

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

O'Brien v. Garza

O'Brien · No. 2:22-cv-1730-TLN-JDP (P) · Decided March 6, 2025

SUMMARY

The United States District Court for the Eastern District of California grants plaintiff’s motion to modify the scheduling order and motion to subpoena non-party documents, while denying his motion to compel. The court finds good cause to extend discovery deadlines, authorizes subpoenas for documents held by California Medical Facility offices, and concludes that the requested reports, personnel records, and certain text messages are protected by official-information, privacy, attorney-client, or common-interest protections.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
WRITING FOR THE COURT	Jeremy D. Peterson
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	March 6, 2025
DOCKET	2:22-cv-1730-TLN-JDP (P)
DISPOSITION	other
PROCEDURAL POSTURE	Plaintiff moved to modify the scheduling order, subpoena non-party documents, and compel discovery in an ongoing prisoner civil-rights action. The court granted the first two motions and denied the motion to compel.
STANDARD OF REVIEW	A scheduling order may be modified only for good cause and with the judge's consent, with the inquiry focused on the diligence of the party seeking modification. For discovery disputes, the requesting party bears the initial burden of showing relevance, while the resisting party bears the burden of clarifying, explaining, and supporting objections and establishing privilege.
PRECEDENTIAL VALUE	unpublished
PARTIES	Kory T. O'Brien v. R. Garza, Baker

TOPICS

discovery dispute

attorney client privilege

civil procedure

evidence

PRACTICE AREAS

civil procedure

prisoner civil rights

discovery

evidence

QUESTIONS PRESENTED

1. Whether plaintiff established good cause to modify the scheduling order and extend the discovery and dispositive-motion deadlines.
2. Whether plaintiff could obtain subpoenas for relevant non-party documents that defendants were unable to procure.
3. Whether plaintiff's motion to compel should be denied as untimely after the discovery-motion deadline was subsequently extended.
4. Whether defendants established that investigative reports and personnel records were protected from disclosure under the official-information privilege, privacy interests, and related protections.
5. Whether defendants established that withheld text messages were protected by attorney-client privilege and the common-interest doctrine.

HOLDINGS

1. Good cause existed to modify the scheduling order because plaintiff appeared to have acted diligently and could not reasonably meet the existing deadlines under the circumstances presented.
2. Plaintiff was entitled to issuance of subpoenas for relevant documents held by non-parties because he had attempted unsuccessfully to obtain the information from defendants and the record did not establish an undue burden or expense.
3. The motion to compel would not be denied as untimely because the court granted plaintiff's motion to modify the scheduling order and extended the deadline for discovery motions.
4. Defendants satisfied their burden to show that the requested Confidential Fact Gathering Reports, Allegation Inquiries, and personnel records were protected from compelled disclosure.
5. Defendants established that the withheld text messages implicated attorney-client privilege and the common-interest doctrine, so the court would not compel their production.

KEY QUOTATIONS

“A court’s scheduling order “may be modified only for good cause and with the judge’s consent.”” (at 2)

“The good cause inquiry focuses on the diligence of the party seeking the modification.” (at 2)

“Courts must ensure that the party serving the subpoena has taken reasonable steps to avoid imposing an undue burden or expense on the person or entity to be served with the subpoena.” (at 7)

“The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting his objections.” (at 10)

“Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed.” (at 10)

FACTUAL BACKGROUND

Plaintiff, a prisoner asserting constitutional and state-law claims against correctional officers at California Medical Facility, sought additional time for discovery after experiencing crisis bedding, an impending rotator-cuff surgery, and delayed receipt of defendants' discovery responses. He also sought documents allegedly held by the facility's litigation coordinator or office of grievances after defendants could not obtain them. Defendants withheld investigative reports, personnel-related materials, and text messages based on official-information, deliberative-process, privacy, attorney-client, and common-interest grounds, supported by privilege logs and a declaration from the facility's litigation coordinator.

PROCEDURAL HISTORY

Plaintiff filed the action in September 2022 and later amended his complaint. The court screened the amended complaint and found cognizable First and Eighth Amendment claims and state-law tort claims against Garza and Baker. After defendants answered, the court entered an amended scheduling order. Plaintiff then filed the three motions resolved by this order.

