Litigation Law Section Newsletter
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Inadvertent Disclosure of Client Communications:
Waiver of the Privilege?
By George A. Dean

As trial lawyers, many of us have realized, with a sinking feeling, that we sent a confidential document protected by the attorney/client privilege to opposing counsel with a large batch of discovery responses. The document itself may not be terribly incriminating; however, the mere fact that it was delivered to the opposition is troubling and nevertheless extremely embarrassing. If Lady Luck is on our side, opposing counsel will quickly realize that a mistake has been made, and if they're a cooperative opponent, it may be returned. On the other hand, it may not be. The question then becomes whether the attorney/client privilege has been waived concerning this communication.

Many attorneys immediately respond to this question with the argument that the attorney/client privilege is a sacred trust, and can only be waived knowingly and intelligently by the client. The attorney's failure to protect against its revelation certainly cannot be a waiver by the client. Unfortunately, the law is not nearly so clear. In some circumstances, the waiver need not be made knowingly, and the attorney's actions can work the waiver without the participation of the client in any manner.

There is a statutory provision that provides for the attorney/client privilege. Tennessee Code Annotated §23-3-105 states:1

No attorney, solicitor or counselor shall be permitted, in giving testimony against a client, or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterwards, to his injury.

The statute, obviously, has little or no guidance for us in resolving the question regarding inadvertent disclosure of client confidences. Additionally, Tennessee appellate courts do not appear to have ever addressed this issue. We thus must look for guidance elsewhere.

The federal courts have reviewed the elements of the attorney/client privilege in this manner: (1) The privilege holder must actually have been or sought to have been a client; (2) The communications must have been to a member of the bar (or an agent), acting in his/her professional capacity; (3) The communication must relate to a fact of which the attorney was informed by his/her client, outside the presence of strangers, for the purposes of securing a legal opinion, legal services,

assistance in some legal proceeding, and not for the purpose of committing a crime or a tort; and (4) The privilege must be claimed and must not have been waived.2 Possibly the most interesting case discussing inadvertent disclosure is the California case of Kantor v. Superior Court.3 The court analyzed the legal question presented from a number of different perspectives; ultimately, the privilege was deemed waived. The lawsuit concerned a bad faith action against an insurance company. Counsel for the plaintiff served a subpoena for all non-privileged documents in the possession of the former attorney for the defendant in the original action. Those documents were delivered to counsel representing the company. Pursuant to the subpoena, a photocopy of the file was made, and ultimately delivered to counsel for the plaintiff.

The documents as received by plaintiff's counsel were not numbered or lettered. The documents were segregated by type but, as it turned out, numerous privileged documents were interspersed among the non-privileged documents. Approximately 1,600 documents were disclosed, with about 160 being privileged. Defense counsel maintained that he at no time intended to produce privileged documents. He contended that, but for a clerical error in his office, the documents would not have been produced. His file did, however, contain a separate folder for the privileged materials.

The lower court, finding that the waiver had been inadvertent, and not knowingly, granted a protective order. The California Court of Appeals disagreed.
Noting that the lower court concluded that the lack of a knowing and intentional waiver was sufficient to maintain the privilege, the appellate court clearly and unequivocally held that a knowing and intelligent waiver was not necessary. The court analogized to voluntary testimony concerning privileged communications, and ruled that inadvertent disclosure evidences an intent inconsistent with the continued assertion of the privilege.

The court reviewed three different approaches to analyzing inadvertent waiver of the attorney/client privilege. The first approach, dubbed the strict responsibility approach, results in an automatic waiver of the privilege once a privileged document has been disclosed. (The court cited Wigmore as the primary proponent of this approach.)

At the other end of the waiver continuum, a court may look to the client's subjective intent to waive the privilege, as opposed to the intent to disclose. "Under this analysis, the privilege is retained until the client affirmatively waives it."4 Naturally, the net result of this approach is to render the privilege insurmountable, and waiver would be impossible under almost all circumstances. The Kantor court expressly rejected this position. An attempt by the defendants, in support of the privilege, to argue that this was consistent with the patient-physician relationship was also ineffectual. The court noted that attorneys are trained in legal matters, and are therefore better deeply to understand the consequences that can follow a waiver. In

addition, the court felt that the attorney played a greater role in protecting a client's privilege than a physician ordinarily would have.5

Finding that automatic waiver was too harsh, and the subjective approach too lenient, the court turned to the last of the three major approaches to this issue: an ad hoc approach. Citing Lois Sportswear v. Levi Strauss,6 the court listed several factors to be considered, including the reasonableness of the precaution to prevent inadvertent disclosure; the time taken to rectify the error; the scope of the discovery; the extent of the disclosure; and the overriding issue of fairness. Adding one other factor, the court noted that it should be considered whether there were special circumstances that exist in favor of concluding that the disclosure was somehow compulsory.7

In the case at bar, the court found that the precautions taken by counsel were simply insufficient to protect against waiver of the privilege. The court pointed out that the segregation of the file, into privileged as opposed to non-privileged documents, was most probably done by an assistant with insufficient training to make that call. Second, the request for photocopying was for the entire file; why not just copy the non-privileged documents? Third, it is not clear that after photocopying, that anyone ever reviewed the file. Fourth, the documents were not numbered or lettered in any organized fashion.

