

***McDermott Will & Emery LLP et al., v. The Superior Court of Orange County, Respondent; Richard P. Hausman, SR., et al., Real Parties in Interest (2017) DJDAR 3726***  
Disqualification of law firm appropriate following firm's violation of ethical obligations regarding use of inadvertently disclosed privileged email.

**FACTS**

Marilyn Hausman formed a holding corporation, M. Hausman Inc. (MHI). Her husband, Dick, managed MHI's investments. The Hausman's hired defendants to provide a variety of estate planning services for their family. Marilyn later died and Dick became president of MHI. In 2013, Dick named Rick (a son) as MHI's president. Soon after Rick became president, Rick sought to increase his and his other sibling Cox's salaries in MHI but Dick objected and disputes arose. Dick hired Mark Blaskey, an attorney, to help advise him on the situation. On August 22, 2013, Dick, Blaskey, Rick, Cox, and Lurie met to discuss their disagreements. Immediately after the meeting, Dick, Blaskey and Jill Lindsey met to review their options. Lindsey is Dick's personal assistant and regularly received and maintained correspondence on Dick's behalf.

On August 27, 2013, Blaskey sent an email to Dick summarizing the meeting and providing legal advice. Blaskey had cc'd Lindsey on the email as well. The email was entitled "Summary of 8/22/13 meeting." The following day, Dick forwarded the email to Mr. and Mrs. Gavin Shearer Herbert at Ninetta Herbert's email address. The email did not include any other text other than "sent from my iPhone." Ninetta then forwarded the email to Gavin, Marilyn's brother. Gavin's only role was to act as an intermediary to help resolve the dispute and had no interest in MHI.

On September 4, 2013, Rick, Cox, and Greg Pellizzon had a meeting with Gavin whom they alleged had provided copies of the email sent by Blaskey.

In August 2014, a year after the dispute arose, Dick attempted to acquire all MHI voting shares and filed a probate petition. Rick's counsel, Jason Kirby, during this lawsuit discovered the Blaskey email. He forwarded it to Dick's counsel Alan Kessel stating it appeared to be confidential but that Dick waived the privilege by sending it to Ninetta and Gavin. Kessel told Kirby the email was privileged and this was the first time Dick had learned the email had been sent to anyone. Dick claimed he inadvertently disclosed the email. Dick's counsel requested that all copies be destroyed. Kirby said he would comply but would keep and seal one only to deal with the waiver issue.

In May 2015, Plaintiffs filed 2 malpractice lawsuits against defendants based on alleged conflict in representing various members of the Hausman family, the Hausman family trusts, and MHI. They brought the 2<sup>nd</sup> lawsuit as a derivative action on behalf of MHI.

In July 2015, defendants produced thousands of pages of documents through discovery. On August 13, 2015, the parties deposed Lurie who was represented by Gibson Dunn. During the depo, Rick's counsel sought to question Lurie about the Blaskey email. Dick's counsel, Paul George, immediately objected stating it was privileged and he was assured by Rick's counsel that no other copies existed.

A week later, in the malpractice lawsuits, Lindsey and other Hausman siblings were deposed and the Blaskey email was once again brought up. Dick's attorney objected and stated it was confidential. After doing discovery around the issue of waiver, Gibson Dunn stated the email was not privileged and would continue using it. The parties in the malpractice lawsuits were represented by different counsel.

## PROCEDURAL HISTORY

Dick filed a motion in the malpractice actions seeking (1) judicial determination that the Blaskey email was privileged attorney-client communication that Dick inadvertently disclosed and (2) an order requiring Gibson Dunn to return all copies of the email and strike portions of depo testimonies from the record that discussed the email. The trial court found that Plaintiff and real party in interest Hausman (Dick) did not waive the attorney client privilege by forwarding the confidential email he received from his personal attorney to his sister-in-law because Dick inadvertently and unknowingly forwarded the email from his iPhone. The court also found the sister-in-law did not waive the privilege when she forwarded the email to her husband, who then forwarded it to 4 other individuals because Dick did not consent to these disclosures and did not know about them.

The trial court also disqualified Gibson Dunn from representing defendants because they had an ethical obligation to return the privileged material and refrain from using it under *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal. App. 4th 644.

## ISSUES

- 1) Whether the client waived the attorney-client privilege by disclosing the communication to third parties, and;
- 2) Whether the trial court erred in disqualifying the law firm that represented one of those third parties because its attorneys failed to notify the client or the client's attorney that counsel had obtained a copy of the communication, reviewed and analyzed the communication, and used it in the lawsuit.