DISPOSITION

other

CASES CITED

- Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 608 (9th Cir. 1992)
- Kelly v. City of San Jose, 114 F.R.D. 653, 670 (N.D. Cal. 1987)
- Blemaster v. Sabo, No. 2:16-CV-04557 JWS, 2017 WL 4843241, at *1 (D. Ariz. Oct. 25, 2017)
- DIRECTV, Inc. v. Trone, 209 F.R.D. 455, 458 (C.D. Cal. 2002)
- United States v. Sanmina Corp., 968 F.3d 1107, 1116 (9th Cir. 2020)
- Upjohn Co. v. United States, 449 U.S. 383, 389-90 (1981)
- United States v. Ruehle, 583 F.3d 600, 607-09 (9th Cir. 2009)
- In re Grand Jury Investigation, 974 F.2d 1068, 1071 n.2 (9th Cir. 1992)
- Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575, 578 (N.D. Cal. 2007)

OPINION

(PC) O'Brien v. Garza

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 11 KORY T. O'BRIEN Case No. 2:22-cv-1730-TLN-JDP (P) 12 Plaintiff, 13 v. ORDER 14 R.
GARZA, et al., 15 Defendants. 16 17 18 Plaintiff has three motions pending: a motion to modify
the scheduling order, ECF No. 44; 19 a motion to subpoena non-party documents, ECF No. 45,
and a motion to compel, ECF No. 46. 20 Defendants have opposed the motion to compel. ECF No.
47. I will grant plaintiff's motions to 21 modify the scheduling order and to subpoena non-party
documents and deny his motion to 22 compel. 23 Background 24 In September 2022, plaintiff
filed his first complaint in this case. ECF No. 1. I issued the 25 first scheduling order in April
2023. ECF No. 19. In August 2023, I granted plaintiff's motion to 26 modify the scheduling order
and to stay discovery. ECF No. 23. In August 2023, plaintiff filed 27 an amended complaint. ECF
No. 25. I screened the amended complaint in January 2024, finding 28 that plaintiff alleged
cognizable First and Eighth Amendment claims and state claw tort claims 1 against defendants
Garza and Baker, correctional officers at California Medical Facility. ECF

2 No. 39. Defendants filed their answer in May 2024. ECF No. 41.

3 On July 10, 2024, I issued an amended scheduling order. ECF No. 43. I ordered that the 4
deadline for completion of all discovery, including filing all motions to compel discovery, be set 5
at October 11, 2024, and warned that, absent good cause, discovery motions would not be 6
considered after the deadline. Id. I set September 13, 2024, as the deadline for all discovery 7
requests, and April 4, 2025,¹ as the deadline for dispositive motions. Id. 8 On September 6, 2024,
plaintiff filed a motion to modify the scheduling order, ECF No. 9 44, and a motion to subpoena
non-party documents, ECF No. 45. He filed a motion to compel on
10 October 17, 2024, ECF No. 46. I will address each in turn.

11 Motion to Modify 12 First, plaintiff moves to modify the scheduling order. ECF No. 44. He
requests a 90-day 13 extension on all current deadlines because he was in crisis bedding from
August 2, 2024, he had 14 rotator cuff surgery scheduled for September 1, 2024, and he received
defendants' response to his 15 first discovery requests on August 29, 2024. Id. at 1. He argues that
good cause exists to modify 16 the scheduling order because he made diligent efforts to complete
discovery. Id. He asserts that 17 he conferred with defendants on July 31 and August 1, 2024,
regarding discovery issues, and that 18 defendants would not be biased or prejudiced by a
modification to the scheduling order. Id. at 2- 19 3. He asserts that defendants did not object to the
requested extensions, Id. at 3, and defendants 20 have not opposed plaintiff's motion. 21 A court's
scheduling order "may be modified only for good cause and with the judge's 22 consent." Fed. R.
Civ. P. 16(b)(4). The good cause inquiry focuses on the diligence of the party 23 seeking the
modification. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 24 1992). Thus,
the "court may modify the pretrial schedule if it cannot reasonably be met despite 25 the diligence
of the party seeking the extension." Id. 26 27 1 I originally set the dispositive motion deadline at
April 4, 2024, ECF No. 43, but reset 28 the date, ECF No. 48. 1 I will grant plaintiff's motion to
modify the scheduling order because good cause exists, 2 and it appears that plaintiff has been
diligent in attempting to comply with the current order. The 3 parties have 30 days from the

