Speaking Up Upon Discovery of Inadvertently Disclosed Communications

Avoiding Liability

By Jeffrey P. Lewis

Jeffrey P. Lewis is a member in the Philadelphia office of the law firm of Eckert Seamans Cherin & Mellott LLC. He serves on the PBA Professional Liability Committee.

The Pennsylvania Rules of Professional Conduct recognize an affirmative duty to immediately call to the attention of opposing counsel instances where opposing counsel has inadvertently disclosed communications that are obviously privileged. But what if that duty is honored and opposing counsel is promptly informed that privileged communication was inadvertently disclosed but the notifying counsel continues to utilize such communication? What would be an appropriate sanction for failure to destroy or return and continued use of such communication in the pending litigation or elsewhere? In a recent decision by a California intermediate appellate court, the court was called upon to review a decision by a trial judge who disqualified the lawyer and his law firm for refusal to cease utilizing privileged information when he had been informed that it had been inadvertently disclosed.

In *McDermott Will & Emery LLP v. The Superior Court of Orange County*, 217 Cal. Rptr.3d 47, 10 Cal.App.5th 1083 (Cal. Ct. of App., Fourth Div., Third Division, 2017), the court held that plaintiff had not waived the attorney-client privilege when he "inadvertently and unknowingly forwarded the e-mail from his iPhone [to his sister-in-law], and therefore lacked the necessary intent to waive the privilege." Moreover, the trial court found that the privilege was not waived when plaintiff's sister-in-law thereafter forwarded the "e-mail to her husband, who then shared it with four other individuals" because the privilege was personal to plaintiff, who had not consented to these further disclosures. In fact, plaintiff did not learn of either the initial disclosure or the subsequent disclosures until more than a year later.

The trial court found that opposing counsel should have recognized "the potentially privileged nature of the e-mail after receiving a copy from [plaintiff's counsel]" and that he had "an ethical obligation to return the privileged material and refrain from using it" as California case law requires. Defense counsel "analyzed and used the e-mail" notwithstanding that plaintiff's counsel, once he had learned of the inadvertent disclosure, had objected to its further use by the defense. In the appellate court's view, the proper test that should apply to determine whether receiving counsel has a duty to speak up about the receipt of seemingly privileged communication is as follows: "Whenever a reasonably competent attorney would conclude the documents obviously or clearly appear to be privileged and it is reasonably apparent they were inadvertently disclosed, [California case law] requires the attorney to review the documents no more than necessary to determine whether they are privileged, notify the privilege holder the attorney has documents that appear to be privileged and refrain from using the documents until the parties resolve or the court resolves any dispute about their privileged nature." Under California case law, it has also been stated that this duty arises where the materials in question "obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged and shall immediately notify the sender that he or she possesses material that appears to be privileged." This is a call that receiving counsel cannot make himself but requires inquiry first with the counsel who made the disclosure and, if not resolved in that manner, by court decision.

In the appellate court's view, the fact that the receiving attorney has a reasonable belief that the documents are not privileged or that some exception to privilege applies, does not excuse him from honoring this duty. The receiving attorney may elect not to honor this duty, but if he does not wait until there has been a resolution by the parties or the court of whether the document is privileged, then in the court's view he assumes the risk of disqualification if the court ultimately determines that the document was privileged.

After a fact-intensive analysis, the court affirmed the finding of the trial court that the disclosure was inadvertent based upon the following: Plaintiff was 80 years old; the communication was sent on a handheld device by a man with "reduced dexterity caused by multiple sclerosis;" there was no evidence that plaintiff had engaged in at least "some measure of choice and deliberation" as the privilege holder to subjectively waive the privilege, nor did he exhibit any "intent to disclose the information." Moreover, plaintiff testified that the disclosure was inadvertent, which the court found "an important consideration in deciding whether he waived the attorney-client privilege because waiver requires an intention to voluntarily waive a known right." Finally, the court affirmed the trial court's finding that the absence of any notation that the communication is privileged is not dispositive of the issue of whether it is privileged. Instead, the court noted the "court must consider the totality of the circumstances, and in doing so, repeatedly has found inadvertently disclosed documents that were not marked as privileged retained their privileged status."

What remained for consideration, therefore, was whether the trial court abused its discretion in disqualifying defense counsel as a penalty to him and as a remedy to plaintiff. After all, defense counsel not only used this privileged information at various discovery depositions, he quoted it extensively. He now had this privileged information "in his head" for possible use in the future of this litigation, potentially to plaintiff's detriment. The court found that the trial judge had not abused its discretion in disqualifying defense counsel and his law firm under these circumstances.

The court recognized the tension between, on the one hand, clients' right to counsel of their choice and the importance of "maintain[ing] ethical standards of professional responsibility on the other." The court noted that the mere exposure to inadvertently disclosed adversary's confidence alone is not sufficient to disqualify counsel. On the other hand, quoting California case law, the court noted that "disqualification might be justified if an attorney inadvertently receives confidential materials and fails to conduct himself or herself in [accordance with the rules of professional responsibility], assuming that other factors compel disqualification." The key is whether disqualification is necessary to prevent future prejudice to the opposing party as a result of the information now in the head of counsel resulting from the inadvertent disclosure. Although the compromised party from the inadvertent disclosure need not show existing injury as a result, the trial court may not simply order disqualification for such dereliction that will not substantially affect the compromised party in future proceedings.

Here, the court found that the trial court had not abused its discretion in disqualifying counsel for his prior use of the privileged information because it could affect the outcome of the proceedings. The wrongful conduct was counsel's refusal to return the purported privileged documents upon demand and to await a

continued on page 7

Court Summaries *continued from Page 6*

not improper despite good adjustment during incarceration and service of minimum sentence.

