CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Uber Technologies, Inc. v Google LLC 9/28/18

Attorney-Client Privilege; Attorney Work Product

Anthony Levandowski and Lior Ron are former Google LLC (Google) employees who started the self-driving vehicle company Ottomotto LLC (Otto). Levandowski and Ron started working at Google in 2007. Both resigned from Google in January 2016. After leaving, they formed Otto, a self-driving technology company which Google considered a competitor of its own self-driving car project. In August 2016, Otto was acquired by Uber Technologies, Inc. (Uber). In October 2016, Google initiated arbitration proceedings against Levandowski and Ron for allegedly breaching non-solicitation and non-competition agreements. The arbitration between Google and Levandownski and Ron was scheduled to commence on April 30, 2018.

In July 2017, Google issued a third-party subpoena in the arbitration proceedings, demanding that **Uber produce documents related to pre-acquisition due diligence conducted by the investigative firm Stroz Friedberg LLC (Stroz).** Google sought all documents related to Stroz's investigation into Levandowski, Ron, and Otto, including a report Stroz prepared at the request of counsel. Uber **objected and refused to**

produce the documents, asserting they were protected under the attorney-client privilege and as attorney work product

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In September 2017, Google moved in the arbitration to compel production of the Stroz documents. The arbitration panel chair found these Stroz-related materials ("Stroz Materials") were **not privileged or attorney work product.** Uber appealed to the full arbitration panel which summarily affirmed the chair's order.

Uber petitioned the San Francisco Superior Court to vacate the panel's discovery order. The superior court granted Uber's petition and vacated the arbitration panel's decision, requiring Uber to produce the documents (the "Order" or "Discovery Order").

On January 22, 2018, Google filed this appeal, asserting the Order was a final appealable "order vacating an arbitration award." Days later, in an effort "to accelerate adjudication of the issues raised by Google's appeal," Google petitioned for a writ of mandate, prohibition, and/or other appropriate relief (Case No. A153457), asking this Court to direct the superior court to vacate the Order. This court summarily denied the writ.

In February 2018, Uber moved to dismiss this appeal on the ground that the DCA lacked jurisdiction. Following oral argument on Uber's motion, the Justices deferred a decision on the motion to dismiss until they considered the appeal on its merits.

Uber contended the appellate court lacked jurisdiction over Google's appeal because the trial court's Discovery Order was not a final arbitration award and thus not

appealable. Google argued the Order was final, conclusive, and appealable as "an order vacating an award" under Code of Civil Procedure section 1294, subdivision (c). Following a lengthy discussion and analysis, the First District Court of Appeal found the Discovery Order is a final determination of the discovery rights between Uber and Google in the special proceeding commenced for the sole purpose of resolving this discovery dispute, and the order is appealable. Uber's motion to dismiss was denied, and the Justices agreed to consider the merits of the appeal.

On February 22, 2016, Uber and Otto signed a term sheet for Uber's acquisition of Otto, portions of which have been redacted from the opinion. The term sheet established a process for Uber to potentially acquire 100% ownership of Otto through the execution of a Put Call Agreement. An "Indemnity Construct" agreement was part of the term sheet and provided that Uber would indemnify Levandowski and Ron from certain claims Google might assert against them post-acquisition. These included claims for the infringement or misappropriation of any intellectual property; breach of fiduciary duty to their former employer; and breach of any non-solicitation, non-competition, or confidentiality agreement.

To determine the scope of the indemnified claims, the Indemnity Construct contained a "Pre-Signing Due Diligence Process." An "Outside Expert" was to investigate certain Otto "Diligenced Employees," including Levandowski and Ron. The Outside Expert was to prepare a "third party report," which the term sheet defined as "the written report(s) . . . summarizing in detail all of the facts, circumstances, activities or events obtained by the Outside Expert from any Diligenced Employee that the Outside Expert deems are reasonably related to any Bad Act of such Diligenced

Employee, in each case, based on the interviews, forensic due diligence and other due diligence investigation with respect to all Diligenced Employees conducted by the Outside Expert." "Bad Acts" covered any infringement or misappropriation of trade secrets, breach of fiduciary duty, and violation of any non-solicitation, non-competition, or confidentiality agreement committed by an employee.