issuance of this order to serve any additional discovery requests; 60 4 days from the issuance of this order to file discovery motions, including any motions to compel; 5 and 90 days from the issuance of this order to file any dispositive orders. 6 Motion to Subpoena Non-Party Documents 7 Plaintiff also moves to subpoena non-parties allegedly in possession of discovery 8 materials. ECF No. 45. He argues that defendants' answers to his interrogatories demonstrate 9 that non-parties possess documents that he needs to present his case. Id. He argues that his 10 claims hinge on timelines, and that he needs documents to establish the timeline of events 11 underlying his claim. Id. at 2. He asserts that he met and conferred with defendants twice, but 12 that defendants have been unable to procure the documents plaintiff requested because the 13 documents are in the possession of either the California Medical Facility's Litigation Coordinator 14 or California Medical Facility's Office of Grievances. Id.; see also ECF No. 45-1, 45-2. 15 Defendants do not oppose this motion. 16 To obtain discovery from a non-party, plaintiff must seek issuance of a subpoena and 17 demonstrate that the information sought cannot be obtained from defendants through discovery. 18 See Fed. R. Civ. P. 45(d)(1). Courts must ensure that the party serving the subpoena has taken 19 reasonable steps to avoid imposing an undue burden or expense on the person or entity to be 20 served with the subpoena. See Fed. R. Civ. P. 45(d)(1). 21 I will grant plaintiff's motion to subpoena non-party documents. Plaintiff seeks 22 information relevant to his claims, and he has attempted to obtain this information from 23 defendants without success. ECF No. 45. Defendants informed plaintiff they cannot obtain these 24 documents, but that the documents could be obtained from the Litigation Coordinator of the 25 California Medical Facility or the California Medical Facility's Office of Grievances. See ECF

26 No. 45-1, 45-2. As such, I will direct the Clerk of Court to provide plaintiff, along with this 27 order, with four signed but otherwise blank subpoena forms. See Fed. R. Civ. P. 45(a)(3). 28 1 Motion to Compel 2 On October 17, 2024—six days after the deadline to file all discovery motions, including 3 motions to compel—plaintiff filed a motion to compel the production of documents. ECF No. 46. 4 He notes that defendants provided responses to plaintiff's first set of production of documents, 5 but that defendants invoked the "official-information, deliberate-process" privileges against 6 specific requests. Id. at 1. Plaintiff contends that defendants cannot rely on the official- 7 information and deliberate-process privileges or on defendants' right to privacy in their personnel 8 records because the requested information would not compromise the safety of the institution, 9 defendants, or other inmates. Id. at 6. 10 Plaintiff takes issue with defendants' responses to a few specific requests for production, 11 namely, (1) plaintiff's requests for production to Garza asking that Garza produce an Allegation 12 Inquiry report, a Confidential Fact Gathering Report, and "all electronically stored information of 13 communications between [Garza] and . . . Baker, or any other individual, that are located on 14 [Garza's] cell phone," Id. at 2-5, 7, 15-17, and (2) plaintiff's requests for production to Baker 15 asking Baker to produce the same Confidential Fact Gathering report and Allegation Inquiry, Id. 16 at 5-6, 23-24. 17 Garza objected to plaintiff's interrogatories on varying grounds, including that they were 18

