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To Represent or Not
By Richard P. Green – September 11, 2017

One of the most important aspects of complex civil litigation is the use of discovery depositions. Every trial lawyer uses discovery as an important component of his or her case development strategy in order to be more effective during trial. For the complex civil litigator, the deposition is key. Complex civil litigation involves numerous fact witnesses, numerous expert witnesses, thousands of pages of document production, all squeezed into a very specific area of the law. The following analysis is primarily a review of the Florida Rules of Professional Conduct, which closely mirror the ABA rules.

Because discovery is so vital, attorneys have relied on the use of privilege to cloak discovery material from production. Two commonly used privileges are the attorney-client privilege and the attorney work-product doctrine. The reason is that these two privileges are often seen as the closest thing to an absolute privilege. See State v. Rabin, 495 So. 2d 257, 262 (Fla. 3d Dist. Ct. App. 1986). If successful, an attorney can shield potentially detrimental information from being disclosed in the litigation. Of course, the purpose of litigation is to decide cases on the merits, but litigation is a game and this is a strategy many attorneys use.

A frustrating component to complex litigation matters is the nonparty fact witness. Nonparty fact witnesses are individuals who potentially have knowledge of facts that could affect the outcome of the case but who have no stake in the claim or defense. Furthermore, they are not expert witnesses. They are necessary because attorneys can make use of their unique, specific, or general knowledge of the facts in the case to educate the jury. They are frustrating because an attorney is heavily burdened with the task of shielding his or her client from the effects of the witness's testimony. That burden is addressed by deposing the opposing party's fact witness to discover what knowledge the witness has and, when necessary, learn information that could be used to discredit the witness.

A few issues present themselves for the scenario of the nonparty fact witness being deposed. First, who represents the witness, if anyone? Second, is the witness entitled to an attorney at the deposition? The answer to this question will depend on the jurisdiction. A New York appellate court has ruled that a nonparty witness is not entitled to have his or her own attorney present. Thompson v. Mather, 70 A.D.3d 1436 (N.Y. App. Div. 2010). The basis for this ruling was that the rules governing the taking and use of depositions were to proceed as if it were in a trial. For example, the non-party fact witness is being questioned on the stand at trial. Only the opposing attorney(s) may record an objection to the form/substance of the question being asked. An attorney who happens to represent the non-party fact witness cannot object.
Accordingly, because the nonparty witness attorney could not object at trial, that attorney could not lodge an objection at the deposition. *Id.* Florida has no bright-line rule, but the rule governing depositions has a similar standard. Florida Rule of Civil Procedure 1.310 allows for examination and cross-examination as permitted at trial. Further, it limits only a "party" to instructing a deponent not to answer on the basis of privilege. Although no case is directly on point, it is certainly the case that there is no affirmative right of a nonparty to have an attorney present.

Third, may an attorney representing one of the interested parties also represent the nonparty fact witness? The allure of such an action should be clear to any litigator. Although the nonparty witness has no stake in the outcome of the case, the attorney can establish control over the witness and guide what information is disclosed. The attorney can also learn off the record what information the witness may speak to at deposition.

Contact with a nonparty fact witness outside a formal deposition is inevitable. There certainly is no ABA model rule that prohibits this contact, nor is there a rule in Florida. However, there are rules that govern the attorney's *conduct* in such situations. Florida Rule of Professional Conduct 4-4.3(a), which mirrors ABA Model Rule 4.3, deals specifically with attorneys who represent a party to the litigation and their contact with unrepresented persons. These unrepresented persons can be pro se litigants or nonparty persons who are not otherwise represented. The rule is as follows:

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel.

Of course, there are instances where a nonparty would likely fall within the purview of the attorney's representation of a named party. If the attorney is able to demonstrate that his or her current client and the nonparty witness had some commonality in the past, then the attorney should be able to represent the witness respective to that common interest. Such commonalities include the employer-employee relationship or marriage or the witness was prior legal counsel for the interested party. In any of these instances, it can be construed that at one time, which was the basis for the knowledge of the witness, the two parties were one and the same. If the witness does not meet any of those particular attributes, then the witness is likely an unrepresented person falling within the purview of the aforementioned rule.

