

Advancing Technologies, Advancing Ethics?

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Introduction

Did you know that when you draft an e-mail on a company computer using a personal, password-protected e-mail account, accessed through the Internet, it can be saved to the computer's hard drive? What if the e-mail is a communication to you from your client? Could this normally privileged communication be considered inadvertently disclosed to the owner of the computer? Is the attorney-client privilege now deemed waived because of this disclosure? And what are the ethical obligations on the recipient of the inadvertently disclosed privileged communications under these circumstances?

A state court judge in Massachusetts recently was forced to grapple with these tough questions when the plaintiff corporation in litigation against a former employee and his new employer brought a motion to compel disclosure of attorney-client communications between the individual defendant and his attorney. *National Economic Research Associates, Inc. v. Evans*, 2006 WL 2440008 (Mass. Super. Ct. Aug. 2, 2006). These communications were in the form of e-mails—e-mails that the defendant had written to his personal

attorney from work before he resigned from the plaintiff corporation. All the communications had been made and sent on the defendant's company laptop via the defendant's personal Yahoo account, but they were easily retrieved from the laptop's hard disk by the forensic expert hired by plaintiff after defendant left plaintiff's employ.

The judge rejected the argument that any reasonable person in the defendant's shoes would have known that the hard disk of a computer makes a "screen shot" of all that it sees, in a temporary file, including e-mails retrieved from a private password protected e-mail account on the Internet—*i.e.*, that the defendant had no expectation of privacy in these e-mails such that he could not properly cloak the communications in the attorney-client privilege. Under Massachusetts law, "an attorney-client communication is not confidential and therefore not protected by the attorney-client privilege if: the communication was made in the presence of a third party who was not a necessary agent of the attorney or the client; the communication was intended to be made privately but the client reasonably should have understood from the circumstances of the communication that it was likely to be overheard; or the communication was made privately but it was understood that the

information communicated was meant to be conveyed to others." *Id.* (internal citations omitted).

The judge actually admitted in the opinion that he himself had been unaware that e-mails from an Internet account were routinely stored in this manner. The judge also rejected the contention that the privilege was waived through the inadvertent disclosure of the communications. Indeed, it is difficult to imagine a disclosure more inadvertent than e-mails composed on your personal e-mail account accessed through the Internet that the owner of the computer can only uncover by utilizing a forensic computer expert.

The attorney-client privilege, described routinely in case law as one of the oldest privileges recognized at common law – "the most ancient of the confidential privilege communication privileges," is now facing challenges in the practice that are new to attorneys and courts alike. See *Trudeau v. New York State Consumer Board*, 2006 WL 2390345 (N.D. N.Y.) (quoting various treatises on the attorney-client privilege and its position as "one of those bedrock principles of our justice system which has been sustained for hundreds of years, dating back to the 1600s.") (internal quotations omitted). Indeed, given the ever-advancing technological age in which we practice law, it is increas-

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ingly clear that a heightened vigilance is required with regard to protection of the privilege. Given the ease with which e-mails are exchanged, and the growing prevalence of electronic discovery, it has become more likely that privileged documents will be inadvertently disclosed to the opposing party. Once this occurs, questions arise like the ones seen in the case above – has the attorney-client privilege been waived? Even if the court answers “yes,” is it ethical for the recipient of the disclosure to retain and utilize the once-privileged document? Surprisingly, or perhaps unsurprisingly given the speed with which various technologies are advancing, the answers are not altogether clear.

Inadvertent Disclosure and Waiver of the Attorney-Client Privilege

It is universally accepted by the courts facing the question of whether inadvertent disclosure of privileged communications results in waiver of the attorney-client privilege and/or work product doctrine that the attorney-client privilege and the work product doctrine serve important social values. However, there is no consensus among the courts with respect to when the privilege should be deemed waived. Typically, courts have analyzed this issue in one of three different ways.

Some courts have held that there is a *per se* waiver of the attorney-client privilege where privileged documents have been disclosed. In other words, the intent of the privilege holder in disclosing the document does not matter. Privilege knowingly waived is treated the same as privilege inadvertently waived. The support for this approach lies in the purpose of the at-

torney-client privilege. Because its purpose is to protect confidential communications, when the communication has been disclosed, it is no longer confidential, and accordingly, there is considered to be “little benefit” in protecting such a privilege at that point. See, e.g., *International Digital Systems Corp. v. Digital Equipment Corp.*, 120 F.R.D. 445, 449-50 (D. Mass. 1988) (finding privilege had been waived by inadvertent disclosure of twenty privileged documents in the course of discovery between the parties, as the “confidentiality of the [disclosed] communication can never be restored, regardless of whether the disclosure was ‘inadvertent’ or purposeful”). The courts that favor this approach typically focus on their inability to provide an adequate remedy in this situation – the confidentiality has been breached, the harm cannot be undone. As one court explained, to order return of the once-privileged documents would “do no more than seal the bag from which the cat has already escaped.” *Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990).

