LITIGATION
INFORMATION MEMO
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A Topical Refresher: Inadvertent Disclosure and Privilege Claw-Back

The dramatics of the Alex Jones trial have many litigators stirring about inadvertent disclosure of privileged information and what needs to be done to properly claw it back. The sheer volume of discovery that is exchanged between parties has exploded since the inception of "electronically stored" documents and communications. It is more likely than ever that mistakes may be made now that teams of attorneys are reviewing and producing large amounts of discovery in relatively short periods of time. In light of this evolution of discovery, knowing what to do if you have made an inadvertent disclosure of privileged information or if you have received such a disclosure is critical.

New York Rules of Professional Conduct

New York Rule of Professional Conduct 1.6 requires attorneys to keep their clients' information confidential, unless the client waives privilege. It also specifically provides that attorneys must work to prevent the inadvertent or unauthorized disclosure or use of confidential client information.

On the flip side of Rule 1.6 is Rule 4.4, which requires that a lawyer who receives a document (in any form) that the lawyer knows or reasonably should know was inadvertently disclosed promptly notify the sender of the disclosure.

Together, these rules work to protect confidential client information from mistaken disclosure and subsequent use.

The Alex Jones case (while not governed by New York rules) is a perfect example of what not to do when a lawyer is notified by their opponent that they are in receipt of inadvertently disclosed communications. Mr. Jones' lawyer inadvertently disclosed the contents of the defendant's cell phone, but when notified of the same by plaintiffs' counsel, did not take the appropriate steps necessary to claw that information back. So, at the time of trial, that evidence became fair game.

So, this begs the question: what steps must a lawyer take to properly clawback inadvertently-disclosed confidential client information?

How to Properly Clawback Disclosed Privileged Information

At the outset of a case, lawyers should consider including in a protective order "clawback provisions" as a way to protect their client's confidential information from inadvertent disclosure. The courts now routinely encourage parties to do so. The Uniform Forms of the Supreme and County Court and the Commercial Division Rules expressly contemplate clawback agreements, and the Commercial Division Rules even provide model language for such an agreement. *See* 22 NYCRR 202.12(c)(3)(viii) and 22 NYCRR 202.70, Rule 11-g(c).

Outside the confines of a clawback agreement, a lawyer who has inadvertently disclosed confidential client information can still claw it back, provided the lawyer satisfy certain criteria. An oft-cited case providing the framework for clawing back documents and communications is *New York Times Newspaper Div. of New York Times Co. v. Lehrer McGovern Bovis, Inc.*, 300 A.D.2d 169, 172 (1st Dept. 2002). In that case, the court instructed that:

> Disclosure of a privileged document generally operates as a waiver of the privilege unless it is shown that the client intended to maintain the confidentiality of the document, that reasonable steps were taken to prevent disclosure, that the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and that the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued.

Not surprisingly, it is incumbent on the disclosing attorney to prove that these elements were satisfied in order to successfully clawback documents.

The important lesson to take away from the Alex Jones trial is that an attorney who seeks to clawback documents or information must act promptly and effectively. What that means in any particular case depends on many factors, such as what the information disclosed was, how much information was disclosed, and in what format it was disclosed. Failure to do so can lead not only to embarrassment on the part of the lawyer, but prejudice to the client.

If you have any questions about the contents of this information memo, please contact Kathleen McGraw or any member of Bond's Litigation practice.

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