An attorney in this instance, in coming into contact with this witness, should inform the witness of who the attorney is and represents in the litigation. The attorney cannot inform the witness...
that the attorney will represent the witness at the deposition. This is impliedly prohibited in the rule by the wording, which prohibits the attorney from giving legal advice to the witness. Furthermore, if at any point in the conversation it becomes apparent that the witness believes the attorney represents the witness, the rule mandates that the attorney correct the witness regarding the misunderstanding. If the witness seeks legal advice, the attorney may only inform the witness to seek legal counsel. This is particularly important because the threshold for creating the attorney-client relationship is a low bar, hinging on the reasonable belief of the client. See Mansur v. Podhurst Orseck, P.A., 994 So. 2d. 435, 437 (Fla. 3d Dist. Ct. App. 2008). Should the attorney follow the rule when in contact with an unrepresented nonparty fact witness, it would be unreasonable for the witness to conclude that the attorney will represent the witness at the deposition.

However, even after all of these disclosures, it is conceivable that a witness with a prior relationship with the attorney's client will nonetheless seek to be represented by the attorney. This representation is likely prohibited by the Florida Rules. Florida Rule of Professional Conduct 4-1.7, which closely resembles ABA Model Rule 1.7, limits the ability of an attorney to represent parties with a conflict of interest. The attorney for the interested party has a duty of loyalty and a pecuniary interest to that party. That interest and duty can be seen as the compelling interest in wanting to represent the nonparty fact witness. The attorney will have no interest in the fact witness, but rather will only want to dictate what information the fact witness discloses. At trial, the attorney for the interested party will be unable to represent the nonparty witness. Accordingly, the interests of the fact witness and interested party cannot both be adequately preserved by the attorney for the interested party. Therefore, the attorney is under the obligation of Rule 4-1.7 to decline representation.

Attempting to cloak a nonparty fact witness in the attorney-client relationship such as this could lead to detrimental outcomes for the attorney. First, the opposing party will likely move to compel testimony from the fact witness, including all manner of discussions between the attorney and witness. In this situation, the nonparty fact witness will bear the burden to demonstrate that the attorney-client relationship exists. S. Bell Tel., Co. v. Deason, 632 So. 2d 1377 (Fla. 1994); Carnival Corp. v. Romero, 710 So. 2d 690, 694 (Fla. 5th Dist. Ct. App. 1998). Should the court evaluate the ethical rules and properly conclude that representation in this manner is prohibited, then the court will likely order the witness to answer all questions from the opposing attorney, which potentially would include attorney strategies as well as privileged information jeopardizing the interested party's case. See Visual Scene, Inc. v. Pilkington Bros., plc, 508 So. 2d 437 (Fla. 3d Dist. Ct. App. 1987) (holding that to the extent privileged information was disclosed to an unrepresented third party, the attorney-client privilege is waived).
This could be argued as legal malpractice. See *Lenahan v. Russell L. Forkey, P.A.*, 702 So. 2d 610, 611 (Fla. 4th Dist. Ct. App. 1997). Violating the rules, whether unintentionally or otherwise, is grounds for a legal malpractice claim. Attorneys are expected to know and abide by the ethical rules. See Preamble to Florida Rules of Prof'l Conduct. In complex litigation, damages in the millions are often what is at stake. The attorney could arguably be on the hook for losses to that degree. Also, violations of the ethical rules are bar violations that can result in punishment from the bar as severe as disbarment. Florida Rules of Prof'l Conduct R. 4-8.4(a).

It is not the intent of the justice system to shield facts from being used to determine a case on the merits, but it is nonetheless a component of our adversary system. Most litigators I have encountered do it, and most seek new strategies for accomplishing this goal. However, litigators must be cognizant of their responsibilities to represent the interests of their clients ethically.

Diverse Family Structure: Reevaluating the Best-Interests-of-the-Child Standard

By Jennifer Johnson and Brenda A. Baietto, Esq. – September 11, 2017

Due to no-fault divorce and "diverse family structures," children often experience a form of inequality that is largely ignored. With lawyers and judges focused on a liberty that is defined as adults' happiness with their family structure choices, there is little focus on the inequalities these choices create for children. The legal profession readily supports the thinking that a happy adult makes for a happy child, yet we disregard a century of jurisprudence linking the state's interest in natural marriage to children and their formation and the substantial body of literature linking children and communities flourishing with the stable presence within a family of married, biological parents. Nor does the "best interests of the child" standard address this form of structural inequality. Finally, it is only fair to consider the testimonies of the children affected, especially once they are old enough to separate appropriately from their parents, examine their childhoods in an objective manner, and then decide for themselves how fair and just it was.

