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# Court: No Waymo to Uber's Assertion of Privilege on Pre-Litigation Investigation

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You are defending a recently acquired company in a litigation. As part of pre-acquisition diligence, and prior to the litigation commencing, executives from your client and the company that acquired it shared analysis of facts relevant to the litigation. Now that the acquisition is complete, to what extent can these communications be protected by the attorney-client privilege, the work product doctrine or the common-interest exception to waiver? A recent decision from the Northern District of California strongly signals that companies engaged in pre-merger diligence should use great care in sharing information relating to potential litigations, as it may be very difficult to preclude disclosure down the road.


The Waymo driverless car is displayed during a Google event, Tuesday, Dec. 13, 2016, in San Francisco. The self-driving car project that Google started seven years ago has grown into a company called Waymo. The new identity announced Tuesday marks another step in an effort to revolutionize the way people get around. Instead of driving themselves, people will be chauffeured in robot-controlled vehicles if Waymo, automakers and ride-hailing service Uber realize their vision within the next few years.
*Photo: Eric Risberg/AP*

In *Waymo v. Uber Technologies,* 3:17-cv-00939, plaintiff and Google affiliate Waymo have asserted state and federal trade secret claims against Uber alleging that one of its engineers, Anthony Levandowski, appropriated Waymo's trade secrets relating to driverless car technology and formed his own company, Ottomotto, which he then sold to Uber. As part of Uber's diligence before completing its acquisition of Ottomotto, the two companies agreed that an outside forensic expert would conduct an investigation of whether current Ottomotto employees who had come from Waymo, including

Levandowski himself, had misappropriated any of Waymo's intellectual property. The investigator's report was completed and circulated to Uber, Ottomotto and counsel for the investigated Ottomotto employees.

In the subsequent trade secret litigation, Uber asserted work product and attorney-client privilege over the report. Waymo, unsurprisingly, moved to compel its production.

The magistrate judge for the Northern District of California rejected Uber's assertion of the privilege over communications between Ottomotto and Uber prior to the acquisition, finding that the at the time the report was circulated Uber and Ottomotto were on opposite sides of a transaction and were therefore adverse, despite the acquisition's eventual consummation. The court explained: "Two clients represented by separate counsel do not create an attorney-client relationship by jointly retaining an agent." The court also rejected an argument by Uber and Levandowski that communications among them, Ottomotto, and the investigator, as Uber's and Ottomotto's agent, were protected by the common-interest doctrine, reasoning that because the common-interest doctrine is actually an anti-waiver exception, it only applies when an initially protected attorney-client communication is shared with a third party. In Waymo, the information that Levandowski provided to the investigator was never subject to the attorney-client privilege in the first place.

The court also found that Uber had waived any work product protection, which shields documents from discovery that are prepared by a party or his representative in anticipation of litigation. The court rejected Uber's argument that Uber, Levandowski and Ottomotto had requisitioned the investigator's report as part of a joint legal effort to defend a potential lawsuit by Waymo, finding instead that Uber would only have such an interest after it had committed to acquiring Ottomotto. The evidence reflected Uber's purpose in retaining the investigator was to evaluate the acquisition, not to defend against a claim by Waymo.

The court found that although the work product doctrine is not as easily waived as the attorney-client privilege – the disclosure of a protected communication to a third party does not waive work product protection unless the disclosure also increases the likelihood that an adversary will obtain the communication—Ottomotto and Levandowski were adverse to Uber in the potential acquisition so that Uber's disclosure of the report had waived any potential work product protection. Finally, the magistrate judge found that even if the investigator's verbatim interviews with Levandowski within the report were protected as "fact work product," Waymo had shown a substantial need justifying their production: Levandowski was accused of absconding from Waymo to Ottomotto with numerous confidential documents containing trade secrets and had refused to testify or provide any disclosure on Fifth Amendment grounds.

On June 21, District Judge William Alsup overruled Levandowski's, Ottomotto's and Uber's objections to the magistrate judge's opinion. First, Judge Alsup reiterated that because Levandowski was not represented by counsel for Ottomotto

or Uber, he had no attorney-client connection with the investigator and his communications to the investigator were not protected by the privilege: "Uber's carefully-worded objection suggests the remarkable proposition that information communicated in confidence by anyone to [the investigator] for the purpose of enabling Uber and Ottomotto to obtain legal advice [from their respective law firms] should be covered by the attorney-client privilege. That suggestion has no basis in law." Judge Alsup affirmed the magistrate judge's reasoning that Uber had not identified a pre-existing communication protected by the attorney-client privilege so the common interest exception to waiver had no application; for the common-interest exception to apply "the [investigator's] interview [of Levandowski] must still, as an initial matter, qualify for the attorney-client privilege."

Further with respect to the work product doctrine, Judge Alsup endorsed a line of cases holding that common-interest protection does not extend to communications made in connection with the prospective purchase of a business, distinguishing *Hewlett-Packard v. Bausch & Lomb*, 115 F.R.D. 308 (N.D.Cal. 1987) which had questioned whether parties negotiating a merger were adverse as a practical matter.

The lesson of this case is clear: corporate clients contemplating an acquisition or merger should be advised that communications with potential targets may be discoverable in litigation. If sensitive information must be exchanged, it should only be done pursuant to a confidentiality or joint-defense agreement and the bases for its protection from discovery should be express at the outset. As Uber has learned the hard way, anything less puts such communications at risk of disclosure.

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