Stroz, an independent third party and digital forensic expert, was the Outside Expert tasked with performing the pre-signing due diligence and **was to be "jointly directed by and engaged by" Uber and Otto.** Stroz was jointly retained in an engagement letter dated March 4, 2016, by **Uber's outside counsel at Morrison Foerster (MoFo)** and **Otto's outside counsel at O'Melveny & Myers (O'Melveny).** Their engagement letter with Stroz states: "The purpose of the investigation is to ascertain facts that, in the opinion of MoFo and O'Melveny, bear on issues of whether certain current or prospective employees . . . of Ottomotto have improperly retained on devices or in storage repositories not belonging to former employers, confidential information belonging to former employers, and whether such current or prospective employees breached any fiduciary duty, duty of loyalty, or other confidentiality, non-solicitation, non-competition or other obligations based in contract, statute or otherwise."

During the pre-acquisition due diligence, **Levandowski was represented by Donahue Fitzgerald LLP's John Gardner**. **Ron was personally represented by Levine & Baker, LLP**. **Neither retained Stroz on behalf of their clients.**

In and around March 2016, Stroz began its investigation under MoFo's and O'Melveny's supervision and direction. Stroz collected from Levandowski and Ron

various electronic devices and access to various cloud-based storage accounts. In addition, Stroz interviewed Levandowski and Ron.

Sometime in April 2016, Stroz gave Uber's counsel at MoFo an **oral report** on its preliminary fact finding and memos of interviews with Levandowski and Ron.

On April 11, 2016, Uber and Otto executed the Put Call Agreement and finalized the indemnification agreement.

That same day, Otto, Levandowski, Ron, and Uber through their respective counsel executed a "**Joint Defense, Common Interest, and Confidentiality Agreement**" "in contemplation of potential investigations, litigation, and/or other proceedings" related to Uber's acquisition of Otto. Uber claims that the parties had an oral joint defense and common interest agreement as of February 24, 2016.

On August 5, 2016, Stroz issued its **final, written report** to Uber's MoFo attorneys and Otto's O'Melveny attorneys. That report is labeled "Privileged & Confidential Attorney Work Product."

On February 23, 2017, with Google's arbitration pending against Levandowski and Ron for the alleged breach of their employment contracts, Google filed a related civil action, *Waymo LLC v. Uber Technologies, Inc.*, Case No 3:17-cv-00939-WHA in the United States District Court for the Northern District of California (the "Federal Case"). In this Federal Case, Waymo, the Google-related self-driving car company, sought

damages and injunctive relief against Uber based on alleged trade secret misappropriation arising out of Uber's acquisition of Otto.

Waymo moved to compel production of the Stroz report and its exhibits. In June 2017, the magistrate judge granted Waymo's motion. The magistrate held the Stroz documents were not protected by Levandowski's attorney-client privilege because the "record is clear that Uber and Otto alone engaged Stroz to conduct the due diligence required by the Term Sheet." Nor were the documents protected by Uber's attorney client privilege because Stroz interviewed Levandowski and Ron in their individual capacities, not as Otto executives. The magistrate also found the Stroz report was not protected attorney work product, and not protected under the common interest doctrine. Over the objections of Uber, Otto, and Levandowski, the district court affirmed the magistrate's order. Levandowski unsuccessfully sought mandamus relief in the Federal Circuit. (See *Waymo LLC v. Uber Techs., Inc.* (Fed. Cir. Sept. 13, 2007) 870 F.3d 1350.) In October 2017, Uber released the Stroz report.

As the Federal Case proceeded, the arbitration between Google and Levandowski and Ron moved forward. Like Waymo did in the Federal Case, Google sought and moved to compel production of the Stroz-related documents in the arbitration. The arbitration panel chair found these Stroz Materials were protected by neither the attorney-client privilege nor attorney work product doctrine. Uber appealed to the full arbitration panel which summarily affirmed the chair.

Then, Uber successfully petitioned the San Francisco Superior Court to vacate the panel's order. The superior court held the Stroz Materials were protected under the

attorney client privilege, and it was not waived when the documents were shared between Uber, Otto, Levandowski, Ron, and their respective attorneys. The superior court granted Uber's petition and vacated the arbitration panel's decision compelling Uber to produce the documents.

On January 22, 2018, Google appealed from the Order.

The First DCA began its discussion by noting that under California law, **an attorney-client communication is one "between a client and his or her lawyer in the course of that relationship and in confidence."** (Evid. Code, § 952.) **An attorney-client relationship exists when the parties satisfy the definitions of "lawyer" and "client" as specified in Evidence Code sections 950 and 951, respectively. For purposes of the attorney-client privilege, "client" is defined in relevant part as "a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal *service or advice* from him in his professional capacity . . . ."** (Evid. Code, § 951, italics added.) **"Confidential communication" protected by the privilege refers to "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence" by confidential means.** (Evid. Code, § 952.) **A confidential communication may include "a legal opinion formed and the advice given by the lawyer in the course of that relationship."** (*City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1032.)