Family Structure Equality for Children

There is a kind of equality for children that deserves attention. It is called "family structure equality." It is the idea that most children should have the same kind of family structure, one founded on the lifelong marriage of their own married mother and father, also known as natural marriage. This is humanity's anthropological truth, our foundation—preexisting the law of marriage. Diagrammatically, this is represented as an inverted triangle, with the couple's child or children at the third point. This triad, in line with overwhelming social science evidence (both past and present), is the family structure that best ensures equality for children—equality
of love, belonging, and security. When the family breaks down or doesn't form according to the triad, the inequalities for children multiply. Here are three ways this happens.

**1. Two half-time dads do not equal one full dad.** When parents divorce, a child can spend his or her childhood going back and forth between "two homes." If both parents remarry, that child can conceivably have a male father figure in each home. So the child has two half-time dads: a dad and a step-dad. For that child, however, having two half-time dads does not equal having one full-time dad. To a casual observer, it might seem as though the child being with each of them half the time would be the same as having one whole dad. But for one of the authors of this article, Jennifer Johnson, who was raised by divorced parents, it was not:

I am not 100 percent sure how I came to this realization, but I do remember thinking it as I stood in the driveway one day when I was about 12 years old. I remember feeling terrible about the messed-up nature of my family, how alone I was in it, and how it was never going to change.

Perhaps I came to this realization because I was an eyewitness to what a full-time dad looked like. My step-dad was a full-time dad to my half-sister. She lived with both her married parents, my mom and my step-dad. I could see that what she had and what I had were two different things. In each home, I needed to pretend that my other parent (and that parent's family) did not exist, meaning
they were not welcome. Family photos of other people's whole families were on the walls, but not of my whole family. Group family photos were taken and hung on the walls, but I wasn't in them. I was the only one who had divided Christmases, divided birthdays. While all this was going on for me, I am acknowledging everybody's mother and father and their whole families. But mine was not acknowledged. Thus, I had no real sense of family and home.


2. Non-triad arrangements. Other types of non-triad arrangements have inequalities as well. Children who are conceived from anonymous gametes must pretend that half of who they are does not exist.

If the parents were raised inside the intact triad, then there is an inequality between the parents and the children because there are two different standards being applied. The child must pretend that half of himself or herself does not exist, while the child's parents do not. A study was conducted in 2010 of young adults who had been conceived through sperm donation. Two-thirds of them agreed with this statement: "My sperm donor is half of who I am." Elizabeth Marquardt et al., *My Daddy's Name Is Donor: A New Study of Young Adults Conceived Through Sperm Donation* (Inst. for Am. Values 2010).
“It’s going to be heartbreaking for him (Zachary) to grow up and realise he hasn’t got a mummy.” —Elton John (quoted in Sarah Nathan, "It Will Break My Son's Heart to Realise He Hasn't Got a Mother," Daily Mail, July 15, 2012).

The wedge between a child and the gamete donor represents the legal system. It permanently blocks children from knowing half of their family trees. In some cases, this includes falsifying the child's birth certificate with the social parent’s name. Consider the additional stressors these kids endure:

- Who is my donor?
- Who are my half-siblings?
- Will our paths cross?
- Will I accidentally marry one of them?

This is an inequality in their family structure that neither their parents nor their peers share, with stressors that their parents and their peers can hardly even imagine.

3. Disenfranchised grief. If a child thinks or feels something about the inequality he or she experiences, the child's thoughts and feelings may not be welcome. To welcome those thoughts and feelings might cast doubt on the structure of the family and call into question the adults' freedom to make those choices. Thus, the child suffers a disenfranchised grief, one not accepted by the wider culture. Part of the healing process for these people is having the freedom to talk about the inequalities without being judged or pathologized. This is a kind of equality that is now denied in the popular culture.

Addressing Adoption

Even if our society agreed with all of this, there would still be a small amount of structural inequality among children. Death, rape, ignorance, and human weakness mean that some family structure inequality will always exist. Adoption serves as a remedy for this kind of inequality because it provides parents to children who need them.