The court noted that it took almost 15 months for the defendants to correct the mistake. In fact, defendants did not realize the error until after it was drawn to their attention. While the scope of discovery, and in particular, the amount of documents turned over relating to this incident was large, the number of privileged documents erroneously supplied was also large. The court simply felt that too many privileged documents were released, demonstrating that adequate care had not been taken. This case, while probably better analyzed than most, certainly seems to represent the federal court approach to deciding this issue. Unfortunately, many of the federal judges who have reviewed this issue, have decided against the privilege. On the other hand, the result in state courts, seems to be much more likely on the side of the privilege.

In Sterling v. Keidan,8 the Michigan Court of Appeals reviewed the actions of an attorney who released a private document belonging to him to a client. The court found no waiver. In a fact setting that any one of us could sympathize with, the defendant, an attorney, represented a client in a divorce action. For reasons not specified in the opinion, the attorney feared a possible malpractice lawsuit and called his insurance carrier. The carrier assigned defense counsel, and that attorney, after speaking with the defendant, wrote a three-page letter reflecting the substance of the conversation. The letter was marked "Personal and Confidential."

About one year later, the plaintiff asked for a copy of his file from the defendant. The file was quite large, and the defendant forgot to remove the three-page letter from the defense counsel. The suit was initiated and the plaintiff attempted to use the

letter during the litigation, seeking to take the deposition of the defense counsel (another attorney was assigned by the insurance company to represent the defendant for the purposes of the litigation). The defendant moved for a protective order and the trial court granted the motion.

The attorney-client privilege is a creature of the common law in Michigan. The court analogized to the physician/patient privilege, and cited a Michigan Supreme Court ruling that concluded that the only recognized waiver is the production of a doctor as a witness for the plaintiff in a personal injury lawsuit.9 In the course of reviewing another case involving the physician/patient privilege, the court cited with favor:10

Privilege includes both the security against publication, and the right to control the introduction in evidence, of such information or knowledge communicated to or possessed by the physician. The latter right exists although the former had ceased to be of any benefit. The public may know; but shall the jury be permitted to receive and weigh testimony derived from a source which the law has put the seasonal of silence upon, unless released by the party who alone has the right to say whether that particular witness shall be the medium of conveying such knowledge to the jury?

The Sterling court concluded that the dual nature of the privilege applied to the attorney/client privilege as well; and that it was an appropriate means of evaluating inadvertent disclosure. Because of the dual nature of the privilege in Michigan, the court concluded that "[a]t the very least, waiver through inadvertent disclosure should require a finding of no intent to maintain confidentiality or circumstances evidencing a lack of such intent."11

Another example of a state court ruling is Barnes/Science Associates Limited Partnership v. Barnes Engineering Co.,12 where, pursuant to a discovery request, plaintiffs' counsel agreed to permit opposing counsel to inspect several thousand pages of documents. The attorney handling the case separated the privileged documents from the non-privileged documents, but somehow, sometime, the documents were re-combined and produced for inspection. Now, the plaintiff claims no waiver of the privilege; the defense maintains the opposite.

The Connecticut court examined the contours of the privilege and noted the divergent positions of the various courts. It then concluded:13

There was no knowing or intentional disclosure of the documents. A large volume of documents was involved in the disclosure request, and the attorney-privilege claim applies only to four of them. Counsel did not approach production of the material in a cavalier or careless matter. Under the circumstances here the court agrees with the plaintiffs that the documents were turned over by an inadvertent mistake and that the privilege has not been waived.

Once again, it is quite apparent that the state court was much less strict when scrutinizing the factual backdrop against which the claim of privilege arises. The federal courts seem much more willing to second guess the conduct of the parties. While experience certainly will differ from region to region, one would suspect that the federal courts in Tennessee would be much more aggressive in evaluating the conduct of counsel when analyzing a potential claim of waiver. The judges sitting in the state courthouse would, on the other hand, be more receptive to the assertion of the privilege and less critical of inadvertent mistakes made by trial counsel. All the same, counsel should be aware of this dichotomy, and attempt at all times to scrupulously protect the client's privilege.

