products Co. v. Superior Court*, 184 Cal.App.3d 476, 491 (1985). Specifically, "qualified" work product items are discoverable if denial of discovery will "unfairly prejudice" the party seeking discovery in preparing the party's claims or defenses or will result in an "injustice." *See Code of Civil Procedure* §2018.020.

This code section is intended to strike a balance between the work-product doctrine and modern discovery rules. *National*, 164 Cal.App.3d at 467. On the one hand, attorneys must prepare their own cases and should not be able to exploit the efforts of their opponents. *Id.* at 487. On the other hand, liberal discovery rules are intended to insure a fair contest to the fullest possible disclosure of relevant information. *Id.* In striking this balance, courts must assess whether there is an adequate substitute for the information sought. *Id.* at 491.

Under the hypothetical presented, there is no adequate substitute for the numerous witness statements employers obtain from their current workforce. Naturally, an employer is able to survey nearly all of its current employees by requiring them to attend meetings conducted by their own litigation lawyers during company time. Class counsel cannot compel similar results. Defense counsel also refuse to provide the identifying information (telephone numbers and addresses) that would even allow class counsel to contact these class members. And even if class

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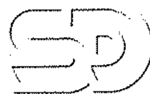
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counsel had such identifying information, they are unlikely to obtain the same level of cooperation as defense lawyers do during their employer-mandated workplace survey.

Conclusion

An employer's contentions that signed survey forms are protected work product or attorney-client communications, are generally misguided. Signed witness statements by potential class members are not derivative work product. Nor are these documents fairly characterized as "attorney interview notes." Class counsel do not seek attorney's notes, impressions, opinion, or analysis, but only the data concerning the hours of work and duties at issue—otherwise unavailable to them—in the signed written statements. As such, they should be subject to discovery.

Aashish Y. Desai is a partner at Mower, Carreon & Desai, LLP where he prosecutes class actions involving antitrust, wage and hour, and consumer issues. He understands his position may be slanted and, therefore, invites defense counsel to submit contrary views.

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