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§5.29 Inadvertent Disclosure

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Prior to the enactment of FRE 502 by Congress in 2008, federal courts had been divided on the question whether the attorney-client privilege was lost by accidental or inadvertent disclosure, as happens when a privileged document is released during discovery. One minority view held that the privilege was waived by any unprivileged disclosure that was voluntary, even though made inadvertently and without intent to waive.[1] A second minority view held that the privilege was waived only when the disclosing party actually intended to waive it.[2]

Intermediate approach

The prevailing intermediate view was that the question whether disclosure during discovery results in loss of privilege protection depended very much on the circumstances,[3] and the issue should be resolved by looking at the degree of care apparently exercised by the claimant[4] and her behavior in taking remedial steps after disclosing privileged material.[5] Promptness in discovering the fact of disclosure and seeking return or suppression of material was thought to support the notion that disclosure was truly accidental and it lessened the likelihood that other parties would rely on the disclosed material.[6]

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§5.29 1. *See, e.g.*, In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (refusing to "distinguish between various degrees of 'voluntariness' in waivers of the attorney-client privilege" or to "grant greater protection to those who assert the privilege than their own precautions warrant"; court requires that parties "treat the confidentiality of attorney-client communications like jewels—if not crown jewels").

2. Eisenberg v. Gagnon, 766 F.2d 770, 788 (3d Cir. 1985) (no waiver where defense counsel discussing privileged correspondence at side bar assumed discussion was off the record since the "waiver must be knowing" by any standard), *cert. denied*, 474 U.S. 946.

3. *See, e.g.*, Gray v. Bicknell, 86 F.3d 1472, 1484 (8th Cir. 1996) (intermediate approach considering precautions taken to preserve privilege is "best suited to achieving a fair result").

4. In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 674-675 (D.C. Cir. 1979) (after producing documents for the government, counsel was asked whether documents marked "P" were privileged, and then failed to assert privilege), *cert. denied*, 444 U.S. 915; Eigenheim Bank v. Halpern, 598 F. Supp. 988, 991 (S.D.N.Y. 1984) (waiver by inadvertence found where procedures used to maintain confidentiality were "lax, careless, inadequate or indifferent to consequences").

5. *See, e.g.*, United States v. De La Jara, 973 F.2d 746, 749-750 (9th Cir. 1992) (privilege waived where holder failed to reclaim privileged letter seized during government search); In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir. 1979) (privilege waived where attorney allowed disclosure of certain documents that appeared to be privileged but a year later sought return on ground that they were privileged and disclosure was inadvertent), *cert. denied*, 444 U.S. 915.

6. United States v. Ary, 518 F.3d 775, 785 (10th Cir. 2008) (defendant waited six weeks after Rule 16 discovery

FRE 502(b) codifies the intermediate view for inadvertent disclosures made in a federal proceeding or to a federal officer or agency. The Rule provides that such disclosures do not operate as a waiver if the holder of the privilege took reasonable steps to prevent disclosure and also took reasonable steps to rectify the error,[7] which often includes complying with the requirement stated in Civil Rule 26 to give notice and try to retrieve materials that were mistakenly disclosed.[8]

The waiver standard of FRE 502 is binding not only on the immediate parties to the litigation, but on third parties as well (who may become aware of the inadvertent disclosure and seek discovery of the released documents). FRE 502 is binding on state courts evaluating the impact of inadvertent disclosures made in federal proceedings or to federal offices or agencies, as well as on federal courts. It also controls the standard of privilege waiver in diversity cases or other cases where state law supplies the rule of decision.[9]

"Reasonable steps"

Under FRE 502, as under prior decisions, courts must decide whether a party took "reasonable steps" to preserve the privilege. Factors that are relevant in determining whether inadvertent disclosure is a waiver include the volume of discovery, the time taken to rectify the error, the scope of discovery, the extent of disclosure, and considerations of fairness.[10] The ACN to FRE 502

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meeting to claim privilege for documents seized on execution of search warrant at his home; privilege waived). *See generally* Davidson & Voth, Waiver of the Attorney-Client Privilege, 64 Or. L. Rev. 637, 644-645 (1986) (courts should uphold privilege where attorney who inadvertently releases document takes prompt steps to recover it before reliance by opposing side).

7. *See* Eden Isle Marina, Inc. v. United States, 89 Fed. Cl. 480, 508 (2009) (government disclosure waived work-product protection notwithstanding protections of FRE 502 where government did not demonstrate adequacy of measures to prevent disclosure and failed promptly to act to cure erroneous disclosure).