impermissibly vague and ambiguous, improperly referred to another discovery response, sought 19 information that was confidential under state regulations, and invaded Garza's privacy rights. Id. 20 at 11-20. Garza also objected that plaintiff sought information protected by the "official- 21 information and deliberate-process privileges." See generally id. As to plaintiff's request for text 22 messages between Garza and Baker, Garza also objected on the basis that such disclosure was 23 protected under attorney-client privilege. Id. at 19. Baker raised the same objections. See 24 generally id. at 23-26. 25 Defendants provided a privilege log explaining that they were withholding documents 26 related to the Confidential Fact Gathering Reports and Allegation Inquiries under the official- 27 information and deliberate-process privileges, the peace officers' right of privacy in their 28 personnel records, and for the confidentiality of non-party inmates' case records and medical 1 information. Id. at 10. As for the request for text messages, Garza produced a privilege log, 2 noting that he was withholding some of the requested documents based on attorney-client 3 privilege and the common-interest doctrine. Id. at 9. 4 Defendants also produced a declaration from B. Ebert, a Correctional Counselor and 5 Litigation Coordinator at California Medical Facility. Id. at 30. In his declaration, Ebert 6 explained that he had reviewed the privilege log and that the documents identified by defendants 7 related to the Confidential Fact Gathering Reports and Allegation Inquiries were generated by the 8 California Department of Corrections and Rehabilitation ("CDCR") and, at all times, had been 9 kept confidential. Id. at 31. Ebert stated that staff-misconduct allegations made by inmates were 10 considered confidential because they contained personal and private information about staff and 11 inmates. Id. Additionally, these documents were prepared as part of an investigation, and the 12 documents reflected the evaluation, deliberation, and investigative sources and methods used by 13 the prison in evaluating the allegations. Id. Ebert explained that allowing the disclosure of these 14 records has the potential to identify third parties not subject to the current suit, which would place 15 those individuals in danger and have the potential to deter inmate-witnesses from providing 16 information in the future for fear of disclosure. Id. Additionally, the disclosure of defendants' 17 personnel files would implicate their safety, as it would give an inmate access to confidential 18 information that could improperly be used against the defendant and the morale of officers would 19 be impacted. Id. at 32. Ebert stated that the release of these materials, even under a protective 20 order, would have the potential to jeopardize institutional safety. Id. 21 Defendants oppose plaintiff's motion to compel. ECF No. 47. First, they argue that the 22 motion should be denied as untimely because it was filed after the deadline set in the scheduling 23 order. Id. at 3. They then argue that plaintiff failed to meet and confer before filing his motion, 24 in violation of federal rules, and that the motion should be denied on that ground, as well. Id. at 25 3-4. Defendants next contend that the official-information privilege protects the Confidential 26 Fact Gathering Report from disclosure. Id. at 4. They argue that they met the burden under Kelly 27 v. City of San Jose of demonstrating that official-information privilege protected the documents 28 from disclosure. 114 F.R.D. 653, 660 (N.D. Cal. 1987), at 4-7. Defendants also argue that 1 attorney-client privilege

