PROFESSIONAL LIABILITY UPDATE

ATTORNEY-CLIENT PRIVILEGE

By Jennifer Becker

McDermott Will & Emery LLP v. Superior Court (2017) 10 Cal.App.5th 1083

The Fourth District holds an inadvertent disclosure of an attorney-client communication to a third party is not a knowing waiver. An attorney who improperly uses inadvertently disclosed attorney-client communications can be disqualified.

McDermott, Will & Emery LLP (McDermott) attorney Jonathan Lurie provided estate planning services for Marilyn and Dick Hausman. Dick managed Marilyn's assets through MHI. McDermott also represented MHI on corporate, employment, and other miscellaneous matters. Dick and Marilyn's son Rick and William Cox were officers of MHI.

After Marilyn's death Dick and Rick struggled for control over MHI. Dick received an email from his attorney Mark Blaskey with his thoughts, impressions, and advice. Dick inadvertently forwarded Blaskey's email to Ninetta Herbert, the wife of Gavin Herbert, Dick's brother-in-law attempting to act as an intermediary to resolve the dispute. Ninetta forwarded the email to Gavin.

In ensuing Probate litigation between Dick and Rick, Rick's attorney Jason Kirby found the email, and sent it to Dick's counsel Alan Kessel. The attorneys agreed to disagree about whether Dick had waived his privilege, and tabled use of the email until the court could resolve the issue. However, when Lurie was deposed Rick's counsel attempted to use the email to question Lurie, who was represented by a Gibson, Dunn & Crutcher, LLP (Gibson) attorney, and Dick's attorney objected.

In a separate action Dick sued McDermott alleging conflicts of interest in representing members of the of the Hausman family, the Hausman family trusts, and MHI. McDermott's attorney at Gibson, James Fogelman introduced the Blaskey email at a deposition.

When Dick's malpractice counsel, Suzanne Burke Spencer, saw the email for the first time at the deposition, she objected to use of what appeared to be an inadvertently produced privileged attorney-client communication, and demanded Fogelman return all copies. Fogelman refused, claiming Dick had waived his privilege by forwarding the email to third parties. Fogelman did not tell Spencer Dick's Probate action attorney made the same objection less than two weeks earlier at Lurie's deposition in the Probate action, nor did he inform her of the agreement the

parties in the Probate action reached about the e-mail.

Spencer sent a letter objecting to continued use of the Blaskey email; Fogelman agreed to temporarily stop using it while the parties investigated the circumstances of its disclosure. However, he broke this agreement when he produced a copy of the Blaskey e-mail in a document production.

Fogelman asserted Dick had been given enough time to investigate and he would use the email again. Dick moved to establish the Blaskey email was privileged; to order Fogelman to return all copies; and to strike discovery conducted about the email. After the trial court granted Dick's motion, he moved to disqualify Fogelman and Gibson from representing McDermott, which the trial court granted.

The Court of Appeal observed a holder waives its attorney-client privilege when it discloses a significant part of a communication, or consents to disclosure by anyone else. (Evid. Code, § 912 (a)) Courts consistently hold inadvertent disclosures are not a waiver, because the code section contemplates a measure of choice and deliberation.

The holder's intent in disclosing a privileged communication is an important consideration, but not necessarily dispositive. The trial court must also examine manifestations of the holder's intent to disclose, including precautions the holder took to preserve confidentiality, and how promptly the holder sought return of the inadvertently disclosed document.

Substantial evidence supported the trial court's resolution of the conflicting evidence of Dick's intention in his favor. Dick's e-mail to Ninetta did not explain why he forwarded the Blaskey e-mail to her; it came from a iPhone; Dick, almost 80 years old, suffered reduced dexterity from multiple sclerosis; Ninetta had no connection to the MHI dispute; Dick rarely spoke to Ninetta and never about MHI; Gavin testified transmission of the e-mail was a mistake; and Dick and Gavin never spoke about the email. Ninetta's disclosure of the e-mail to Gavin, and Gavin's later disclosure to others, was not significant because neither were holders of the privilege, and Dick did not consent to disclosures he knew nothing about. The Court of Appeal refused to draw the contrary inferences McDermott suggested could be concluded from the evidence.

Disqualification was appropriate because Fogelman violated long established rules for handling privileged, inadvertently disclosed communications, known as the *State Fund* rule after the case that articulated the standard. When a lawyer receives materials that appear privileged or confidential, and it is reasonably apparent the materials were inadvertently disclosed, the attorney should not examine the materials any more than is essential to ascertain if the materials are privileged, and immediately notify the sender he or she possesses the material. The parties may resolve the situation by agreement, or resort to the court for guidance and orders.

The *State Fund* rule is an objective standard that asks whether reasonably competent counsel, knowing the circumstances, would have concluded the materials were privileged, how much review was reasonably necessary to conclude that, and when counsel's examination should have ended. The rule honors the sanctity of the attorney-client privilege; safeguards the confidential relationship between clients and attorneys; and discourages unprofessional

conduct. An attorney's obligation includes respecting the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.

Gibson urged the State Fund rule applies only when the materials are "obviously" or "clearly appear" to be privileged. The privileged nature of the materials and the inadvertence of their disclosure need not be established to a legal certainty to trigger an attorney's *State Fund* duties.

Only when inadvertently received materials are not obviously privileged does a lesser standard apply. There, the attorney's duty is simply to notify the privilege holder that the attorney may have privileged documents inadvertently disclosed. The onus shifts to the privilege holder to protect the materials if the holder believes the materials are privileged and were inadvertently disclosed.

The State Fund rule is not limited to inadvertent disclosures of privileged materials in litigation. To limit the application of the rule to litigation disclosures is not supported by case law or sensible policy.

Comment: The stakes are high when an attorney fails to take precautions in upon receipt of an adversary's attorney-client communication the attorney knows or should know were inadvertently disclosed. Failure to follow ethical rules can lead to disqualification, at great harm to the client.