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Sharing Screens, Not Secrets: Preventing Inadvertent Privilege Disclosures When Videoconferencing, article by Henry Norwood, Esq. and Jack Kallus, Esq., published in LegalTech News, 3-1-2024

During videoconference depositions these days, the deposing attorney will probably share their screen with all parties present. The questioning attorney's screen displays an exhibit for the deponent and opposing counsel. In the course of the questioning, the attorney receives an email from their client and a notification popup appears on the shared screen. The information could be seen by opposing counsel, their client, and even the court reporter. While the notification popup is small, it displays confidential information, such as a settlement valuation.

Will this exposure of information be considered a breach of the attorney-client privilege? Can the opposition now utilize the information obtained in this scenario to its advantage? Can it fall under the safe harbors provided by the federal rules?

Videoconferencing Technology in the Practice of Law

During the COVID-19 pandemic, much of the practice of law went remote. Videoconferencing technologies such as Zoom, Skype and Microsoft Teams have endured beyond the pandemic and are still ubiquitous in the practice of law. Videoconferencing has saved time, resources and inconvenience in the modern practice of law and should be a permanent fixture in the field to compliment in-person practice. Because of this, courts should adopt uniform rules regarding videoconference proceedings.

A common feature of videoconferencing is the ability to share screens with other users. This feature allows exhibits or other documents to be distributed as though the parties were physically present in the same room. However, the use of screen-sharing may result in unintended consequences. Email "pop-up" notifications displaying communications between a client and their attorney can divulge attorney-client information. Open documents on the shared screen can also potentially reveal privileged information.

The Attorney-Client Privilege

Every jurisdiction in the United States has some form of attorney-client privilege, which generally protects clients from unauthorized disclosures of communications between the client and their attorney. The attorney-client privilege protects communications pertaining to legal advice alone, so communications that do not pertain to legal advice are not protected by the privilege. As stated in, "*Upjohn Co. v. United States," 449 U.S. 383, 389 (1981), the purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."*

During the course of litigation, an attorney can mistakenly breach the privilege through an inadvertent disclosure of attorney-client communications. A disclosure to the opposing party could put the client at a disadvantage. Federal and state rules provide protections for inadvertent disclosures under specific circumstances.

Federal Rule of Evidence 502(b) provides that an inadvertent disclosure of privileged communications does not result in a waiver of the privilege if: (1) the privilege holder or their attorney took reasonable steps to prevent the disclosure; and (2) the privilege holder or their attorney took reasonable steps to remedy the disclosure. Federal Rule of Civil Procedure 26(b)(5) places obligations on attorneys receiving inadvertently disclosed attorney-client communications, such as returning or destroying the communications, not using or disclosing the information, and attempting to retrieve any confidential information already disclosed.

A disclosure is inadvertent for Rule 502(b) purposes if the privilege holder did not intend the disclosure to occur. U.S. EEOC v. George Wash. Univ., 502 F.Supp.3d 62, 77 (2020) demonstrates the in-depth analysis courts go through when considering the inadvertent disclosure issue under Rule 502(b). The case involved one party, the defendant, unintentionally sending privileged documents to the

plaintiff. The defendant notified the plaintiff of the privileged documents, but the plaintiff refused to return or destroy the documents, prompting the defendant to seek court relief.

The Court walked through several issues related to the disclosure. First, the Court determined the disclosure was inadvertent because the defendant had not intended to provide the privileged documents, as indicated by its notification to the plaintiff shortly after learning of the disclosure. Next, the Court found the plaintiff was not entitled to review the documents themselves to determine if they were actually privileged, relying heavily on the purpose of the attorney-client to promote trust and confidence. Finally, the Court evaluated whether the defendant had satisfied the test for relief from its inadvertent disclosure. The Court determined the defendant took reasonable steps to prevent the production, as the defendant created a multi-level process for reviewing documents and designating any privileged documents accordingly. The Court concluded the defendant took reasonable steps to remedy the disclosure by acting quickly to notify the plaintiff following its discovery of the inadvertent disclosure.

As demonstrated in George Wash. Univ, to avoid a finding that the inadvertent disclosure resulted in a privilege waiver, counsel must argue under Rule 502(b) that he took reasonable steps to prevent the disclosure and reasonable steps to remedy the disclosure. Counsel must point to specific policies and proactive measures in place to avoid inadvertent disclosures.

Conclusion

Counsel should take all reasonable steps to mitigate the risk of inadvertent disclosures during a videoconferencing deposition. It is recommended that email and instant messenger notifications be turned off in advance of using videoconferencing. If two computer screens are available, using one exclusively for screen sharing can limit inadvertent disclosures.

Creating procedures and implementing a multi-level process to mitigate inadvertent disclosures via videoconferencing is a critical step that at least one court relied upon in its evaluation. Staff should be trained regarding these procedures. Clients who may share their screens during videoconference proceedings should be counseled on reducing the risk of inadvertent disclosures. The background blurring feature is recommended to reduce the risk of disclosures from background images or reflections of counsel's computer screen from background reflective surfaces. Finally, counsel are advised to limit screen sharing unless necessary and to disconnect screen sharing immediately after the sharing has served its purpose.

These practices reduce the risk of inadvertent disclosures and can be offered as evidence to demonstrate the reasonable steps taken to prevent a disclosure under Rule 502(b).

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