

ITEM 10.02 | INADVERTENT DISCLOSURE

As communications technology advances (facsimile, e-mail, test, etc.), the opportunities for inadvertent disclosure of lawyer-client privileged communications increase. Inadvertent disclosure of lawyer-client privileged communications, and the resultant issues of waiver and disqualification have been addressed by Florida courts more frequently in recent years, and in 2010, Fla. R. Civ. P. 1.285 was enacted, governing the inadvertent disclosure of privileged materials. It was amended effective January 1, 2011.¹³ The rule is self-explanatory. To preserve the privileges recognized by law, the party must serve written notice of the assertion of privilege on the party to whom the materials were disclosed, within 10 days of actually discovering the inadvertent disclosure.¹⁴ The rule sets forth the duty of the party receiving such notice;¹⁵ the right to challenge the assertion of the privilege;¹⁶ and, the effect of a determination that the privilege applies.¹⁷

Florida law has always required the recipient of inadvertently disclosed attorney-client privileged communications to act appropriately, or risk being disqualified from the case.¹⁸ An attorney who promptly notifies the sender and immediately returns the inadvertently produced materials without exercising any unfair advantage will, generally, not be subject to disqualification.¹⁹

The recipient still has the right to challenge the claimed privilege on the basis of waiver.²⁰ The rule does not set forth any specific test to determine whether a waiver occurred, however, the courts have addressed this issue in the past. To determine whether the privilege has been waived due to inadvertent disclosure, Florida courts will apply the "relevant circumstances" test. The test involves a factual determination, thus requiring an evidentiary hearing. The court must consider:

- (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production;
 - (2) the number of inadvertent disclosures;
 - (3) the extent of 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.^{[21](#)}

One should note the court's consideration of the "precautions taken to prevent inadvertent disclosure." As communications are more commonly transmitted by facsimile/e-mail, the prudent lawyer should carefully consider the protections in place (or not in place) at the recipient's location. For example, many facsimile terminals are used by large groups of people, and may not provide the necessary privacy for the transmission of privileged communications. Facsimile and e-mail communications should, at the very least, always include a lawyer-client privilege notice.^{[22](#)}

Attorneys should also remember that they have ethical duties when they send and receive electronic documents in the course of representing their clients. These ethical responsibilities are now issues in the practice of law where lawyers may be able to "mine" metadata from electronic documents. Lawyers may also receive electronic documents that reveal metadata without any effort on the part of the receiving attorney. Metadata is information about information and has been defined as information describing the history, tracking, or management of an electronic document.

Metadata can contain information about the author of a document, and can show, among other things, the changes made to a document during its drafting, including what was deleted from or added to the final version of the document, as well as comments of the various reviewers of the document. Metadata may thereby reveal confidential and privileged client information that the sender of the document or electronic communication does not wish to be revealed.

In response, The Florida Bar issued Ethics Opinion 06-2 (September 15, 2006), which provides as follows:

A lawyer who is sending an electronic document should take care to ensure the confidentiality of all information contained in the document, including metadata. A lawyer receiving an electronic document should not try to obtain information from metadata that the lawyer knows or should know is not intended for the receiving lawyer. A lawyer who inadvertently receives information via metadata in an electronic document should notify the sender of the information's receipt. The opinion is not intended to address metadata in the context of discovery documents.

Inadvertent disclosure does not always involve disclosure to the opposing party. Privileged materials may be inadvertently disclosed to a party's own expert. In that circumstance, a party does not automatically waive the privilege simply by furnishing protected or privileged material. The court will consider whether the expert relied upon the material in forming his or her opinion.²³

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Footnotes

¹³ Fla. R. Civ. P. 1.285 Inadvertent Disclosure of Privileged Materials.

¹⁴ Fla. R. Civ. P. 1.285(a).

¹⁵ Fla. R. Civ. P. 1.285(b).

¹⁶ Fla. R. Civ. P. 1.285(c).

¹⁷ Fla. R. Civ. P. 1.285(d).

¹⁸ See: *Atlas Air, Inc. v. Greenberg Traurig, P.A.*, 997 So. 2d 1117 (Fla. 3d DCA 2008).

¹⁹ *Abamar Housing & Development, Inc. v. Lisa Daly Lady Decor*, 724 So. 2d 572 (Fla. 3d DCA 1998); citing Fla. Bar Comm. On Professional Ethics, OP. 93-3.

²⁰ Fla. R. Civ. P. 1.285(c)(4).

²¹ *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007).

²² See: *Nova Southeastern University, Inc. v. Jacobson*, 25 So. 3d 82 (Fla. 4th DCA 2009).

²³ *Mullins v. Tompkins*, 15 So. 3d 798 (Fla. 1st DCA 2009).