RIGHT-TO-KNOW LAW

COMMONWEALTH COURT

SENTENCING ORDERS — possession of Department of Corrections — 42 Pa.C.S. 9764(a)(8) — no presumption document possessed by department — de novo standard of review — plenary scope of review — determination finding no further action required affirmed

Saunders v. Dept. of Corr., No. 223 C.D. 2017 (Oct. 11, 2017) — Section 9764(a)(8) of Sentencing Code, 42 Pa.C.S. 9764(a)(8), relating to information required upon commitment of inmate to department does not create presumption department possesses sentencing order for such inmate.

SEARCH AND SEIZURE

SUPERIOR COURT

TYPE OF ENCOUNTER — INVESTIGATIVE DETENTION — refusal to stop upon seeing trooper — attempt to identify person — prior surveillance video — defendant placed in handcuffs — relatively brief detention — Fourth Amendment — Article I, Section 8 — officer safety — reasonable suspicion — judgment of sentence affirmed

Com. v. Smith, 2017 PA Super 318 (Oct. 10, 2017) — Investigative detention when police detained person to determine whether he was person identified in prior surveillance videos and, when he walked away from police, detained and handcuffed him to remove him from area because of concerns re officer safety.

ARREST WARRANT — SUBSEQUENT DETERMINATION WARRANT DOES NOT EXIST — lack of probable cause for arrest — STATEMENTS TO POLICE — ATTENUATED FROM ARREST — information re hotel room shared by defendant — search warrant executed on room — contraband discovered — evidence linking defendant to drugs — waiver of *Miranda* rights — intervening circumstances — taint from illegal arrest purged — judgment of sentence affirmed

Com. v. Wilson, 2017 PA Super. 319 (Oct. 10,2017) — Any taint of defendant statements from illegal arrest was purged when police obtained search warrant for hotel room shared by defendant and another, who was charged, and found items linked to defendant, and defendant waived his *Miranda* rights and spoke to police.

UNEMPLOYMENT COMPENSATION

COMMONWEALTH COURT

CONTRIBUTION RATE — Section 301(e) and (j) — Unemployment Compensation Law — 43 P. S. 781(e) and (j) — two-year delay in issuing revised rates — PROMPT NOTICE REQUIREMENT — failure to notify department of merger — REASONABLENESS — order of holding denial of appeal affirmed

Hospitality Mgmt. v. Com., No. 380 C.D. 2017 (Oct. 3, 2017) — Denial of appeal of unemployment compensation contribution rates affirmed despite two-year delay in issuing revised rates since delay not unreasonable due to petitioner failure to notify department of merger for approximately one year.

WORKERS' COMPENSATION

COMMONWEALTH COURT

FATAL CLAIM PETITION — COURSE AND SCOPE OF EMPLOYMENT — fatal automobile accident — manager in training — employer with three locations — Dunkin' Donuts franchise — employee at other location reportedly ill — employer contacted decedent — decedent killed en route to other store — insufficient evidence decedent stationary employee — special assignment for employer — employer knowledge and approval of travel — denial of compensation reversed

Rana v. W.C.A.B., No. 1401 C.D. 2016 (Sept. 29, 2017) — Denial of compensation under fatal claim petition reversed since decedent, manager in training of Dunkin' Donuts franchises, killed in auto accident en route to check on another store with knowledge of and approval of employer after employer contacted decedent to inform him the employee at another location was sick and decedent indicated he would investigate that situation.

SUPERSEDEAS — Section 443(a) — 77 P.S. 999(a) — compromise and release agreement — grant of reinstatement petition — recurrence of prior injury — settlement with insurer — grant of reinstatement petition reversed — final determination on merits — aggravation or new injury — compensation payable for said injury — identity of responsible carrier not determinative — order denying application for supersedeas bond reimbursement affirmed

Volpe Tile and Marble v. W.C.A.B., No. 118 C.D. 2017 (Sept. 29, 2017) — When adversarial appeal process culminates in final determination on merits whether claimant sustained aggravation or new injury for which compensation payable, and appeal regarding whether applicant for supersedeas fund reimbursement meets criteria that compensation not payable, determination of which insurer responsible for payment of compensation or whether liable carrier entered into compromise and release agreement is not relevant.

ZONING AND LAND USE

COMMONWEALTH COURT

PRELIMINARY AND FINAL LAND DEVELOPMENT PLAN — approval — failure to obtain zoning relief for temporary construction access road — language of Subdivision and Land Development Ordinance (SALDO) — no explicit requirements for approval — no waiver — order upholding approval of plan affirmed

Dambman v. Bd. of Sup. of Whitemarsh Twp., No. 1883 C.D. 2016 (Oct. 5, 2017) — Zoning permit for temporary construction access road not required for approval of preliminary and final land development plan when SALDO does not require zoning permit before filing land development plan.

Avoiding Liability

continued from page 4

judicial determination of their privileged status. The court recognized that counsel, if not disqualified, and notwithstanding having returned the privileged materials, stands to benefit his client based upon the information retained in his head from having reviewed the privileged information.

The dissent, in a fact-based analysis, contended that the disclosure, which was not made directly to opposing counsel but was made by the client to a third party who disclosed it to other third parties, was not privileged because steps had not been taken soon enough to claw back the documents. Counsel to the party who had made the inadvertent disclosure knew for almost a year before they came to the attention of the later disqualified counsel and, in the dissent's view, did not take adequate steps to retrieve these documents.

The lesson learned here is that upon the discovery that documents have been inadvertently disclosed, not by counsel but by his or her client, counsel must be vigilant to recover the privileged documents in order to preserve the privilege. But moreover, the demand to return, or at least not to use, allegedly privileged materials should be honored until there has been a judicial determination as to their privileged status.