Client Sends Privileged Email From iPhone That Triggers Inadvertent Production Rule

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Eight years ago the Second District Court of Appeal issued a decision establishing an attorney's ethical duties upon receipt in discovery *from opposing counsel* of an inadvertently produced, privileged communication. *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 (the "*State Fund* rule"). A recently published (April 18, 2017) Fourth District Court of Appeal decision addresses whether *a client's* inadvertent production of his attorney's privileged email imposes the same duties on opposing counsel. *McDermott Will & Emery LLP v. Superior Court*, 2017 Cal. App. LEXIS 349 (Cal. Ct. App. 2017) ("*McDermott*").

An attorney has no control over an attorney-client email once sent to the client. In *McDermott*, the client ("Dick"), not his counsel, inadvertently forwarded a privileged email to his sister-in-law, which ended up in the hands of the opposing counsel (the "Law Firm") representing the McDermott firm that Dick had sued for malpractice. The *McDermott* decision holds as irrelevant that the inadvertent production was by the client not counsel, and it affirmed the receiving law firm's duty to protect the sanctity of the privilege by following the *State Fund* rule.

After the Law Firm used the email in depositions and discovery over Dick's objections, Dick filed motions asking the trial court to determine that the email was privileged, that all copies of the email be returned, and to disqualify the Law Firm. The trial court granted the motions in their entirety and the Court of Appeal affirmed in a lengthy 2-1 decision which includes a vigorous dissent.

Was the email inadvertently disclosed under the *State Fund* rule?

The first issue was whether Dick waived the attorney-client privilege by disclosing the communication to a third party. Ev. Code § 952. The Court of Appeal held that Dick had inadvertently forwarded the email from his iPhone and therefore did not waive the privilege, as a matter of law. Dick testified that he did not intend to forward the email to his sister-in-law and did not know he had done so until after the email surfaced in litigation a year later. Although Dick's testimony was not dispositive, there were other factors that supported inadvertent disclosure including "(1) the absence of any text in Dick's e-mail to [to his sister-in-law] explaining why he forwarded the [privileged] e-mail to her; (2) the forwarded e-mail came from Dick's iPhone; (3) Dick's elderly age (nearly 80 years old); (4) his reduced dexterity caused by multiple sclerosis; (5) the lack of any connection between [his sister-in-law] and the [] dispute discussed in the e-mail; (6) Dick's testimony he rarely spoke with [his sister-in-law] and never about [the dispute]..." (Slip Op. at *27-28.) The Court of Appeal held that the disclosures which occurred after Dick forwarded the email could not constitute waiver because Dick was the holder of the privilege, he never consented to the disclosures, and he knew nothing about them. Although the attorney who sent the email to Dick did not "prominently mark" it as privileged and there was not much evidence on what actions Dick and his lawyer took to prevent inadvertent disclosure, the Court of Appeal refused to find waiver.

Did the law firm violate the *State Fund* Rule and Should It Be Disqualified?

The second issue the Court of Appeal addressed is whether the Law Firm violated the *State Fund* rule and should have been disqualified. The Law Firm argued that the *State Fund* rule did not apply because the email was not inadvertently produced in discovery and did not come from Dick's lawyer, which the Court of Appeal rejected. "Contrary to Defendants' contention, an attorney's *State Fund* duties are not limited to inadvertently disclosed, privileged documents the attorney receives from opposing counsel, but also may apply to documents the attorney receives from the attorney's client." (Slip Op. at *3-4) Relying on *State Fund,* the Law Firm also argued that its ethical duties were not triggered because the email did not "obviously ... or ... clearly appear" to be privileged and it was not "reasonably apparent" the materials were inadvertently disclosed. (Slip Op. at *35.) The Law Firm contended that the "e-mail was not obviously privileged because [the Law Firm] reasonably concluded Dick had waived the privilege by forwarding it to [his sister-in-law] and then allowing her to forward it to [others]." (Slip Op. at *44). The Court of Appeal rejected the Law Firm's argument:

> Contrary to Defendants' suggestion, an attorney's State Fund duties are not limited to situations where the materials are indisputably privileged, leaving no basis to infer the privilege has been waived or an exception applies. [...] Allowing opposing counsel to avoid their State Fund obligations any time they can fashion a colorable argument for overcoming the privilege would create an exception that would swallow the State Fund rule. As *State Fund* and the other cases explain, an attorney's obligation is to review the materials no more than necessary to determine whether they are privileged, and then notify the privilege holder's counsel. At that point, the parties may confer about whether the material is privileged and whether there has been a waiver. If the parties are unable to reach an agreement either side may seek guidance from the trial court. [Citations omitted.] The attorney receiving the material, however, is not permitted to act as judge and unilaterally make that determination. (Slip Op. at *44-46).

The Court of Appeal held that "substantial evidence support[ed] the conclusion it was reasonably apparent that [the privileged] email was inadvertently disclosed" and triggered the *State Fund* rule. (Slip Op. at

*49.) Even if the email was not sufficient by itself, the Court of Appeal held Dick's lawyers' objections at depositions to the use of the email "removed any doubt" whether Law Firm likely had received an inadvertent disclosure. (*Ibid.*)

Finally, the Court of Appeal agreed that the appropriate remedy was to disqualify the Law Firm as counsel because "[c]ounsel's review and use of the e[-]mail at deposition goes beyond 'mere exposure' and raises the likelihood that this could affect the outcome of these proceedings both in terms of [Dick's] rights against use of his privileged communications against him and in terms of the integrity of these judicial proceedings and public confidence in them." (Slip Op. at *60.) The Law Firm contended that disqualification was not necessary because the email was sealed and the Law Firm was prevented from using it in any manner. The Court of Appeal disagreed explaining that the knowledge the Law Firm gained from the email could still be potentially used even if the email itself was no longer available to the lawyers.

Lessons Learned and Questions Remaining

Although this case reminds attorneys and clients to be careful in how privileged communications are reviewed and shared, as well as the duty of receiving counsel to follow the *State Fund* rule in similar but not identical circumstances, it also leaves questions for future decisions. Would this case have been decided the same way if the client were a millennial in good health rather than an elderly client with limited dexterity? What if the client learned that the email was accidently sent from his phone, but delayed taking any action to retrieve the email and protect the privilege? Could the Law Firm have used the email if Dick had inadvertently sent it to his sister-in-law with other recipients whom he intended to email? Should the Law Firm have been monetarily sanctioned? There will almost certainly be a discussion between the client and its disqualified counsel over who should pay for replacing the Law Firm with new counsel following the Law Firm's choice to put litigation strategy ahead of its ethical obligations.

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