The attorney client privilege may also extend to third parties who have been engaged to assist the attorney in providing legal advice. (See *State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 639)

In assessing whether a communication is confidential and thus privileged, the **initial focus of the inquiry is on the "dominant purpose of the relationship" between attorney and client and not on the purpose served by the particular communication.** (*Costco,* at pp. 739-740) "If the trial court determines that communications were made during the course of an attorney-client relationship, the communications, including any reports of factual material, would be privileged, even though the factual material might be discoverable by other means."

The privilege "is to be strictly construed" in the interest of bringing to light relevant facts. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 396.) The privilege is also to be strictly construed "where the relationship is not clearly established." (*People v. Velasquez* (1987) 192 Cal.App.3d 319, 327, fn. 4.)

"**When a party asserts the attorney-client privilege it is incumbent upon that party to prove the preliminary fact that a privilege exists**. Once the foundational facts have been presented, i.e., that a communication has been made 'in confidence in the course of the lawyer-client . . . relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential,' or that an exception exists." (*State Farm*, at p. 639.)

Uber never established the Stroz Materials were attorney-client communications nor could it. The Stroz Materials resulted from a pre-acquisition due diligence process Uber's and Otto's attorneys jointly hired Stroz to perform. Both Levandowski and Ron had separate personal counsel who never retained Stroz. Uber and Otto attorneys directed Stroz's efforts, not the personal attorneys for Levandowski or Ron. Moreover, at the time Stroz performed its due diligence, the interests of Uber were adverse to those of Otto, Levandowski and Ron. Uber was in the process of evaluating whether it would purchase Otto and in doing so indemnify Levandowski and Ron. To that end, **when Stroz interviewed Levandowski and Ron and collected their devices for review, it did not do so as their agent or on behalf of their attorneys.** Levandowski and Ron were the subjects of an investigation and were not MoFo or O'Melveny clients. Their communications to MoFo and O'Melveny lawyers through Stroz (the agent) did not constitute information transmitted from client to lawyer. This is made clear in the Stroz engagement letter. It provides that "under no circumstances will Stroz Frieberg disclose to Uber or MoFo or any of their representatives any attorney-client privileged communications between Ottomotto and/or any of its employees, stockholders, officers, members, managers or directors, on the one hand, and counsel for Ottomotto or counsel to any of such persons, on the other hand, that are disclosed to or discovered by Stroz Friedberg in its performance of the services. For the avoidance of doubt, communications between Ottomotto and/or any of its employees, stockholders, officers, members, managers or directors, on the one hand, and any of the following attorneys and law firms, on the other hand, is attorney-client privileged communication and will not be disclosed by Stroz Friedberg to Uber or MoFo or any of their respresentatives: O'Melveny & Myers LLP, ..." Thus, Levandowski's and Ron's communications with

Stroz, as reflected in the Stroz Materials, and shared with MoFo are not protected by the attorney-client privilege.

Uber argues that the attorney-client privilege attaches to the Stroz Materials **because Levandowski and Ron were Otto employees when they communicated with Stroz, who was acting as the agent for Otto's lawyers at O'Melveny**. Uber observes that "when a lawyer for a corporation gathers facts from the corporation's employees in order to give legal advice to the corporation, those factual communications are privileged." The Justices, however, note the record shows that **neither of them had any attorney-client relationship with O'Melveny. Each retained separate personal counsel**, and the Stroz engagement letter makes clear that attorney-client privileged information obtained from Otto employees is not to be shared with Uber and MoFo. Further, Levandowski's and Ron's personal attorneys established additional parameters around sharing certain information with the MoFo and O'Melveny lawyers. Prior to turning over devices and account information to Stroz, Ron's attorney instructed Stroz not to provide MoFo or O'Melveny or Uber or Otto any of Ron's privileged documents.