8. FRCP 26(b)(5)(B) provides that if information produced in discovery is subject to a claim of privilege or work product, "the party making the claim may notify any party that received the information of the claim and the basis for it," after which the latter "must promptly return, sequester, or destroy the specified information and any copies it has" and cannot "use or disclose the information until the claim is resolved." Indeed, the latter must take "reasonable steps to retrieve the information" if disclosure has already occurred. The information can be promptly presented in court under seal "for a determination of the claim," and the party who produced the information "must preserve" it until the claim is resolved.

9. FRE 502 applies to all federal proceedings, even diversity cases where state law provides the rule of decision. *See* FRE 502(f) ("And notwithstanding FRE 501, this rule applies even if state law provides the rule of decision"); ACN to FRE 502(f) ("the rule applies to state law causes of action brought in federal court"). However, state privilege law continues to control other matters relating to the creation and scope of the privilege. *See, e.g.*, Jefferson Parish v. Waste Management of Louisiana, L.L.C., 2011 WL 3512078, 8 (E.D. La. Aug. 11, 2011) (state law determines who has authority to waive privilege); Stopka v. American Family Mut. Ins. Co., Inc., 2011 WL 3839735, 2 (N.D. Ill. Aug. 30, 2011) (state law controls who may be party to communication without destroying confidentiality).

10. Gray v. Bicknell, 86 F.3d 1472, 1481-1482 (8th Cir. 1996); Gloucester Twp. Hous. Auth. v. Franklin Square Assocs., 38 F. Supp. 3d 492, 497 (D.N.J. 2014) (in determining whether there has been waiver by inadvertent

comments that a party using "advanced analytical software applications and linguistic tools in screening privilege" may have taken "reasonable steps" to prevent inadvertent disclosure,[11] and notes that implementation of "an efficient system of records management" by the privilege holder may be relevant.[12]

Other factors

Also important are extenuating circumstances, the most obvious being the press of massive discovery going forward under tight deadlines, where even caution in producing documents may fail to prevent all mistakes.[13] Other factors bear on the calculus as well, including the number of disclosures, the volume, nature, and importance of disclosed material, the obviousness of privilege issues, and whether the interests of justice would be served by relieving the party of its error.[14] If an inadvertent disclosure reveals a significant amount of privileged information, the disclosure is

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disclosure, court should consider (1) 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 disclosures;
(5) whether the overriding interests of justice would or would not be served by relieving a party of its error). *See also* Wise v. Washington Co., 2013 WL 4829227 (W.D. Pa. 2013) (privilege waived by inadvertent disclosure by substitute secretary during holidays; an "attorney's responsibilities . . . do not take a holiday").

11. *But see* Rhoads Indus. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216, 226-227 (E.D. Pa. 2008) (use of software to screen privileged documents found inadequate; steps to prevent disclosure were not reasonable despite use of consultant; privilege holder did not use adequate search terms to identify privileged documents, search was improperly limited to email address line rather than email body, no quality assurance testing was used, and privilege holder produced documents that search should have intercepted; even so, interests of justice militated against finding of waiver).

12. *See* Board of Trustees, Sheet Metal Workers' Natl. Pension Fund v. Palladium Equity Partners, LLC, 722 F. Supp. 2d 845, 851 (E.D. Mich. 2010) (reasonable steps were taken to prevent disclosure of privileged documents; law firm reviewed 63,025 documents totaling 4.7 million pages, prepared privilege logs for 1,306 documents, team of 16 associates supervised by 2 senior associates spent 2,500 hours reviewing 8,700 hard copy documents and more than 59,000 electronic documents; review involved correspondence with 11 law firms).

13. CP Salmon Corp. v. Pritzker, 238 F. Supp. 3d 1165, 1176 (D. Alaska 2017) (given the "sheer number of pages" and the "compressed time frame," not surprising that a handful of privileged documents were inadvertently disclosed; no waiver).