On the other end of the spectrum, courts employ a “never waived” approach to privilege issues arising in the context of inadvertent disclosure. This view is grounded in the reasoning that a disclosure made negligently cannot effect a waiver because the privilege truly belongs to the client, not the attorney, and an inadvertent disclosure made by the attorney cannot possibly be imputed to the client. As one court stated on this point, “if we are serious about the attorney-client privilege and its relation to the *client’s* welfare, we should require more than . . . negligence by *counsel* before

the client can be deemed to have given up the privilege.” *Corey v. Norman, Hanson & Detroy*, 742 A.2d 933 (Me. 1999) (quoting *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951 (N.D. Ill. 1982)) (emphasis in original).

The third approach utilized by courts addressing this issue adopts a middle ground, and analyzes the question of whether the privilege was waived on a case-by-case basis. Using this approach, the court examines a number of circumstances relating to the inadvertent disclosure, including “1) reasonableness of precautions taken to prevent inadvertent disclosure; 2) the amount of time it took the producing party to recognize its error; 3) the scope of the production; 4) the extent of the inadvertent production; 5) the overriding interest of fairness and privilege.” *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287 (D. Mass. 2000). In this multi-factored analysis, the scrutiny of the court tends to be focused on the first prong — the reasonableness of precautions taken to prevent inadvertent disclosure — with the others playing a less substantial role.

For example, in a federal district court case in Massachusetts, *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, the court utilized the “middle test,” and focused most of its inquiry on the precautions taken by the disclosing party to attempt to prevent the disclosure. *Id.* The circumstances of the inadvertent disclosure in that case involved a document review by defendant’s counsel of over 200,000 pages of documents to identify non-privileged responsive documents to Amgen’s discovery requests. The review resulted in 3,821 documents

identified as privileged, and these were set aside in four small boxes on a separate shelf to be withheld from production. However, when the copy vendor arrived to collect the documents to be produced for copying and bates-numbering, a paralegal mistakenly allowed the boxes containing the privileged documents to be taken along with the non-privileged documents. Due to the error of this paralegal, the privileged documents were included among the twenty-three boxes produced to Amgen's counsel. Five days later, Amgen's counsel sent a letter to co-counsel for defendant to inquire whether the privileged documents had been produced intentionally. Defendant's counsel responded in the negative by letter, and asked for return of the documents immediately.

The *Amgen* court's decision largely rested on the lack of precaution it found defendant's counsel had exercised in preventing the inadvertent production of the privileged documents. The court acknowledged that while the privileged documents were placed on a different shelf from the documents intended to be produced, there were other simple precautions that could have been taken to avoid the inadvertent disclosure. Among these, the court suggested, was a simple review undertaken by an attorney or legal assistant to ensure that the correct documents were copied. In the court's view, the very notion that this disclosure could have been easily prevented precluded its ruling that defendant's attorneys took reasonable precautions to avoid it. *Id.* at 292. Thus, the court found that the privilege was waived.

Another federal decision in the Southern District of New York, in

which a similar "middle ground" test was employed, largely focuses on the "carelessness" involved in the inadvertent disclosure in holding that the privilege was waived. In *Atronic International GMBH v. SAI SemiSpecialists of America, Inc.*, 232 F.R.D. 160 (E.D.N.Y. 2005), through the course of discovery, plaintiff inadvertently disclosed two e-mails exchanged between plaintiff's management and its international lawyer in Nevada. The lawyer who was assigned to review the production was unaware that the person in Nevada was a lawyer, and accordingly allowed the e-mails to be produced. The issue came before the court by defendant's motion to allow it to retain and use the two e-mails.

The *Atronic* court applied the multi-part test used in the Southern District of New York, one remarkably similar to the five-factor test employed in *Amgen*, to analyze whether the privilege was waived by the disclosure. The court held that the plaintiff had waived the privilege by counsel's inadvertent disclosure of the two e-mails. In looking at whether plaintiff had taken reasonable precautions to protect the privilege, the court was unimpressed. The court noted that counsel had failed to label the e-mails "confidential" or "privileged," and thereby failed to give others notice of their status as privileged. The court was also critical of counsel's failure to employ a reasonable procedure for identifying and separating the confidential communications from the non-privileged communications. The fact that an attorney was assigned to review all the documents was not sufficient for the court as a precaution, given that this attorney did not even know the identity of plaintiff's legal counsel in the

matter. The court therefore found that there was inadequate precaution taken to protect the privilege.

