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HANDLING POTENTIALLY PRIVILEGED DOCUMENTS AND MANAGING DISQUALIFICATION RISK AFTER *MCDERMOTT WILL & EMERY LLP V. SUPERIOR COURT*

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In April of 2017, the Fourth Appellate District disqualified Gibson, Dunn & Crutcher LLP from further representing its client, McDermott, Will & Emery LLP, in a dispute with former clients. (*See McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083.) Gibson Dunn was disqualified for using an email originally sent by a lawyer to his client and forwarded by the client to others, which Gibson Dunn found in McDermott's files. The Court of Appeal concluded that the email was presumptively privileged, and sustained the trial court's factual finding that no waiver had occurred because the client's disclosure was inadvertent. Gibson Dunn was disqualified for failing to follow the procedure for handling inadvertently disclosed privileged communications articulated in *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 and *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, because (a) it did not notify the client or his attorney it had obtained a copy of the email; (b) it reviewed and analyzed the email; and (c) it used the email in the lawsuit after objections were asserted based on attorney-client privilege.

Lawyers concerned with the development of the law of privilege, waiver and attorney disqualification have greeted the *McDermott* opinion with enthusiastic disagreement. The disagreement mostly arises from differing interpretations of the dense, complicated and conflicting facts of the case and differing conclusions about the proper inferences to draw from those facts. Virtually all of these disagreements boil down to the simple contention that the trial court could have decided the case differently. But, given the highly deferential standards of appellate review of a trial court's privilege rulings (substantial evidence) and disqualification orders (abuse of discretion), there is no assurance that the next case will come out any differently. McDermott thus presents a cautionary tale. It must be recognized that trial courts are given very broad discretion in deciding these issues. (This article addresses only California law. Federal law is quite different. In the Ninth Circuit, for example, the existence and scope of the attorney-client privilege is reviewed de novo by the appellate court, and factual findings are reviewed for clear error. Federal courts construe the privilege narrowly and appear to be more receptive to waiver arguments. (E.g., *United States v. Ruehle* (9th Cir. 2009) 583 F.3d 600, 606-607 ["(T)he privilege stands in derogation of the public's right to every man's evidence and as an obstacle to the investigation of the truth, [and] thus, . . . [i]t ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle," internal quotation marks omitted].)

Space does not permit a complete recitation of McDermott's facts. Nonetheless, there are some key teachings that one should heed when addressing information that appears privileged and determining what to do when a dispute over waiver arises. The bottom line is that lawyers who confront these issues without following *State Fund* procedures risk disqualification.

State Fund's requirements. *State Fund* holds that when a lawyer receives materials that "obviously" appear to be subject to an attorney-client privilege or "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 the materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and should immediately notify the sender that he or she possesses material that appears to be privileged. "The parties may then proceed

to resolve the situation by agreement or may resort to the court for guidance . . . ." (*State Fund*, *supra*, 70 Cal.App.4th at pp. 656-657.)

A communication "obviously" or "clearly" appears privileged when it is between lawyer and client and its purpose is consultation or advice. If third parties are copied on the communication or if it is later distributed beyond lawyer and client, waiver issues may exist. Surrounding circumstances, later-acquired information or a seasonably-asserted objection may be enough to make it "reasonably apparent" that the document was inadvertently disclosed, triggering *State Fund* duties.

A lawyer who decides these issues for himself or herself risks the court deciding them differently. That happened in *McDermott*, where the court found that an 80-year-old client with multiple sclerosis unknowingly and accidentally forwarded a privileged email from an iPhone. The recipient thereafter forwarded the message to another, who in turn distributed the email to others. None of the subsequent events altered the presumptively privileged nature of the original communication, and because the client's disclosure was inadvertent, the subsequent disclosures to third parties did not waive the privilege.

State Fund should be considered applicable to all documents that appear to be privileged, regardless of source or republication. The problem in *McDermott* arose when Gibson Dunn continued to use the presumptively privileged email after the client's counsel objected that the email had been inadvertently disclosed. Once the trial court concluded the communication was privileged and that no waiver had occurred because the email had been inadvertently disclosed, Gibson Dunn's fate was all but sealed.

Until the California Supreme Court rules otherwise, caution dictates viewing *State Fund* as applicable whenever the circumstances present a presumptively privileged communication and there has been no confirmation or agreement regarding waiver by the holder of the privilege. It does not matter whether the document came from your client's own file, or from a third party, opposing counsel, or another source. It makes no difference whether the matter is transactional or litigation. And, it does not matter how many people may have subsequently received the communication, or how many times it may have been forwarded or published online. This is because the holder of the privilege is the client, and only the holder can waive the privilege. (See Evid. Code, § 954.) The attorney-client privilege is, after all, a rule of evidence. It precludes use or introduction of privileged communications in a proceeding governed by those rules.

Once the proponent of the privilege makes a prima facie showing of a confidential attorney-client communication, it is presumed the communication is privileged, and the burden shifts to the opponent to establish waiver, an exception, or that the privilege does not apply for some other reason. (*DP Pham, LLC v. Cheadle* (2016) 246 Cal.App.4th 653, 659-660.) Making a prima facie showing requires only that the client establish a confidential communication between client and lawyer under Evidence Code section 952. Once that showing is made, the communication is presumptively confidential. The proponent of the privilege need not negate facts suggesting waiver in order to preserve the claim. That burden rests with the party claiming waiver.

Resolve the dispute before using the information. It is risky to reject a privilege claim and take the position that the holder waived the privilege because the holder didn't bring a motion to resolve the dispute. In *McDermott*, the privilege holder's attorney objected to use of the privileged email when the opposing party tried to examine a witness about it. The attorney did not instruct the witness not to answer, and did not bring a motion to address the inadvertent disclosure. Although the lawyer might have been found to have waived the privilege as the agent of her principal under those circumstances, the trial court found that the lawyer's objection was enough to preserve the holder's privilege claim. (*McDermott, supra* 10 Cal.App.5th at pp. 1113-1115.) Therefore, counsel may not be able to safely rely on arguments that an attorney allowed questioning about a privileged document or that the privilege was waived by failing to bring a motion to resolve the assertion of privilege.

The temptation to take advantage of inadvertently-disclosed privileged information, especially when there seems to be a clear waiver, must sometimes be almost irresistible. *McDermott* teaches that we must resist – not just because it's the professional thing do, but because the risk of not playing by the *State Fund* rules is simply too high.

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