14. Judson Atkinson Candies v. Latini-Hohberger, 529 F.3d 371, 388-389 (7th Cir. 2008) (on issue of reasonable care when privileged document is disclosed in discovery, court considers volume of documents and precautions taken to safeguard privilege; there was nothing "clearly inadequate" here; no waiver). *But see* Gloucester Twp. Hous. Auth. v. Franklin Square Assocs., 38 F. Supp. 3d 492, 498 (D.N.J. 2014) (the "nature" of the disclosed documents favored waiver because they were "clearly privileged, substantive information pertaining to this litigation").

more likely to seem careless and perhaps even purposeful. In such cases, the notion of waiver more clearly applies, and loss of protection seems justified.[15] Much the same applies if the material is central to issues that are well defined, if the privilege claim seems obvious, and if the claimant grants wide access or discloses more than once.[16] Finally, it should count in the calculus that the receiving party has relied or has not relied on the disclosed material in developing litigation strategy.[17]

Inadvertent or accidental disclosure may happen for reasons having little to do with the discovery process. The age of express delivery, fax machines, and email has brought new opportunities for putting material into the wrong hands through misaddress and misadventure. If materials are misdelivered or mistransmitted through simple accident (misdialing a fax number or misaddressing an email), or through misadventure (a delivery service leaves material at the wrong address), surely privilege protection should not be lost. Outsiders are likely sometimes to gain a windfall from unanticipated material that goes astray by accident or misadventure. But the privilege itself should survive these common pitfalls in an age that offers so many opportunities for mistake.[18]

Authority to waive

Inadvertent or accidental disclosure brings two additional issues: First, how far should the actions of the attorney bind the client, considering that the client owns the privilege and ultimately has authority to claim or waive it? Modern courts hold that retaining a lawyer to represent the client generally means that the client is charged with the lawyer's mistakes in disclosure during the course of legal representation,[19] although a few older cases said the client should not be bound

15. *See, e.g.,* Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) (listing "extent of disclosure" as factor in determining whether waiver occurred); Edelen v. Campbell Soup Co., 265 F.R.D. 676, 698 (N.D. Ga. 2010) (inadvertent disclosures did not constitute waiver where only 4 pages of a more than 2,000-page production were privileged).

16. Eigenheim Bank v. Halpern, 598 F. Supp. 988, 991-992 (S.D.N.Y. 1984) (waiver found where inadvertent disclosure made for a second time after documents were returned after a first inadvertent disclosure).

17. *See, e.g.,* Weil v. Investment/Indicators, Research & Mgmt., Inc., 647 F.2d 18, 25 (9th Cir. 1981) (court considers fact that disclosure was made to opposing counsel rather than to court, came early in the case, and no prejudice resulted).

18. *Cf.* ABA Model Rule of Professional Conduct 4.4(b): "A lawyer who receives a document [including emails] relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The accompanying Comment says that lawyers "may choose to return" an inadvertently sent document "unread" as "a matter of professional judgment."

19. Weil v. Investment/Indicators, Research & Mgmt., Inc., 647 F.2d 18, 25 n.13 (9th Cir. 1981) (waiver found where privileged communications voluntarily disclosed without objection by asserting party's counsel); In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir. 1979) (where "counsel acted within the scope of authority conferred upon it," client "may not now be heard to complain about how that authority was exercised"), *cert. denied*, 444 U.S. 915.

by counsel's mistakes in disclosing or failing to protect the confidentiality of privileged materials.[20]

Scope of waiver under FRE 502

Second, does waiver (if it happened at all) apply only to the matter disclosed, or does it reach other related communications that are also privileged? Rule 502 answers this question, at least for inadvertent disclosures made in a federal proceeding or to a federal office or agency, by saying that there is no subject matter waiver at all for inadvertent disclosure. Subject matter waiver applies only to "intentional" disclosure where the related undisclosed matter "ought in fairness" be considered with the privileged material already disclosed.[21.]

For inadvertent disclosures in circumstances not covered by FRE 502, a similar policy generally applies. The purpose of the rule of waiver by partial disclosure is to prevent a party from obtaining unfair advantage by disclosing a portion of privileged matter that may be unrepresentative or misleading. This danger is generally nonexistent in cases where the disclosure was inadvertent.[22] Therefore, most courts limit the scope of waiver by inadvertent disclosure to the material already disclosed.[23] A broader scope of waiver is justified in cases where the disclosing party has obtained unfair advantage by the disclosure or refuses to stipulate that the disclosed material will not be used at trial, thereby creating a need for the opposing party to discover related communications on the same subject.[24]

There has been confusion in the cases on the question whether inadvertent disclosure should be addressed as a problem of failed confidentiality or as a matter of waiver.[25] The two issues are

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20. *See, e.g.,* KL Group v. Case, Kay & Lynch, 829 F.2d 909, 918-919 (9th Cir. 1987) (inadvertent waiver by lawyer not charged to client when client did not disclose or consent to disclosure); Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982) ("[I]f we are serious about the attorney-client privilege and its relation to the client's welfare, we should require more than such negligence by counsel before the client can be deemed to have given up the privilege.").

