UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION — CIVIL ACTION NO. 00-2238-M

VERSUS — U.S. DISTRICT JUDGE ROBERT G. JAMES

RITE AID CORPORATION — U.S. MAGISTRATE JUDGE JAMES D. KIRK

M E M O R A N D U M R U L I N G

Before the court is a motion for protective order [Doc. #10] by defendant K&B Louisiana Corporation d/b/a Rite Aid ("Rite Aid"). Because time was of the essence, a hearing was held by telephone on February 15, 2001 and letter briefs filed by the attorneys.

Counsel for Rite Aid, George D. Fagan, alleges that on February 15, 2000 he prepared a letter to Tracy L. Schrey in the legal department of Rite Aid, his client. However, the letter was mistakenly placed in an envelope prepared for a letter to an investigator with the plaintiff, Equal Employment Opportunity Commission ("EEOC"). Mr. Fagan asserts that he sent six letters in an attempt to regain possession of the letter and shows that it is subject to the attorney-client privilege and that the letter was inadvertently mailed to plaintiff.

Plaintiff's counsel, Yancy A. Carter, argues that the ethical standards governing attorneys do not apply in this case because the letter was received by an investigator, not by the legal department. EEOC further argues that the letter is not subject to attorney-client privilege because the facts contained in it were

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previously known to EEOC. EEOC's attorney admits, however, that he became aware of EEOC's possession of the letter in May 2000 and, at that time, Rite Aid's counsel Fagan demanded its return and asserted the privilege. Carter claims, however, that EEOC "did not see why the document was privileged" and that "Mrs. Thompson is shielded from any ethical standard violations to which attorneys would be subject."

Despite the claim of privilege and the fact that it was obvious that the letter had been inadvertently sent, neither EEOC nor its counsel ever sought a court ruling on the matter, but simply refused to return the document. Thereupon, defendant's counsel Fagan filed the instant motion for protective order.

Questions of privilege are governed by state law. The law has long recognized that communications between attorney and client made with the expectation of confidentiality are protected by the attorney-client privilege and cannot be disclosed without the client's permission. Pitard v. Stillwater Transfer and Storage Co., 589 So.2d 1127 (La.App. 4 Cir. 1991).

The attorney-client privilege cannot be waived by the attorney's inadvertent disclosure of a communication in that such disclosure is without the consent of the client. Id. at 1128; La. R.S. 13:3734.3. *See also* Hebert v. Anderson, 96-0994 (La.App. 4 Cir. 9/18/96), 681 So.2d 29.

The client is the holder of the attorney-client privilege and only the client has the power to waive it. Such waiver must be founded on an affirmative act by the client. Smith v. Kavanaugh, Pierson & Talley, 513 So.2d 1138 (La. 1987).

In addition, the American Bar Association Standing Committee on Ethics and Professional Responsibility has addressed this issue and has concluded that it is the obligation of an attorney who receives an obviously inadvertent transmission of apparently privileged material, to immediately cease examining the documents and return them to the sender and not use or disclose the documents. Formal Opinion No. 82-368 (October 16, 1992)(copy attached).

The Fifth Circuit has considered this issue in Alldread v. City of Grenada, 988 F.2d 1425 (5th Cir. 1993). The court balances the circumstances surrounding the disclosure, including (1) the reasonableness of precautions taken to prevent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness. Here, like Greneda, the documents were obviously sent inadvertently. Mr. Fagan immediately informed opposing counsel of his error and repeatedly attempted to regain possession of the document. The materials were not discoverable and included not only confidential communication by the attorney to his client, but also his mental impressions. Fairness mandates

that the documents be returned. There was no waiver.

In this case, it should have been obvious to the investigator upon receipt of the letter that neither she nor the EEOC was the intended recipient of the letter[1]. Although EEOC argues that it often receives copies of letters addressed to other persons, this letter was obviously a communication by an attorney to his client, the EEOC's adverse party. In addition, a perusal of even the first few lines of the two-page letter reflects that (1) the letter is from defense counsel; (2) the letter is directed to defense counsel's client; (3) the letter contained a client file number; and (4) the letter expresses that "my opinion is . . .." If the letter was read in its entirety, which it was (in violation of the ABA rules), it would further have been clear that the letter discussed strategy with regard to settlement. The investigator should have known that the letter needed to be returned or should have contacted the EEOC legal department for advice. Regardless of the investigator's obligations, however, attorney Carter became aware of the existence of the letter, its contents, and the claim of privilege in May 2000. Now, almost nine months later, the EEOC has steadfastly refused to return the letter despite repeated

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[1] EEOC apparently retained the envelope in which the letter was sent apparently to prove that it was mailed to the investigator. The retention of the envelope, unless it is the practice of the EEOC to retain all envelopes in which it receives mail, is an indication that at the very moment the letter was received, it was obvious that the letter was not intended for the EEOC.

demands of defense counsel and did not file any motion with the court to have the matter resolved. Had the attorney performed legal research with regard to Louisiana cases, cases from other states, or ethics opinions, he would have quickly discovered his error in refusing to return the document and would have known exactly what was required of him and his client.

Therefore, I find that the letter was inadvertently sent, that it is a confidential communication subject to both the attorney-client and work product privileges, there was no waiver of the privilege and that the letter should have been returned to the sender. "Lawyers are not required to stuff the envelopes and deposit the mail in order to protect the privilege." Resolution Trust Corp. v. First of America Bank, 868 F.Supp. 217 (W.D. Mich. 1994).