protects the disclosure of Garza's text messages between himself and Baker, as the common-interest doctrine applies to their circumstances and the texts being sought directly implicate attorney-client common-interest communications. *Id.* at 7-9. Defendants provided declarations and screenshots of the withheld text messages, demonstrating that the withheld messages directly spoke to communications between parties related to the information their attorney communicated to them. See ECF No. 47-1, 47-2. Under Federal Rule of Civil Procedure 34, "[t]he party to whom [a request for production] is directed must respond in writing within 30 days after being served." Fed. R. Civ. P. 34(b)(2)(A). The responding party may state an objection to any request but must offer a specific rationale for doing so. In responding to a request to produce documents, the responding party must affirmatively state whether any responsive materials are being withheld on the basis of the proffered objection. Fed. R. Civ. P. 34(b)(2)(C). Under Federal Rule of Civil Procedure 37, "a party seeking discovery may move for an order compelling an answer, designation, production, or inspection." Fed. R. Civ. P. 37(a)(3)(B). The party seeking to compel discovery has the initial burden of establishing that its requests are relevant, see Fed. R. Civ. P. 26(b)(1), but "[t]he party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." See *Blemaster v. Sabo*, No. 2:16-CV-04557 JWS, 2017 WL 4843241, at *1 (D. Ariz. Oct. 25, 2017) (quoting *DIRECTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal. 20 2002)). Under the official-information privilege, defendants must provide an affidavit from a knowledgeable official indicating that: (1) the agency has maintained the confidentiality of the documents at issue; (2) a statement that the official has personally reviewed the documents; (3) a specific identification of the governmental or privacy interests that would be compromised by production; (4) a description of how disclosure subject to a carefully crafted protective order would create a substantial risk of harm to these interests; and (5) a projection of how much harm would be done to these interests if the disclosure were made. *Kelly*, 114 F.R.D. at 670. As an initial matter, because I am granting plaintiff's motion to modify the scheduling order, I will not deny the motion to compel as untimely. Nevertheless, the motion will be denied because defendants have properly satisfied their burden of demonstrating that the documents being sought are protected from disclosure. First, defendants have, as required, provided a declaration from Ebert, a litigation coordinator and correctional counselor, addressing the Kelly requirements. ECF No. 46 at 33-34. They have also, as required, provided a privilege log. *Id.* at 8 26-28. Thus, defendants have made the requisite showing that the disclosure of the requested documents—the Confidential Fact Gathering Report, the Allegation Inquiry, and defendants' personnel records—should not be compelled, and plaintiff's motion does not demonstrate otherwise. As to the documents allegedly protected under the attorney-client privilege, the "attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020) (9th Cir. 2011)

(citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 16 (1981)). It “exists to protect not only the giving of professional advice to those who can act on it 17 but also the giving of information to the lawyer to enable him to give sound and informed 18 advice.” *Upjohn*, 449 U.S. at 390. The “party asserting the attorney-client privilege has the 19 burden of establishing the relationship and the privileged nature of the communication,” and “if 20 necessary, [of] segregat[ing] the privileged information from the non-privileged information.” 21 *United States v. Ruehle*, 583 F.3d 600, 608-09 (emphasis omitted). “Because it impedes full and 22 free discovery of the truth, the attorney-client privilege is strictly construed.” *Id.* at 607. The 23 attorney-client privilege exists: 24

(1) Where legal advice of any kind is sought (2) from a professional legal adviser

25 in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) 26 from disclosure by himself or by the legal adviser, (8) unless the protection be waived. 27 28 1 | *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 n.2 (9th Cir. 1992). The party asserting the 2 | privilege bears the burden of establishing each element. *Ruehle*, 583 F.3d at 608. 3 Attorney-client privilege extends to communications between individuals with a common 4 | interest who communicate amongst themselves for the purposes of preparing a joint strategy. 5 || *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007). Although not a 6 | “privilege” in and of itself, the common interest doctrine is an exception to the rule on waiver and 7 | applies where (1) the communication is made by separate parties to the proceeding where the 8 || parties have a common legal interest; (2) the communication is mean to further their efforts; and 9 | (3) the privilege has not been waived. *Id.* 10 Defendants have made the requisite showing that the texts messages between them, listed 11 | as withheld in the privilege log, implicate the attorney-client privilege and common-interest 12 | doctrine. See ECF No. 47-1, 47-2. As such, I will not order that the identified text messages be 13 | compelled. 14 Conclusion 15 Accordingly, it is ORDERED that: 16 1. Plaintiff’s motion to modify the scheduling order, ECF No. 44, is GRANTED. 17 || The parties have 30 days from the issuance of this order to serve any additional discovery 18 || requests; 60 days from the issuance of this order to file discovery motions, including any motions 19 | to compel; and 90 days from the issuance of this order to file any dispositive orders. 20 2. Plaintiff’s motion to subpoena non-party documents, ECF No. 45, is GRANTED. 21 3. Plaintiff’s motion to compel, ECF No. 46, is DENIED. 22 4. The Clerk of Court is directed to provide plaintiff with four signed but otherwise 23 | blank subpoena forms with this order. See Fed. R. Civ. P. 45(a)(3). 24 95 IT IS SO ORDERED. 26 | q Sty — Dated: _ March 5, 2025 ow——

27 JEREMY D., PETERSON

UNITED STATES MAGISTRATE JUDGE