We must distinguish between adoption and other instances where children are not being raised with their own married parents. Anonymous gamete donation, for example, is not analogous to adoption. It is when adults want to become parents and use money and business contracts to create children. Consider the screening process. In adoption, adults are screened. Those who are deemed unfit to be parents are excluded, at least in principle. In anonymous gamete donation, the children are screened. Those deemed unfit to be children are aborted, thrown away as embryos, or permanently frozen. Adults with enough money can be parents using this technology, including those with criminal histories or personality disorders. People with
criminal histories and personality disorders can become parents under natural marriage, but they must secure the cooperation of the child's other genetic parent, which mitigates the child's risks.

**The Legal Community's Responsibility**
The "best interests of the child" standard, which is used where there are custody and time-sharing disputes, focuses on individual "fitness" to parent or what parenting arrangement would benefit a child in the future (or both). It does not address the family structure itself. Nearly all states share a **codified list of factors** to determine the best interests of the child that serves to remind parents of their parental responsibility to the child—"**while marriages and relationships may dissolve, parents are forever**." Implicitly, the assumption is that children need "parents," but what that means is untethered from familial structural equality and tied more closely to the freedom of adults to make those choices, regardless of the social science.

St. Pope John Paul II has said that the future of the world passes through the family. If, in that future, our children grow up accustomed to inequality and injustice, what can they pass on to the next generation? Adult children of divorce and other non-triad arrangements are speaking out. It is incumbent on us to review that literature, whether it is the six adult children of gay parents who filed amicus briefs against gay marriage in the *Obergefell* case or the video by Zach Wahls advocating for his lesbian parents and separately pointing out the joy of having and knowing about a biological sister (a shared sperm donor) or author Jennifer Johnson's testimony about her negative experiences with no-fault divorce. See also Leila Miller's new book, *Primal Loss: The Now-Adult Children of Divorce Speak* (LCB Publishing 2017).

The legal community is ethically bound to uphold truth and justice for all citizens—adults and children. We have accepted children's inequality as part of the landscape of contractual families that provide unbridled freedom to the adult. Should the legal community reevaluate when to apply the best interest standard? Should it be applied before an adult is given autonomy with a child's family structure? Can a guardian ad litem focus on these inequalities and be a source of education for parents? Are the child's true best interests being sacrificed at the time an alternative family is founded, where that child is without any legal protection? We in the legal community must reevaluate our duty to children when we are involved in the formation and dismantling of families.

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The *Kozlov* Test for Piercing Privileges Is Alive and Well

*By Andrew M. Shaw – September 11, 2017*

Mark Twain is said to have quipped, "The reports of my death have been greatly exaggerated." Setting aside questions of veracity, the quote might be applied with equal force to the privilege-piercing analysis under *In re Kozlov*, 79 N.J. 232, 398 A.2d 882 (1979).

In *Kozlov*, the New Jersey Supreme Court established a three-part test for piercing privileges: (1) there must be a legitimate need for the evidence; (2) the evidence must be relevant and material to the issue before the court; and (3) by a preponderance of the evidence, the party must show that the information cannot be secured from any less intrusive source. *Id.* at 243–44. Afterward, that piercing test was interpreted as broadly applicable to virtually any scenario in which a privilege had been challenged.

One particularly important application occurred nearly 20 years later in *Kinsella v. Kinsella*, 150 N.J. 276 (1997), which is a case dear to the hearts of divorce and family law attorneys like me. Therein, the court applied the three-part test under *Kozlov* to a situation in which a litigant was alleged to have waived the psychologist-patient privilege, New Jersey Rule of Evidence 505, by filing a complaint for divorce based on "extreme cruelty." *Kinsella*, 150 N.J. at 308. The court reversed for, among other things, failure to establish that the information could not be secured from a less intrusive source under the third prong of *Kozlov*.

Subsequently, the New Jersey Supreme Court decided *State v. Mauti*, 208 N.J. 519 (2012), which is broadly (and correctly) interpreted to have severely curtailed the applicability of the *Kozlov* piercing analysis. In *Mauti*, the court held that the wife of the defendant in a criminal proceeding was entitled to exercise the spousal privilege because doing so did not conflict with a constitutional right and because there had been no waiver of the privilege. Thus, the court in *Mauti* identified two basic categories of cases to which the *Kozlov* piercing analysis remains applicable: "(1) where a constitutional right is at stake; or (2) a party has explicitly or implicitly waived the privilege." *Mauti*, 208 N.J. at 538–39.