In Resolution Trust, the court observed:

> "In this Court's judgment, common sense and a high sensitivity toward ethics and the importance of attorney-client confidentiality and privilege should have immediately caused the plaintiff's attorneys to notify defendant's counsel of his office's mistake. The lawyers who received the document must have known by the markings and contents of the document that a clerk or secretary in the defendant's lawyer's office mistakenly included the privileged letter within the documents intended for the plaintiff's lawyers. Thus, plaintiff's lawyers must have known that neither the defendant nor its lawyer intended to waive the attorney-client privilege. While lawyers have an obligation to vigorously advocate the positions of their clients, this does not include the obligation to take advantage of a clerical mistake in opposing counsel's office where something so important as the attorney-client privilege is involved." Id. at 219.

Therefore, defendant's motion [Doc. #10] is GRANTED.

IT IS THE ORDER of the court that the EEOC and Yancy A. Carter return the original letter by mailing it no later than 4:00 p.m. on February 15, 2001 to Mr. George D. Fagan.

IT IS FURTHER ORDERED that the EEOC and Mr. Carter obtain all copies of the letter which they sent to anyone or all copies made by recipients of the copies and return those to Mr. Fagan by February 22, 2001.

IT IS FURTHER ORDERED that no computer images or files of the letter be retained.

IT IS FURTHER ORDERED that the Government, including the EEOC and Mr. Carter, may not make use of the letter or any of the information contained in the letter unless it can prove that it had obtained the information from another source prior to receipt of the letter and any reference to it is stricken from plaintiff's pleadings.

IT IS FURTHER ORDERED that the EEOC and Mr. Carter are not to disclose the contents of the letter to anyone or to refer to the letter at any trial or other proceeding in this case.

IT IS FURTHER ORDERED that defendant's counsel, Mr. Fagan, submit to the court by February 26, 2001 an itemized list of his time and expenses in attempting to regain possession of the letter and asserting his client's privilege, in preparing and filing the motion for protective order and attending the telephone hearing on

it and all other matters in connection therewith. Whether additional sanctions will be ordered and whether this matter will be referred to the Louisiana State Bar Association is pretermitted for further consideration.

This case may be appealed to the district judge, but the orders contained herein shall be complied with as stated unless the district judge orders a stay pending any appeal to him.

THUS DONE AND SIGNED at Alexandria, Louisiana, this 15th day of February 2001.

JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE

COPY SENT:
DATE: 2-15-01
BY: TW
TO: Butler
Fagan

(Cite as: 30-NOV Ariz. Att'y 10, *15)

of evidence that could have been held back. ▶[FN47]

The court continued:

Indeed, whenever the question has been considered by courts, the expansive view of waiver has been rejected . . . . "The general rule that a disclosure waives not only the specific communication but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure, unless it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure." ▶[FN48]

ETHICAL CONSIDERATIONS

The American Bar Association Standing Committee on Ethics and Professional Responsibility ("ABA Committee") recently addressed the ethical*16

(Cite as: 30-NOV Ariz. Att'y 10, *16)

obligation of an attorney who receives an obviously inadvertent transmission of privileged material. ▶[FN49] The ABA Committee adopted the position that when a lawyer receives an obviously inadvertent transmission of apparently privileged material, the lawyer must, upon noticing the apparently privileged nature of the material, immediately cease examining them and return them. Although the ABA Committee's position does not impose any duties on attorneys who are not members of the ABA, its position is highly probative of the ethical duties required under the rules governing lawyers' ethical conduct in the

(Cite as: 30-NOV Ariz. Att'y 10, *16)

respective states, including Arizona. Accordingly, if a judge found that the attorney who received the privileged documents deviated from the standard of conduct prescribed by the ABA Committee, the judge might be inclined to impose sanctions on the attorney and his or her client for breach of the attorney's ethical duties.

Consequently, when confronted with an "obviously inadvertent disclosure," a prudent attorney may want to copy the inadvertently disclosed document, return the original and promptly file an in camera motion with the court seeking a declaration of waiver. This approach allows the attorney to preserve the argument that the applicable privileges have been waived, while ensuring that the lawyer has satisfied his or her ethical obligations as prescribed by the ABA Committee. ▶[FN50]

CONCLUSION

The modern trend regarding inadvertent disclosure points towards an ad hoc five-factor balancing test. As a result of this approach's emphasis on the steps taken to prevent inadvertent disclosure, counsel should review their document production procedure to ensure that adequate precautions are in place. The precautionary measures taken to prevent disclosure and the time spent on these measures should be recorded. The parties also may want to enter into an

(Cite as: 30-NOV Ariz. Att'y 10, *16)

agreement or obtain a court ruling regarding the disposition of inadvertently disclosed privileged material in advance of any *34

(Cite as: 30-NOV Ariz. Att'y 10, *34)

document production. Further, opposing counsel should not be permitted to review the documents before they are screened with an intent to maintain the documents' confidentiality.

If an inadvertent disclosure occurs despite the precautionary measures, an objection should be filed immediately and efforts should be taken to rectify the disclosure. A good record of all the precautionary measures will prove invaluable in establishing that the inadvertent disclosure did not work a waiver of the applicable privilege. Counsel can at least take some comfort in the fact that even if the inadvertent disclosure is found to have waived the applicable privileges with respect to the inadvertenly disclosed material, it does not waive the privilege with respect to related documents which were not disclosed.

Counsel also should take note of the ABA Committee's recent opinion regarding the ethical obligations of an attorney who receives an obviously inadvertent disclosure of privileged documents. In such circumstances, the ABA Committee's opinion imposes a duty on the attorney to cease examining the documents, not to use or disclose the documents' contents and to return them to opposing counsel.