

2. A ruling from the U.S. District Court for the District of Columbia compelling Defendant to produce portions of its legal hold memoranda and reminder notices where Defendant relied on the existence and content of the notices to defend against a motion for sanctions, finding that the notices were privileged but Defendant had waived the privilege by putting the notices at issue.

In *United States v. Google LLC*, Case No. 20-cv-3010 (APM), Slip Copy (D. Columbia June 28, 2023), U.S. District Judge Amit P. Mehta addressed a motion to compel production of document hold memoranda on the grounds that Google waived the privilege protecting such documents.

Plaintiffs in this case contended that Google engaged in spoliation of evidence by failing to preserve relevant Google Chat messages. *Id.* at 1. In response, Google referred to the initial litigation hold memorandum and subsequent reminder memoranda Google had sent to various document custodians, which “explicitly instructed” custodians “to not use messaging apps going forward, including Google Chat, to discuss topics covered by the legal hold” and to ensure “that the messages were preserved” if they did use chats to discuss relevant matters. Plaintiffs moved to compel Google to produce these hold memoranda.

Judge Mehta first found that Google’s hold memoranda were protected by the attorney-client privilege. He rejected Plaintiff’s argument that the hold memoranda were merely “forceful instructions about what employees must do, rather than advice about what they might do,” concluding that the hold memoranda contained actual legal advice that was subject to the privilege.

Judge Mehta then turned to Plaintiff’s argument that Google waived objections to discovery of its litigation hold procedures by arguing that it took “reasonable steps to preserve relevant documents.” Plaintiffs contended that Google put at issue “the detail of its legal hold with regard to ‘chats specifically,’ the contents of its legal hold, and the instructions given to custodians.” *Id.* at 2. Judge Mehta noted that “[u]nder the common-law doctrine of implied waiver, the attorney-client privilege is waived when the client places otherwise privileged matters in controversy” in order to “prevent an abuse of the privilege, that is, to prevent the confidentiality protected by the privilege from being used as a tool for manipulation of the truth-seeking process.”

Judge Mehta found that Google placed portions of the hold memoranda at issue by arguing that it took “reasonable steps” to preserve evidence by “issuing written preservation notices to document custodians,” “explicitly instructing its employees on legal hold to not use message apps going forward, including Google Chat, to discuss topics covered by the legal hold — and additionally instructing them, if they did still use such apps, to ensure that the messages were preserved.” He concluded that Plaintiffs were entitled to see these instructions and that Google could not “be allowed, after disclosing as much as it pleases, to withhold the remainder.”

Judge Mehta rejected Google’s argument that the privilege was not waived because Google discussed the hold memoranda “only to respond to Plaintiffs’ inquiries about its preservation practices and the briefing on this motion.” *Id.* at 4. He found that an essential component of Google’s defense against sanctions was that it acted in good faith by instructing its employees how to use and preserve potentially relevant Google Chats. He held that Google could not

“shield those instructions from Plaintiffs when it has put them directly at issue.” However, he limited the required disclosure to only the portions of the communications where chats preservation was discussed, finding that under Federal Rule of Evidence 502(a), voluntary disclosure generally results in a waiver only of the communication or information disclosed.