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The Dangers Of Waiting Too Long To Request Return Of Inadvertently Produced Privileged Information

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One of litigation counsel's worst nightmares in producing documents is the inadvertent production of privileged or work-product documents. In this age of electronically stored information where parties are often required to produce hundreds of thousands or even millions of pages of documents, the inadvertent production of privileged or otherwise protected communications is extremely difficult, and maybe even impossible, to avoid. To address the issue of inadvertent production, the Federal Rules of Civil Procedure ("Fed. R. Civ. P."),[1] the Federal Rules of Evidence ("F.R.E."),[2] and even the New Jersey Rules of Court[3] have been amended to establish a procedure for counsel who have taken reasonable steps to prevent such disclosure to promptly take reasonable steps to correct the error without waiving any applicable privilege or work-product protection. In the event that privileged information is inadvertently produced, counsel can notify the receiving party, request that the privileged information be returned, and prohibit the use of the privileged information until the claim of privilege is resolved. Moreover, Rule 4.4(b) of New Jersey's Rules of Professional Conduct ("R.P.C.") requires attorneys to not read and promptly return a document that the attorney has reasonable cause to believe was inadvertently sent.[4]

Despite these procedures and protections, litigation counsel still face the risk of potentially waiving privilege each time privileged information is inadvertently produced. Such a situation recently arose in a case pending in the United States District Court of New Jersey, *D'Onofrio v. Borough of Seaside Park*, No. 09-622 (AET), 2012 U.S. Dist. LEXIS 75651 (D.N.J. May 30, 2012), but with a result that many attorneys may find a bit surprising. In a detailed opinion issued by the Honorable Tonianne J. Bongiovanni, United States magistrate judge, the court held that, despite an ethical violation by plaintiff's counsel in failing to return and not use privileged information inadvertently produced, the defendants' counsel failed to take reasonable steps to correct their inadvertent production of privileged documents and had waived privilege.

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Background

In preparing to produce documents, the defendants' counsel spent approximately 250 hours of attorney time reviewing 14 boxes of documents. Six of the 14 boxes came from the files of two attorneys who previously represented the defendants (the "Attorney Documents") in other matters related to the litigation. The other eight boxes were from the defendants' files ("Borough Documents"). While associates were assigned to review the Borough Documents, a partner reviewed the Attorney Documents. The partner took detailed notes concerning documents she considered to be privileged and confirmed the privilege designation with the attorneys who created the underlying documents. After conducting this careful review, the attorney assigned a non-attorney, clerical employee the task of separating the privileged documents from the non-privileged ones and arranging for the non-privileged documents to be sent to an e-discovery vendor to be scanned and prepared for production on a disc. The clerical employee, however, separated the privileged Attorney Documents from only two of the six boxes, and privileged information in the remaining four boxes was included in the production. On August 12, 2010, the defendants produced a disk to plaintiffs containing what they believed to be non-privileged, responsive documents.

Thereafter, another clerical employee noticed organizational problems with the disk and that some of the partner's electronic comments that were supposed to have been withheld as privileged were contained on the August 12, 2010 disk. Defendants recalled the first disc and produced a new disk on November 4, 2010. On December 9, 2010, plaintiffs' counsel advised that there was a problem with the November 4, 2010 disk, and on December 10, 2010, defendants provided a new copy of the disk.

In November 2010, defendants' counsel began creating a privilege log. The descriptions on the log were reviewed by a partner before the log was produced to plaintiffs. The partner, however, did not notice that the privilege log contained far fewer entries than should have been included based on the partner's review of the Attorney Documents.

On March 15, 2011, plaintiff advised that there was a problem with the order of the documents contained on the December 10, 2010 disk. Defendants' counsel reviewed a small sampling of the disk and determined that the documents were out of order but did not substantively review the disc. Instead, counsel's IT department reviewed the disk, determined that the organization problem was related to the Borough Documents only (the Attorney Documents were not affected) and reorga-

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nized the documents. During this reorganization process, however, the partner also noticed that certain privileged Borough Documents had been mistakenly produced. She removed those documents from the disk, added them to the privilege log and produced another disk in April 2011. The partner, however, did not undertake a re-review of the Attorney Documents on the disk to determine whether any other privileged documents had been inadvertently produced.