Next, Uber claims these communications "were made for the purpose of seeking legal advice" to "assess the potential litigation threats faced" from Google. The record shows otherwise. The term sheet's "Indemnity Construct" does not discuss anticipated litigation. Rather, Diligenced Employees are required to cooperate and make their devices available to Stroz as a pre-condition to the execution of the Put Call Agreement and as a means to determine the scope of the indemnified claims. Levandowski did not comply with the Term Sheet to seek O'Melveny's legal advice. Rather, he provided Stroz information to clarify the extent of any obligation arising out

of the Indemnity Construct. In a letter written to the MoFo and O'Melveny attorneys, Levandowski's lawyer, John Gardner, stated the purposes of the Stroz examination were to "(i) support the indemnification agreement and (ii) to provide evidence that Uber and Otto exercised due care prior to . . . entering into the Transaction Documents." Asked in deposition whether he agreed with the statement by Gardner, Otto's designated company witness testified, "You would have to ask Uber about the purposes. As I've previously indicated, my understanding is that it was more broadly related to Uber determining whether to enter into the transaction, including the indemnification agreement." The need for legal advice or to assess a potential litigation threat did not drive Levandowski's or Ron's communications with Uber and Otto's lawyers.

Because Uber was unable to demonstrate Levandowski's or Ron's communications with Stroz were made in the course of an attorney-client relationship, the attorney-client privilege does not attach.

Uber next contends that even if the Stroz Materials were not privileged attorney-client communications, they were **protected attorney work product**. Google argues the attorney work product doctrine provides no alternate ground to support the superior court's Discovery Order.

"**An attorney's work product is the product of the attorney's ' " effort, research, and thought in the preparation of his client's case. It includes the results of his own work, and the work of those employed by him or for him by his client, in investigating both the favorable and unfavorable aspects of the case, the information**

thus assembled, and the legal theories and plan of strategy developed by the attorney—all as reflected in interviews, statements, memoranda, correspondence, briefs, and any other writings reflecting the attorney's 'impressions, conclusions, opinions, or legal research or theories' and in countless other tangible and intangible ways." '" (*Meza v. H. Muehlstein & Co.* (2009) 176 Cal.App.4th 969, 977.)

The attorney work product doctrine, codified at Code of Civil Procedure section 2018.030, provides: "**A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances**." (§ 2018.030, subd. (a).) **All other attorney work product "is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice."** (§ 2018.030, subd. (b).) The superior court did not address the attorney work product doctrine in the Discovery Order at issue in this appeal, so it made no relevant findings. Based on the record, the Stroz Materials do not meet either standard.

The Stroz Materials **do not reflect an attorney's impressions, conclusions, opinions, or legal research or theories**. Rather, the Stroz Materials reflect the result of a factual investigation into possible past misconduct committed by Levandowski and Ron in the course of leaving Google so that Uber could decide whether to proceed with the Otto transaction and indemnify Levandowski and Ron. The materials summarize what Levandowski and Ron told Stroz without the filter of Stroz's impressions, conclusions, opinions or legal theories. In addition, the engagement letter between Stroz and counsel further indicates that **Stroz was not authorized to practice law and its services were "limited to non-legal services."** Thus, the Stroz Materials do not

constitute **opinion work product** that is absolutely protected under section 2018.030, subdivision (a).

Nor do the Stroz Materials qualify for the **limited privilege for non-opinion work product** set forth in section 2018.030 subdivision (b). Substantial evidence in the record supports a conclusion that denial of discovery will **unfairly prejudice** Google in preparing its claims. These findings supported the arbitration panel's conclusion that production of the Stroz Materials "may be one of the only effective ways for Google to obtain certain relevant information in this case."

Uber disputes that Google showed a "substantial need" for the information, and further argues Google cannot make such a showing because it elected to proceed with the arbitration without the Stroz Materials while there are alternative means to access it. There is substantial evidence in this record from which the arbitrators could conclude the information in the Stroz Materials was material to Google's claims and could not otherwise be obtained. Moreover, there is no evidence identifying the alternative sources for it. The Court will give no weight to the fact that Google was proceeding with the arbitration proceedings in the face of the adverse ruling from the trial court. These factors do not abate or otherwise negate the prejudice Google will unfairly suffer from being denied the Stroz Materials in arbitration.

Finally, Google contends even if Levandowski's communications with Stroz were protected under the attorney-client privilege or attorney work product, any such privilege was waived by disclosure to Uber and not preserved by **the common-interest doctrine.** Google contends the superior court's reliance on the common-interest

doctrine was misplaced. Because Uber never established the Stroz Materials were privileged or work product, the Court will not reach this issue. (See *OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 889.)

Uber's motion to dismiss Google's appeal is denied. The superior court's Discovery Order granting Uber's petition to vacate the arbitration panel's discovery decision is reversed. The matter is remanded to the superior court with directions to enter a new order denying Uber's petition to vacate the arbitration award. Google is awarded costs on appeal.

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