This is when trouble took root. After *Mauti*, the New Jersey Rules of Evidence adopted the following in comment 6 to Rule of Evidence 504 (the lawyer-client privilege):

> There are numerous cases permitting or requiring disclosure of otherwise privileged attorney-client communications where there exist "overriding public policy concerns" which demand that the privilege "yield to other important societal concerns." See *United Jersey Bank v. Wolosoff*, 196 N.J. Super. 553, 563 (App. Div. 1984), in which the court considered the issue as one of "waiver" of the privilege. *Ibid*. However, these
cases relied on the privilege-piercing analysis of *In re Kozlov*, 79 N.J. 232 (1979). See, e.g., *Kinsella v. Kinsella*, 150 N.J. 276, 299-304 (1997); [other citations omitted]. To that extent, the holdings of these cases [are] called into question by the decision in *State v. Mauti*, 208 N.J. 519, 537-539 (2012), which severely curtailed *Kozlov* by discarding its general applicability—with respect to all privileges—and restricted it to instances where constitutional rights are at stake, notably in the criminal law context. See also *Hedden v. Kean University*, [434 N.J. Super. 1, 17 (App. Div. 2013)], noting that *Mauti* severely curtailed and discarded the general applicability of *Kozlov*.

Whether these cases survive stripped of the *Kozlov* rationale remains to be seen. There is no doubt that privileges can be waived. N.J.R.E. 530. A careful analysis may reveal that the attorney-client privilege, or any other privilege, has been explicitly or implicitly waived, without resort to the "piercing" concept of *Kozlov*. See *In re PSE&G Shareholder Lit.*, 320 N.J. Super. 112, 114-116 (Ch. Div. 1998). Decisions concerning admissibility of privileged communications will now have to be analyzed under traditional waiver principles, without resort to the *Kozlov* three-part balancing test. Biunno, *Current New Jersey Rules of Evidence*, cmt. 6 on R. 504, at 457 (2017).

Unsurprisingly, the courts incorporated the comment into their decisions. In *Hedden v. Kean University*, the court explicitly relied on the comment in holding that a motion judge's ruling was erroneous because, among other reasons, the *Kozlov* piercing analysis had been "restricted . . . to instances where constitutional rights are at stake, notably in the criminal law context." 434 N.J. Super. 1, 17 (N.J. Super. Ct. App. Div. 2013) (quoting Biunno, *Current New Jersey Rules of Evidence*, cmt. 6 on N.J.R.E. 504 (2013)). That statement in *Hedden*, like the commentary on which it was based, overlooks the second critical class of cases to which *Kozlov* piercing remains applicable: implied or explicit waiver. The New Jersey Supreme Court took pains to preserve that class:

> [T]he narrow circumstances, apart from the express exceptions in the rules, under which the "need" prong can be satisfied [include the following]: (1) where a constitutional right is at stake, or (2) a party has explicitly or implicitly waived the privilege. It is only such circumstances that permit judicial intervention. Those principles apply equally to all privileges.


In a rather interesting feedback loop, the Rules of Evidence now cite *Hedden* (which, as noted, originally cited the Rules of Evidence). See Biunno, *Current New Jersey Rules of Evidence*, cmt. 6
on R. 504, at 457 (2017). The danger, of course, is that the feedback loop will continue to affect case law in the future. For example, in the unpublished decision of *Alden Leeds v. QBE Specialty Ins. Co.*, No. A-2023-14 (N.J. Super. Ct. App. Div. July 27, 2015), the court quoted extensively from *Hedden* and, quoting *Mauti*, noted that "only in the most narrow of circumstances, such as where a privilege is in conflict with a defendant's rights to a constitutionally guaranteed fair trial, would that need prong of its test be satisfied." While waiver was not at issue in *Alden Leeds*, it is important to reinforce that *Mauti* identified two categories, not one, to which the *Kozlov* piercing analysis would apply. *Mauti*, 208 N.J. at 538-39.

Notably, *Hedden* has a saving grace. The decision appears to acknowledge the existence of circumstances, in addition to conflict with a constitutional right, that would justify abrogation of a privilege. The court held that the privilege should not yield because "there [were] no constitutional rights or overriding public policy or societal concerns to which the attorney-client privilege should yield." *Hedden*, 434 N.J. Super. at 17. That statement mimics, but does not cite, language in *United Jersey Bank v. Wolosoff*, 196 N.J. Super. 553, 563 (N.J. Super. Ct. App. Div. 1984), which referred to "overriding public policy" and "societal concerns" when analyzing waiver.