On January 12, 2012, plaintiff filed a reply brief in support of a motion that attached several of defendants' privileged documents that were first included on the August 12, 2010 disk. On January 13, 2012, defendants' counsel reviewed the reply papers and determined that they contained privileged documents. Defendants' counsel re-reviewed their production and concluded that approximately 1,000 pages of privileged Attorney Documents had been inadvertently produced. On January 18, 2012, defendants advised all other parties of their inadvertent production of privileged documents and requested that all such documents be discarded and not used pursuant to Fed. R. Civ. P. 26(b)(5)(B). Thereafter, defendants moved to reclaim their inadvertently produced privileged documents.

Analysis

In determining whether defendants were entitled to reclaim their privileged documents, the court undertook a two-step analysis pursuant to F.R.E. 502(b): 1) whether the information was, in fact, privileged; and 2) if privileged, whether the disclosure was inadvertent, whether they took reasonable steps to prevent disclosure and whether they promptly took reasonable steps to correct the erroneous production.[5]

After conducting an *in camera* review, the court determined that several categories of documents sought to be reclaimed were in fact privileged and that the production was inadvertent. For those privileged documents, the court next analyzed whether defendants took reasonable steps to prevent disclosure and promptly took reasonable steps to correct the error. The court reviewed the conduct of defendants' counsel and determined that many of the steps undertaken by defendants' counsel were "reasonable," including conducting a multi-attorney review with associates and a partner, devoting approximately 250 hours of attorney time and delegating the task of physically separating privileged documents to a non-attorney clerical employee. The court also determined that defendants' counsel was not initially obligated to review the entire contents of the disc.[6]

The court further examined whether the number and extent of disclosures weighed in favor of waiver. In short, the court found this factor to be "neutral." The court was not persuaded by defendants' arguments that the inadvertent production only involved a small percentage of the overall production because a large number of the inadvertently produced documents were from the six boxes of the Attorney Documents, which defendants' counsel knew were likely to contain a high percentage of privileged documents.

With respect to defendants' counsel's efforts to promptly take reasonable steps to correct the erroneous production of privileged documents, the court held that defendants did not act reasonably to correct their mistake and had in fact waived the privilege. In so holding, the court determined that defendants "should have been aware that something was amiss with their document production long before Plaintiff relied on three privileged documents as part of his reply brief . . . on January 12, 2012."[7] By March 2011, when defendants discovered that they had inadvertently produced privileged information from the Borough Documents on August 12, 2010, on November 4, 2010 and again on December 10, 2010, defendants were on notice that there was a problem with their production and were obligated to re-review their entire production. Accordingly, the court found that defendants failed to take "prompt and reasonable steps" to correct the inadvertent production and waived the privilege.

Of significance, the court noted that "how" a party is notified of its inadvertent production of privileged documents is "largely irrelevant"; rather, "the key is that once a party has notice that something is 'amiss with its production and privilege review[,]' that party has an obligation to 'promptly re-assess its procedures and re-check its production.'"[8] In this regard, the court was not persuaded that plaintiff's counsel's ethical violation of being in possession of documents clearly identified as privileged without notifying and returning them to defendants' counsel as required by R.P.C. 4.4(b) did not, on balance, excuse the conduct of defendants' counsel.

Conclusion

While the finding of waiver is a fact-sensitive analysis and will depend greatly on the reasonableness of counsel's actions, the court's decision in *D'Onofrio v. Borough of Seaside Park* should send a clear message that counsel cannot simply rely on opposing counsel to identify, return and not use inadvertently produced privileged documents. Not only must counsel take reasonable steps to ensure that privileged documents are not initially produced in discovery, counsel must also act promptly to investigate any problems that would lead a reasonable person to check a production to ensure that privileged information was not inadvertently produced. If not, counsel risks being found to have waived privilege and denied the opportunity to reclaim inadvertently produced privileged information.

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1 Fed. R. Civ. P. 26(b)(5)(B) provides: "If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved."

2 F.R.E. 502(b) provides: "Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."

3 Rule 4:10-2(e)(2) of provides: "If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable efforts to retrieve it. The producing party must preserve the information until the claim is resolved."

4 R.P.C. 4.4(b) provides: "A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender."

5 *Id.* at *31-33. The court also considered the factors set forth in *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F. Supp. 404, 411 (D.N.J. 1995): "(1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving the party of its error." *Id.*

6 The court noted that the Explanatory Notes to F.R.E. 502(b) provide that, " the rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake."

7 *Id.* at *50.

8 *Id.* at *61 (quoting *United States v. Sensient Colors, Inc.*, No. 07-1275, 2009 U.S. Dist. LEXIS 81951, at *5 (D.N.J. Sept. 9, 2009)).