21. ACN to FRE 502(a).

22. First Wis. Mortgage Trust v. First Wis. Corp., 86 F.R.D. 160, 173-174 (E.D. Wis. 1980) (where inadvertent disclosure is not advantageous to disclosing party, privilege is not waived for related documents).

23. Gray v. Bicknell, 86 F.3d 1472, 1481-1482 (8th Cir. 1996) (where privilege waived inadvertently by mistaken disclosure of privileged letters during discovery, waiver is limited to two letters actually disclosed; privilege continues to protect related documents).

24. Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 156 (D. Del. 1977) (broad waiver occurs only where "facts relevant to a particular, narrow subject matter have been disclosed in circumstances in which it would be unfair to deny the other party an opportunity to discover other relevant facts with respect to that subject matter").

25. *See, e.g.,* Weil v. Investment/Indicators Research & Mgmt., Inc., 647 F.2d 18, 24 n.11 (9th Cir. 1981) (finding waiver by inadvertent disclosure but noting that other courts have reached the same result by finding that disclosure

analytically distinct. The confidentiality requirement generally focuses on the intent of the communicator at the time the communication was made not to disclose the communication to persons who are outside the privilege.[26] The client's subsequent conduct bears on confidentiality only to the extent that it provides circumstantial evidence of the client's intent at the time the communication was made.

Waiver focuses on whether the holder "voluntarily" disclosed or consented to disclosure of the privileged matter.[27] Waiver occurs only after the making of a confidential communication—the privilege does not attach if the communication was not confidential. As a practical matter, similar standards have tended to evolve under both lines of analysis. If the holder did not take reasonable steps to protect against interception at the time of the communication, the privilege is denied because of lack of confidentiality. If the holder (or the attorney acting as his agent) did not take reasonable steps to protect against later disclosure, the privilege is lost on grounds of waiver.

Stolen or intercepted communications

If confidences are seized or stolen by private parties, such as employees or outsiders who trespass, eavesdrop, intercept mails or deliveries, or rummage through dumpsters (which sometimes does and sometimes does not involve trespass or any invasion of property rights), the client should have an opportunity later to claim the protection of the privilege.[28] A minority of cases hold otherwise, apparently under the influence of Wigmore's overstrict opinion that essentially any disclosure causes loss of protection.[29]

With respect to these private initiatives, the wiser rule is that a claim of privilege survives, at least where the lawyer and client have taken reasonable care to keep privileged material confidential.[30] The privilege should not be lost if unseen eavesdroppers tap the line or listen at the

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has extinguished confidentiality).

26. *See* proposed-but-rejected FRE 503(a)(4), discussed in §5.13, *supra.*

27. Proposed-but-rejected FRE 511. *See generally* §5.28, *supra.*

28. *See* proposed-but-rejected FRE 512 and URE 510 (1999) (privilege not lost where disclosure occurred "without opportunity to claim the privilege").

29. *See* Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 260 (N.D. Ill. 1981) (court finds loss of privilege with respect to copies of letters from defendant to defendant's attorney obtained by plaintiff from defendant's trash dumpster). *But see* Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 n.8 (N.D. Ill. 1982) (criticizing *Sew 'N Sweep* approach).

30. Dukes v. Wal-Mart Stores, Inc., 2013 WL 1282892 (N.D. Cal. 2013) (privilege maintained despite publication of contents of privileged attorney memorandum by the New York Times and anonymous transmission of memo to plaintiff's counsel; unauthorized disclosure by an unknown party did not constitute waiver given privilege holder's reasonable steps to maintain memorandum in a secure location and to limit its dissemination). *But see* In re Victor, 422 F. Supp. 475, 476 (S.D.N.Y. 1976) (privilege waived where client left papers in public hallway outside the office of his attorney: "[I]t certainly could not be said that the client expected these papers to be kept from the eyes

door, or outsiders succeed in pilfering, spying, or rummaging through garbage. Reasonable care surely does not require lawyers or parties to have soundproofed offices or to hire security guards or experts to check for bugs or wiretaps. The privilege requires ordinary care, not elaborate counteroffenses.[31]

of third parties.").

31. This view found its way into proposed-but-rejected FRE 503, which has been adopted by many states. Clause (a)(4) defines a confidential communication as one that is not intended for further disclosure to unprivileged third persons, thereby preserving confidentiality despite interception that could not reasonably be anticipated. Under proposed-but-rejected FRE 503(b), the holder has power "to refuse to disclose *and to prevent any other person from disclosing*" confidential communications, which would include eavesdroppers or thieves. Finally, clause (b) provides that there is no waiver where disclosure occurred "without opportunity to claim the privilege," which covers intercepted communications.