The *Atronic* court's finding that the plaintiff did not use reasonable precautions to protect the privilege spilled over into the remaining factors analyzed by the court. In examining the scope of the production, *i.e.*, "the number of privileged documents disclosed in relation to the overall size of the document production," the court found unavailing the plaintiff's argument that the production of hundreds of documents resulted in the excusable production of the two privileged e-mails. The court also found that overarching issues of fairness favored waiver in these circumstances. Specifically, the court found that because the substance of the e-mails were directly on point and contained admissions that "differ[ed] markedly from the factual position plaintiff had taken in this action," and because the plaintiff's precautions in protecting against inadvertent disclosure constituted "inexcusable carelessness," the claim of privilege was waived. 232 F.R.D. at 166.

Unless you are in a jurisdiction that has adopted the "never waived" approach, a review of the case law demonstrates that an overabundance of caution in dealing with privileged documents, especially electronic documents, is advisable. E-mail correspondence should be labeled as privileged and confidential and instructions should be given to unintended recipients not to read the contents of the e-mail. Protocols for indexing, identifying and storing privileged documents should be adopted and followed in cases with voluminous electronic discovery. However, even

with stringent safety measures in place, it is possible that a privileged document may evade detection and be inadvertently disclosed. As set forth above, many courts addressing such inadvertent disclosure will focus on the precautions employed to prevent such a disclosure, and waiver can be avoided in such jurisdictions by demonstrating reasonable cautionary measures were applied to protect the privilege.

Ethical Obligations on the Recipients of Inadvertently Disclosed Material

What is an attorney's ethical duty when he receives an inadvertently disclosed document? Can the attorney read it at her leisure or should she refrain from doing so? Does he have an obligation to notify the party who inadvertently disclosed the material that he has received it?

The American Bar Association (ABA) has provided mixed guidance on these issues. In a recent Formal Ethics Opinion, No. 05-437, the ABA has stated simply that the receiving lawyer should "promptly notify the sender in order to permit the sender to take protective measures." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 05-437 (2005). The Opinion is silent on the ethical obligation of the attorney in viewing the inadvertently disclosed material. This recent Opinion actually withdraws a prior ABA Formal Opinion, issued in 1992, which required more from the recipient of an inadvertent disclosure:

A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege

or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.

ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-368 (1992). Where this now withdrawn Opinion specifically instructed the recipients of inadvertently disclosed documents to immediately cease review of such materials and to follow the orders of the producing party, the new Opinion imposes a less onerous burden on the recipient, and requires only prompt notice to the sender, so that the sender can take "protective measures." This would seem to place the ball directly (and literally) in court, as the burden is now on the sender to compel return of the documents.

Formal Opinion 05-437 is consistent with the Model Rules of Professional Conduct, specifically, Model Rule 4.4(b), which was added in 2002. According to this Model Rule, "A lawyer who receives a document relating to the representation of the lawyer's client and who knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Model Rules of Professional Conduct R. 4.4(b) (2002).

The new Opinion also appears to eradicate the responsibility of the recipient to refrain from examining the inadvertently disclosed information, which runs afoul of many decisions in which the court lauds the recipient for awaiting official decision before substantively reviewing the mistakenly

produced documents. Indeed, there are a number of decisions in which courts imposed harsh treatment on attorneys who have used or reviewed documents inadvertently disclosed which the attorneys knew or should have known were privileged or confidential. One of these is a California case, *Rico v. Mitsubishi Motors Corp.*, 10 Cal. Rptr. 3d 601, 603 (Cal. Ct. App. 2004), review granted, opinion superseded by *Rico v. Mitsubishi Motors Corp.*, 91 P.3d 162 (Cal. 2004).

