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Did my Client Just Waive Privilege?!

For any attorney, whether new or seasoned, this can be a terrifying possibility. Privilege waivers can happen at any time and can have devastating consequences for your client's case. This possibility is made even more precarious when one considers that jurisdictions have varying guidelines when it comes to what constitutes a waiver.

So how do you know?

First, recognize in which jurisdiction the case will be decided and determine the accompanying discovery rules. Federal discovery rules are codified in Rule 26 of the Federal Rules of Civil Procedure. While some states have adopted identical language, many jurisdictions have made slight tweaks to the rules in order to suit their practice. Next, look for any local rules the court might have adapted. Sometimes the rules are very clear as to what constitutes a privilege waiver, but more often than not that line is pretty gray.

For example, the Louisiana District Court rendered an opinion on May 12, 2021 holding that the Plaintiff's corporate designee, who refused to attend a business planning meeting at his company, indicated that he was doing so based on the advice of his counsel at the time. The District Court indicated that waiver of privilege can happen "[w]here … a party asserts as an essential element of his defense reliance upon the advice of counsel" and that same waiver applies to "all communications, whether written or oral, to or from counsel concerning the transactions for which counsel's advice was sought."[1] The magistrate judge, in granting part of the Defendant's motion to compel, found that the corporate designee "provided evasive or incomplete answers and shift[ed] accountability onto his former counsel [to] hide behind the shield of advice of counsel."[2] Further, the court held "'placing privileged

communications at issue' [by] an affirmative pleading of a claim or defense that inevitably requires the introduction of privileged communications" constitutes a waiver.[3]

Waiving privilege by placing privileged communications at issue in a case is not a new concept; however, it happens quite often. In a May 26, 2021 decision out of the Middle District of Louisiana the plaintiff filed suit related to the death of his long-time girlfriend and their two year old child following a vehicular accident.[4] During discovery, Defendants filed a motion to compel responses to various discovery requests. Plaintiff refused to provide responses, arguing that the information sought was protected by the attorney-client privilege. However, plaintiffs also made several contentions that were directly related to the information defendants sought through their discovery requests. Essentially, plaintiffs made several assertions that could only be proven by examining the very information plaintiffs refused to provide. The magistrate judge, in considering the motions to compel, agreed with the defendants and ordered plaintiffs to produce the information. Plaintiffs then sought to overturn the magistrate's order; however, the Judge in the Middle District held that the magistrate judge's decision should stand since Plaintiffs placed the privileged communication "at issue" by "plead[ing] a claim or defense in such a way that he will be forced inevitably to draw upon a privileged communication at trial in order to prevail."[5]

On the other hand, in an April 19, 2021 decision from civil rights case out of the Northern District of Illinois's Eastern Division, the judge demonstrated just how gray this area can be when deciding that the privilege waiver operates on a document-to-document basis.[6] Plaintiff asserted first that a union-representative privilege existed and that in addition to that privilege, many of the documents were protected by the attorney-client privilege. As a result, the judge requested an in-camera review of the documents in contention and in providing them, Plaintiff highlighted the portions he asserted were protected by attorney-client privilege. While the judge didn't recognize Plaintiff's assertion of a union-representative privilege, he found that as to the highlighted portions, Plaintiff maintained privilege but waived privilege as to the non-highlighted portions. Further, the judge examined the documents so as to determine whether or not Plaintiff was soliciting or receiving legal advice from his counsel. Not surprisingly, the judge ruled that some documents maintained the

asserted privilege while others did not. As an aside, the judge found that an initially privileged communication between Plaintiff and his counsel lost its privilege status once the Plaintiff shared it with his non-lawyer union representative. This instance serves as yet another reason to stress the importance of your clients not forwarding privileged communications because once the privileged content is shared with a third party, that document is no longer privileged and the opposing party is entitled to its production.

In a May 13, 2021 unpublished decision out of the Fourth District Court of Appeals in California, the court held that an inadvertently disclosed email which had not been timely clawed back allowed for waiver of the attorney-client privilege as to the contents of that email.[7] During discovery, the parties had entered into a stipulated protective order which covered the inadvertent disclosure of confidential and privileged information. Specifically, it stated that production of privileged materials, despite reasonable efforts to withhold them, does not waive the privilege or result in a subject-matter waiver "*if a request for return of such inadvertently produced privileged information ("clawback") is made promptly after the producing party learns of its inadvertent production.*"[8] Similarly, the receiving party has a duty to promptly notify the producing party and to not use the privileged information until the matter is resolved. During a January 2020 deposition, Plaintiffs' counsel posed a question about an email from October 2001 that was marked confidential and indicated it was subject to a protective order. Defendant's counsel objected and asserted attorney-client privilege. The parties agreed to address the privilege issue at a later date with the court. However, in early May 2020 plaintiff's filed an opposition to a summary judgment made by the Defendant and included this email. It wasn't until late May 2020 that Defendant's counsel invoked the clawback provision. Plaintiff argued that in waiting five months since the privileged document was brought to light constituted waiver of the privilege. The court agreed.

The existence and evolving nature of these nuances are why best practice is to be well versed in the different jurisdictional rules or to consult a knowledgeable eDiscovery attorney. Doing so may just save your client's case.

Key Takeaways

- Refusing to answer deposition questions regarding certain topics on the advice of counsel may waive the attorney-client privilege, allowing for additional discovery related to that topic.
- Be careful when asserting a claim or defense that you don't also unintentionally waive any possible attorney-client privilege.
- Make sure your client knows not to forward any privileged communications or documents to a third party, thereby waiving privilege status.
- Failing to timely claw back privileged materials inadvertently produced during discovery could amount to waiver of the attorney-client privilege.

This blog post was drafted by Deena Duffy, an attorney in the Spencer Fane Minneapolis, MN office. For more information, visit www.spencerfane.com.

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[1]*Fucich Contracting v. Shread-Kuyrkendall & Assoc.,* 2021 WL 1904859 (E.D. La. 2021) citing *Panter v. Marshall Field & Co.,* 80 F.R.D. 718, 721 (N.D. Ill. 1978).

[2]*Id.*

[3]*Id.*

[4] *Blackmon v. Bracken Constr. Co.,* 2021 WL 2150694 (M.D. LA 2021).

[5] *Id.*

[6] *Belcastro v. United Airlines, Inc.,* 2021 WL 1531601 (N.D. Ill. 2021).

[7] *Novartis Pharm. Corp. v. Superior Court of San Diego Cnty.,* 2021 WL 1918774 (Cal. Ct. App. 2021, unpublished).

[8] *Id.*