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Memo
To: Public
From: Jeffrey Harrington, Esq.
Date: 2005

PRIVILEGE AND THE INADVERTENT PRODUCTION OF DOCUMENTS IN FEDERAL COURT

In deciding whether the inadvertent production of privileged documents waives the attorney-client privilege, the court will consider five factors: (1) The reasonableness of the precautions to prevent inadvertent disclosure, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) the "overriding issue of fairness." *Bud Antle, Inc. v. Grow Tech, Inc., 131 F.R.D. 179 (N.D. Cal. 1990) (quoting Hartford Fire Insurance Co. v. Garvey*, 109 F.R.D. 323.332 (N.D. Cal. 1985)). In addition, the court may find the rule in California, in which lawyers are to refrain from examining materials once the privileged nature of the content is ascertained and to notify the sender immediately, bears weight in this case. *State Compensation Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799, 807 (Ct. App. 1999).

The standard for reasonable precaution is measured by whether the producing party used customary industry practices in preparing documents. A two-tiered review, in which paralegal services and associates initially prepare documents for discovery, is a customary practice and

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evidence of reasonable precaution. *Bagley*, 204 F.R.D. at 179. The same is true for labeling documents in a way that announces privileged content. *Id.* at 179. On the other hand, a delay in providing a list of privileged documents shows a lack of reasonable precaution, for receiving counsel may not have notice of privileged content before examining the documents. *Sause*, 144 F.R.D. at 115. Finally, failure to notice an inadvertent disclosure more than once, twice in both *Sause* and *Antle*, weighs against the sending party as evidence of lack of reasonable precaution. *Id.* at 115; *Antle*, 131 F.R.D. at 183. In this case, where all characteristics of reasonable precaution are present except for prompt provision of a privileged documents list, which is mitigated by the labeling of privileged documents, the factor will weigh in the producing party's favor.

Whether the amount of time the sending party takes to rectify an error in disclosure is excessive or not has been determined differently by different courts. The court in *Antle* and *Sause* determined this factor by considering the time elapsed since the initial discovery. 131 F.R.D. at 183; 131 F.R.D. at 183. In *Sause*, the court found six weeks from the time of initial disclosure to be excessive.

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By this standard, this factor must weigh against us because opposing counsel in this case has had the privileged materials for over a year. However, judged by the standard in *Bagley*, where the court measures the time taken from the moment the producing party realizes the error, this factor will weigh in our favor: provided, of course, we immediately notify opposing counsel of the inadvertent disclosure and request the return of privileged documents. 204 F.R.D. at 181.

The scope of a discovery refers to the number of documents that must be reviewed in preparing a production. The court considers 6,000 pages to be "fairly broad" scope. *Id.* at 183. The scope of the present case, over two million pages, will be considered very large and this factor will, accordingly, weigh against waiver.

The extent of disclosure factor is determined by whether the documents have been fully disclosed. In determining the likelihood of full disclosure, the court looks at such things as the ratio of privileged documents to total documents disclosed, the time the receiving party has had the documents, and evidence of the receiving party's reading, taking notes, and/or discussing the contents. *Bagley*, 204 F.R.D. at 181; *Sause*, 144 F.R.D. at

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115; *Antle*, 131 F.R.D. at 183. In the present case, opposing counsel has had the documents for fifteen months, a long period of disclosure by either *Bagley* or *Sause*. 204 F.R.D. at 181; 144 F.R.D. at 115. Notwithstanding, our office detected the error without being alerted by opposing counsel, which implies the documents have not yet come to their attention. If there has been a close analysis, the judge will view opposing counsel's failure to notify us as misconduct. *Bagley*, 204 F.R.D. at 182. Moreover, because documents were labeled "privileged" and the rule in California indicates attorney's have an ethical duty to refrain from examining documents ascertained to be privileged, the court should find our documents have not been fully disclosed. If they have been, the receiving party has acted unethically. Hence, this factor will ultimately weigh against waiver.

The final factor, overall fairness, is determined by weighing justifiable reliance against the policy of privilege. In *Antle*, the receiving party had no overt notice of the documents' privileged nature, and the material had been extensively incorporated in the receiving party's defense. 131 F.R.D. at 183. As such, the court awarded waiver because the receiving party's reliance on

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the privileged documents was justified and of greater weight than the policy of privilege. *Id.* at 183. However, our case is distinguished from *Antle* by the fact privileged documents were clearly labeled.

In *Bagley*, privileged documents were labeled, and the court found any reliance on privileged content to be unjustifiable. 204 F.R.D at 182. Because privileged documents in this case were labeled, any reliance by the receiving party on those materials is unjustified, and the court will act to protect the policy of privilege, which the court considers important to the legal process and society. *Id.* at 182.

The court in *Bagley* goes on to refute the notion that "the bell has already been rung" (*Antle*, 131 F.R.D. at 183) by arguing it can repair the damage done by disclosure by blocking use of the documents at trial and protecting the client from the future use of those documents in lawsuits. *Bagley*, 204 F.R.D. at 184.

Given the arguments in *Bagley*, the court will find opposing counsel has not or should have not relied on the privileged documents for their litigation; hence, the policy of privilege trumps, and this factor of fairness will weigh against waiver.

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If opposing counsel refuses to return the inadvertently produced documents and we determine the problem of disclosure is critical, we should take the matter to the magistrate judge with confidence a protective order will be granted, for four of the five factors weigh against waiver and the one not clearly in our favor, time taken to rectify, is in equipoise.