In *Rico*, the trial court actually disqualified plaintiff's counsel and plaintiff's experts as a sanction when attorneys for the plaintiff, after receiving a privileged and confidential document, failed to disclose the fact that they had it in their possession and then reviewed it extensively with their experts. *Rico* was affirmed by the appellate court and the California Supreme Court has accepted the case for review. However, the decision in *Rico* definitively relied on the now-withdrawn Formal Ethics Opinion 92-368 (1992), and determined conclusively that the lawyer who discovered the document, which was clearly privileged, should have refrained from examining it any more than necessary to identify it as such, and opposing counsel should have been notified immediately. *Id.* at 614. As one commentator has concluded, based on the *Rico* decision and decisions from other jurisdictions which have relied on Formal Opinion 92-368 to hold that simply notifying opposing counsel of the receipt of inadvertently disclosed privileged communications is not enough, the attempt of the ABA to alter the ethical landscape through Formal Opinion 05-437 may be largely unavailing. See generally, Paller, Jo-

seph L., "Gentleman Do Not Read Each Other's Mail: A Lawyer's Duties upon Receipt of Inadvertently Disclosed Confidential Information," 21 *The Labor Lawyer* 247 (2006).

Additional input on this issue can now be found in the recently adopted amendments to the Federal Rules of Civil Procedure. Specifically, an amendment to Rule 26(b)(5) actually speaks to the "substantial risk" of inadvertent production of privileged or protected documents, and "clarifies the procedure to apply when a responding party asserts a claim of privilege or of work-product protection after production." Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure, Agenda E-18 ("Judicial Conference Report"), at 29. (Sept. 2005). Scheduled to take effect December 1, 2006, the new procedure set forth in Rule 26(b)(5) directs a producing party, who learns that privileged information was inadvertently produced, to notify the receiving party of the disclosure, at which point the receiving party must return, sequester or destroy the information—a noticeably more strenuous standard than the ABA Formal Opinion 05-437 provides for, and also more than some courts would require. It is important to note however, that the Judicial Conference Committee on Rules of Practice and Procedure, which is responsible for approving the amendments, specifically stated that the new rules would not protect a party from the substantive law regarding waiver if it conflicts with the new approved procedures. *Id.*

Another issue brought to the fore by advancing technologies and the increased use of electronic documents in

filing and correspondence is that of metadata. Metadata is the part of an electronic document that contains data on the document history, including the identification of the persons editing and authoring the document. Metadata also contains the history of revisions to the document. Metadata is dangerous because it is largely invisible to the author of a document, but to a knowledgeable recipient of the document, could provide all types of confidential information, *e.g.*, the prior edits to the document. Word processing programs such as Word and WordPerfect typically contain such metadata. Thus, the recipient of an electronic document created by opposing counsel could very well "mine" the document for hidden metadata, and uncover earlier versions of the document and other confidential information.

Is mining a document received by opposing counsel ethical? The New York State Bar Association's Committee on Professional Ethics has advised that it is not. In its Opinion No. 749 (2001), the Committee stated that "[u]se of this technology would enable a lawyer who receives e-mail and electronic documents from counsel for an opposing party to obtain various kinds of information that the sender has not intentionally made available to the lawyer." It further opined that the strong public policy favoring preservation of confidentiality in the lawyer-client relationship mandated that "use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege . . . would violate the letter and spirit of the Lawyer's Code of Professional Responsibility." However, it will be interesting to see how views on this is-

sue develop as more people in the legal profession become aware of metadata and the hidden information it contains. As discussed above, there are courts which hold that a waiver of the attorney client privilege can occur where inadequate precautions are taken to protect the privileged materials, an argument could be made that sending a document with privileged metadata via e-mail constitutes a waiver of the privilege and imposes no ethical obligation on the recipient of the e-mail not to mine for the metadata.

Conclusion

The rapid advancement of technology has enabled attorneys to be faster and more efficient in their practice of law. However, that same technology creates a greater challenge to attorneys imbued with a duty to protect their client's confidences and adhere to ethical guidelines in their practice. Inadvertent disclosure of privileged information is certain to occur with more frequency, given the volume of materials that are now exchanged electronically. A heightened vigilance is advised, and attorneys will be well served by adopting reasonable protocols to protect against inadvertent disclosure and potential waiver of the attorney-client privilege. Although the ethical landscape appears to be changing with regard to the ethical obligations of attorneys who receive inadvertently disclosed material, caution is advised in this area as well.

Some tips for maintaining the confidentiality of privileged materials are:

- Label all e-mails as privileged and confidential, and also include instructions to unintended recipients

not to read the contents of the email.

- Develop and implement protocols to be used for identifying, indexing and storing privileged documents, especially for cases in which voluminous electronic discovery will take place.
- Avoid sending documents containing metadata and instead convert documents to an image format, such as PDF, which do not commonly contain metadata.

Taking steps such as these will help protect against inadvertent disclosures of privileged materials.