Endnotes

1. The statute is a codification of the common law. Johnson v. Patterson, 81 Tenn. 626 (1884).
2. Deuschter v. Lick Fork, Ltd., 35 Bankr. 643 (E.D. Tenn. 1983).
3. 206 Cal. App. 3d 803 (1988).
4. Kantor at 815.
5. This conclusion concerning the analogy to the patient-physician privilege is not very clear. Certainly, physicians often receive correspondence concerning patients' medical records. If a physician mistakenly reveals a record, does that work a waiver of the patient's privilege? It is certainly not clear that a doctor's duty to protect a patient's privilege is any less important than a lawyer's duty.
6. 104 F.R.D. 103 (S.D.N.Y. 1985).
7. Transamerica Computer Co. v. IBM, 573 F.2d 646, 651 (1978).
8. 162 Mich. App. 88, 412 N.W.2d 255 (1987).
9. Kelly v. Allegan Circuit Court Judge, 382 Mich. 425, 427, 169 N.W.2d 916 (1969).
10. Briesenmeister v. Supreme Lodge Knights, 81 Mich. 525, 535-36, 45 N.W. 977 (1890).
11. 412 N.W.2d at 258, (citing "Inadvertent Disclosure of Documents Subject to Be Attorney-Client Privilege," 82 Mich L. Rev. 598, 605-6, 616-9 (1983)).
12. 1990 Conn. Super. LEXIS 464 (1990).
13. Id. at 8-9.

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Practice Tips: Obtaining Financial Records Pursuant to Tennessee's Financial Records Privacy Act
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An opposing party's financial records are frequently needed during the course of litigation. Tennessee's Financial Records Privacy Act provides a means for obtaining these records from financial institutions.

Codified at Tennessee Code Annotated §45-10-101, et seq., the Financial Records Privacy Act is designed to protect the financial privacy rights of individuals as well as financial institutions. In general, the act governs the procedures that must be followed when an individual seeks to obtain the financial records of another person or entity from a financial institution. While the act has been in effect for several years, many attorneys remain unfamiliar with its terms. This unfamiliarity frequently results in an inability to obtain the records needed or an unnecessary delay in obtaining the records. This article explains the Financial Records Privacy Act and the proper procedure to follow to ensure prompt disclosure of the records sought.

Prerequisites to Disclosure

Tennessee Code Annotated §45-10-104 provides that a financial institution may not disclose to any person, except to the customer or the customer's agent, any financial records (including information) relating to that customer unless (1) the customer has authorized disclosure to that person or (2) the records are disclosed in response to a subpoena meeting the requirements of the Act.

The customer's authorization should be signed and dated, and should include the name of the person to whom disclosure is authorized. The authorization additionally should describe the records that are authorized to be disclosed and the period of time during which the authorization is effective.

Frequently, the attorney seeking the financial records of a customer is in an adversarial relationship with that party and authorization may not be freely given. In such an instance, the records can be obtained by serving a subpoena duces tecum on the financial institution. Sections 45-10-106 and 107 of the act set out the requirements of the subpoena duces tecum and its service. The subpoena may be served only if (1) a copy has been served on the adversary party in the proper manner and (2) that party has not moved to quash or has otherwise objected to the subpoena within 10 days after such service. In the case of an objection, the issuing attorney must petition the court for approval before serving the subpoena. The appropriate court includes any court of record in a Tennessee county where the customer resides, or, otherwise, the county in which the financial institution is located.

A financial institution is not required to produce its customer's records unless the subpoena meets the specific requirements of the act. To this end, the code requires that the subpoena indicate on its face that compliance with these statutory provisions has been met. The subpoena duces tecum must additionally describe with specificity the financial records to be produced, including the name and address of the customer whose records are sought, the name or functional description of the records, the time period covered by the records, and any additional information necessary to identify the records sought. The subpoena must further allow a minimum of 15 days for the records to be located, copied and delivered. In some civil actions, a bond for costs incident to the subpoena may be required.

Expenses and Production

The expenses incurred by the financial institution for locating, copying and delivering the records are taxed as court costs in all judicial proceedings, without regard to any bond executed by the requesting party. In all other instances, the party having the subpoena issued is responsible for the financial institution's reasonable expenses incurred in compliance. On delivery of the records, or within 30 days of such, the financial institution must submit a statement of its charges to the issuing party.

The statute provides a detailed method by which the financial institution is to prepare and produce the records. Addition-ally, the financial institution's records custodian must execute an affidavit to accompany the records. The affidavit should state that: (1) the affiant has been duly appointed by the financial institution as custodian of its records and has authority to certify them; (2) the copies are true and correct copies of the records described in the subpoena; and (3) the records were prepared by personnel of the financial institution at or near the time of the act, condition or event reported. The financial institution's expenses should also be set out in the affidavit, which is then filed along with the records. This filing is deemed sufficient proof of such expenses.

Pursuant to the statute, the records are to remain sealed and may be opened only at the time of trial, deposition or other hearing, and in the presence of all parties. Copies of the records are admissible in evidence to the same extent as though the original records were offered and the custodian had been present and testified to the matters set out in the affidavit.

Custodian's Live Testimony and Original Records

The Financial Records Privacy Act also provides a means of obtaining live testimony of the records custodian, rather than his affidavit, as well as the production of original records instead of copies. Specific wording of the subpoena, as detailed in the statute, is required to accomplish such.

Many litigators representing clients in civil actions will, from time to time, need the financial records of an opposing party or of some third person or entity. With a working knowledge of the Financial Records Privacy Act, those records generally can be obtained from financial institutions promptly and without undue difficulty.v

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