## HOLDINGS/DISCUSSION

The attorney client privilege may be waived, but only by the holder of the privilege. A waiver results when the holder, without coercion, (1) has disclosed a significant part of the communication, or (2) has consented to the disclosure made by anyone else. (Evid. Code sec. 912; *State Fund* at 652.) Under the second method of waiver, "Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has legal standing and the opportunity to claim the privilege." (Evid. Code, § 912, subd. (a).) "Despite the statute's declaration that any uncoerced 'disclosure' creates a waiver, courts have consistently held that inadvertent disclosures do not." (*Newark Unified School Dist. v. Superior Court* (2015) 245 Cal.App.4th 887, 900 (Newark).) The privilege holder's characterization of his or her intent in disclosing a privileged communication is an important consideration in determining whether the holder waived the privilege, but is not necessarily dispositive. When determining whether an inadvertent disclosure waived the attorney-client privilege, a trial court must examine both the subjective intent of the privilege holder and any manifestation of the holder's intent to disclose the information.

Here the court applied the substantial evidence standard and found Dick did not waive the attorney client privilege based on the following: (1) the absence of any text in Dick's e-mail to Ninetta explaining why he forwarded the Blaskey e-mail to her; (2) the forwarded e-mail came from Dick's iPhone; (3) Dick's elderly age (nearly 80 years old); (4) his reduced dexterity caused by multiple sclerosis; (5) the lack of any connection between Ninetta and the MHI dispute discussed in the e-mail; (6) Dick's testimony he rarely spoke with Ninetta and never about MHI; and (7) Gavin's testimony that

transmission of the e-mail was a mistake, Dick had no reason to forward the e-mail to Ninetta, and he never spoke with Dick about the e-mail. Additionally, Ninetta's disclosure of the Blaskey e-mail to Gavin, and Gavin's disclosure to Rick, Cox, Pellizzon, and Lurie, cannot support a waiver of the privilege because Ninetta and Gavin are not holders of the privilege.

Additionally, the court found substantial evidence supported the trial courts application of the *State Fund* rule, which states: “When a lawyer who receives materials that 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. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. We do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact.”

Here, the evidence showed that when Gibson Dunn in June 2015 discovered the Blaskey e-mail in its client's files, it knew Blaskey was Dick's personal attorney representing Dick in his dispute with Rick and Cox over control of MHI, and Lurie potentially was an adverse party to Dick based on Lurie's actions regarding the Hausman family trusts and MHI. A cursory review of the e-mail showed it was from Blaskey to Dick, with copies to Blaskey's law partner, Kessel, and Dick's personal assistant and advisor, Lindsay. The e-mail summarized a meeting among the parties to the dispute and their attorneys. The court held this constituted substantial evidence supporting the conclusion the Blaskey e-mail was a communication made in the course of an attorney-client relationship, and therefore it was presumptively privileged. Under these circumstances, the Blaskey e-mail was a presumptively privileged document and therefore was an “obviously privileged” document under the *State Fund* rule. The court went further and stated “This conclusion is further supported by evidence showing Rick's attorney in the Probate Action concluded the *State Fund* rule applied when he found a copy of the Blaskey e-mail in his client's documents. Specifically, after reviewing the e-mail, Rick's counsel pulled the e-mail from his client's document production, sent it to Dick's counsel under separate cover, and asked whether Dick claimed the e-mail was privileged because the original e-mail appeared to be a confidential communication between Dick and his personal attorney.”

Additionally, the court found that the trial court's disqualification of Gibson and Dunn was an appropriate remedy. A disqualification motion involves a conflict between a client's right to counsel of his or her choice, on the one hand, and the need to maintain ethical standards of professional responsibility, on the other. “Although disqualification necessarily impinges on a litigant's right to counsel of his or her choice, the decision on a disqualification motion ‘involves more than just the interests of the parties....When ruling on a disqualification motion, ‘[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process.’ ”

“In the context of inadvertently disclosed, attorney-client communications, “ ‘ ‘[m]ere exposure’ ” to an adversary's confidences is insufficient, standing alone, to warrant an attorney's disqualification.” “[T]he significant question is whether there exists a genuine likelihood that the status

or misconduct of the attorney in question will affect the outcome of the proceedings before the court. Thus, disqualification is proper where, as a result of a prior representation or through improper means, there is a reasonable probability counsel has obtained information the court believes would likely be used advantageously against an adverse party during the course of the litigation. Though such information cannot be unlearned, and the lawyer who obtained it cannot be prevented from giving it to others, disqualification still serves the useful purpose of eliminating from the case the attorney who could most effectively exploit the unfair advantage.” (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)

Here, the trial court in its minute order explained it disqualified Gibson and Dunn because “[c]ounsel’s review and use of the e[-]mail at deposition goes beyond ‘mere exposure’ and raises the likelihood that this could affect the outcome of these proceedings both in terms of [Dick’s] rights against use of his privileged communications against him and in terms of the integrity of these judicial proceedings and public confidence in them.”