Inadvertent Disclosures: The Professional and Ethical Way to Handle Them

MICHELLE DELONG

Introduction

Have you ever received a document or communication and exclaimed, "I can't believe this was produced!", or questioned, "am I supposed to see this?" Did you consider whether the document or communication produced was in fact a privileged document mistakenly disclosed? Florida licensed attorneys have certain ethical obligations to abide by in the event of an inadvertent disclosure during discovery.

Although inadvertent disclosures should never happen, they still infrequently do. The practice of law is fast-paced and technology is speeding up everything. While attorneys have an ethical obligation to oversee and review all work product before it's transmitted externally; sometimes, things get missed when reviewing thousands of documents in a production or perhaps, a staff member unilaterally makes a decision to produce a document or communication without the attorney's review or knowledge. Whatever the reason behind the inadvertent disclosure, attorneys have ethical obligations as the disclosing party or the receiving party under Florida law.

Obligations of the Disclosing Party

The party who disclosed the privileged information must serve written notice to the receiving party within ten days of discovering the inadvertent disclosure. Fla. R. Civ. P. 1.285(a). In that written notice, the disclosing party must state she intends to assert the privilege and "specify with particularity the materials as to which the privilege is asserted, the nature of the privilege asserted, and the date on which the inadvertent disclosure was actually discovered." Id.

Obligations of the Receiving Party

Once the receiving party receives notice that the inadvertent disclosure occurred, she is required to "promptly return, sequester, or destroy the materials specified in the notice, as well as any copies of the material." Fla. R. Civ. P. 1.285(b). The receiving party must also notify any third party who has received the materials in error and take reasonable steps to retrieve those materials for return or destruction. Id. These actions are not optional under the Florida Rules of Civil Procedure. Id.

Obligations When the Receiving Party Recognizes an Inadvertent Disclosure Has Occurred

The Florida Rules of Professional Conduct also provide guidance as to the ethical obligations required of lawyers when a known inadvertent disclosure has occurred. Fla. R. Prof'l Conduct 4-4.4. A lawyer who knows or reasonably should know she received attorney-client privileged documents or information through inadvertence must immediately inform the disclosing party. Id. 4-4.4(b). At that time, the receiving party must return or destroy the materials. Fla. R. Civ. P. 1.285(b). Alternatively, upon notification, the ten days begins to run where the disclosing party must assert privilege and specify with particularity what documents or information must be returned or destroyed. Id. 1.285(a).

An Inadvertent Disclosure Is Not an Automatic Waiver

An inadvertent disclosure of attorney-client privileged information is not grounds for an automatic waiver. Nova Southeastern Univ., Inc. v. Jacobson, 25 So. 3d 82, 86 (Fla. 4th DCA 2009) ("Florida courts do not apply a strict rule that counsel's inadvertent production alone waives the attorney-client privilege."). "Florida law recognizes that the waiver of a privilege, 'imports the intentional relinquishment of a known right.'" Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Décor, Inc., 698 So. 2d 276, 278 (Fla. 3d DCA 1997) (quoting Prieto v. Union Am. Ins. Co., 673 So.2d 521, 523 (Fla. 3d DCA 1996)). An inadvertent disclosure is the opposite of an intentional renunciation. Id. Therefore, a privilege cannot be deemed waived upon an inadvertent disclosure of documents or information. Id.

Still, despite the Rules established under Florida law, when a receiving party refuses to return or destroy privileged documents, the matter gets litigated in the trial courts and decisions have been appealed. Orders denying the request to return privileged documents are reviewed under certiorari because no adequate remedy of law can be provided on plenary appeal when privileged documents are disclosed. Abamar, 673 So. 2d at 277; see also Jacobson, 25 So. 3d at 85.

To determine whether an inadvertent disclosure waives the privilege, the majority approach is to apply the five-factor test known as the relevant circumstances test. Jacobson, 25 So. 3d at 86 (citing Abamar, 698 So. 2d at 278¬–79); see also Lightbourne v. McCollum, 969 So. 2d 326, 333 (Fla. 2007) (citing Abamar with approval). To determine whether the privilege has been waived the court evaluates the following:

(1) the reasonableness of 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; and
(5) whether the overriding interests of justice would be served by relieving a party of its error.

Jacobson, 25 So. 3d at 86 (citing Abamar, 698 So. 2d at 278¬–79). Courts evaluate and weigh the five-factors in each factual circumstance. No one factor weighs more than the other, nor does the absence of any deem automatic waiver. Courts have oftentimes criticized and reminded counsel that these matters should be resolved without court intervention as "the well-justified dictate [implores] '[a]n attorney who receives confidential documents of an adversary as a result of an inadvertent release is ethically obligated to promptly notify the sender of the attorney's receipt of the documents.'" Marcus & Marcus, P.A. v. Sinclair, 731 So. 2d at 846–47 (citing Abamar,

(Con't on pg 18)

Past Presidents' Cocktail Reception

Friday, March 8

5:30 p.m. to 7:00 p.m.

Lake Pavilion - 101 South Flagler Drive - West Palm Beach

Cocktails and heavy
hors d'oeurves will be served

PBCBA Members $35.00
Spouses $50.00 - Judiciary
Complimentary

RSVP Online @ PalmBeachBar.Org

SAVE THE DATE!

Inadvertent Disclosures: The Professional and Ethical Way to Handle Them

(Con't from pg 15)

698 So. 2d at 279, quoting The Florida Bar Comm. On Professional Ethics, Op. 93-3 (Feb. 1, 1994)). Summarily, these matters should rarely if ever be litigated.

Failure to Comply with Rules Could Be Cause for Disqualification

Finally, courts have entered orders disqualifying receiving counsel who have thoroughly reviewed documents and information that have been inadvertently disclosed. See Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Décor, Inc., 724 So. 2d 572, 573 (Fla. 3d DCA 1998). The underlying rationale behind disqualification is that the receiving party has obtained an unfair tactical advantage due to knowledge of the privileged information, and therefore, the disclosing party is prejudiced. Id. (citing General Accident Ins. Co. v. Borg-Warner Acceptance Corp., 483 So. 2d 505 (Fla. 4th DCA 1986)). However, the moving party does not need to demonstrate prejudice to justify the order. Id. (citing Junger Util. &Paving Co., Inc. v. Myers, 578 So. 2d 1117, 1119 (Fla. 1st DCA 1989); Zarco Supply Co. v. Bonnell, 658 So. 2d 151, 154 (Fla. 1st DCA 1995)).

The receiving party's refusal to rectify the disclosure in conjunction with the gain of an unfair tactical advantage is enough to disqualify. Id.

Conclusion

Approaching inadvertent disclosures with professionalism and knowledge of the ethical obligations bestowed upon attorneys, should avoid the need for court intervention to resolve these issues.

YLS 5K Coming Soon