The comment to New Jersey Rule of Evidence 504, however, acknowledges no such exception. Indeed, the comment goes much farther than omission. It questions whether case law, including *Kinsella*, can survive in light of *Mauti* (notwithstanding that *Mauti* discussed and relied on *Kinsella*) and theorizes that "[a] careful analysis may reveal that the attorney-client privilege, or any other privilege, has been explicitly or implicitly waived, without resort to the 'piercing' concept of *Kozlov*." Biunno, *Current New Jersey Rules of Evidence*, cmt. 6 on R. 504, at 457 (2017).

*Mauti* does not support that conclusion. As discussed above, *Mauti* relied extensively on *Kinsella*, which in turn applied *Kozlov* piercing to an implied waiver claim. More importantly, *Mauti* identified two classes of cases that can satisfy the "need" prong of the three-part *Kozlov* test.

Together, *Kozlov* and *Kinsella* establish the narrow circumstances, apart from the express exceptions in the rules, under which the "need" prong can be satisfied: (1) where a constitutional right is at stake, or (2) a party has explicitly or implicitly waived the privilege. It is only such circumstances that permit judicial intervention.


The court's pronouncement is clear; *Kozlov* piercing remains applicable to waiver claims.
It is equally clear that the inquiry does not end after the first prong has been satisfied. The court in *Mauti* had no need to reference the "need" prong if it meant to discard the remaining prongs under *Kozlov*. Even when a privilege is pitted against a constitutional right, or when a litigant has impliedly waived the privilege by placing privileged communications at issue, the court must still determine whether (2) the evidence is relevant and material to the issue before the court; and (3) the information cannot be secured from any less intrusive source. *See, e.g.*, *In re Kozlov*, 79 N.J. 232, 243–44 (1979). Unless these remaining requirements have been met, the court should not compel disclosure. Any contrary conclusion not only runs afoul of New Jersey Supreme Court precedent but would lead privileges that serve legitimate public policy needs to yield unnecessarily.

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Inadvertent Disclosure in E-Discovery: How to Avoid Waiver of Privilege

By Lisa M. Gonzalo – November 3, 2015


Juxtapose this modern reality of voluminous e-discovery with the age-old and sacred protection of client confidentiality afforded by the attorney-client privilege, which "contributes to the trust that is the hallmark of the client-lawyer relationship." Model Rules of Prof'l Conduct R. 1.6 cmt. 2. Consider also the work product doctrine, which protects from discovery attorney notes, observations, and thought processes relating to the client representation. Finding these kinds of privileged documents when faced with a universe of thousands or even millions of client documents that need to be collected for possible production can be like finding a needle in a haystack. Before the age of e-discovery, traditional document-by-document review during collection was not the daunting task it is today.

The sheer volume of information in large ESI cases renders traditional document-by-document review impracticable and economically unfeasible, making it costly and challenging to identify and capture privileged information before it is produced. Parties and courts continue to grapple with cost shifting in these kinds of cases. Compare, e.g., *Zubulake v. UBS Warburg ("Zubulake III"),* 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (placing the burden of costs on the producing party), with *Boeynaems v. LA Fitness Int'l, LLC,* 285 F.R.D. 331, 341 (E.D. Pa. 2012) (ordering prepayment of costs from the requesting party for the demand of disproportionate "additional discovery"). Despite the budgetary constraints in conducting a thorough document review of this magnitude, attorneys still have an ethical obligation to take reasonable steps to protect a client's privileged documents from inadvertent disclosure. Failure to take such steps could result in waiver of the protections afforded these documents and can lead to disastrous results in litigation—both for the client and for the attorney.
Ethical Obligation to Prevent Inadvertent Disclosure and Rule 26 Clawback

Under Model Rule of Professional Conduct 1.6(c), attorneys are ethically obligated to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Even where reasonable efforts are made, however, mistakes happen.

At first blush, it appears that Federal Rule of Civil Procedure 26(b)(5)(B) comes to the rescue. Rule 26(b)(5)(B) includes a clawback procedure for retracting accidentally produced information and provides that a producing party should notify the recipient that privileged documents have been inadvertently produced. The party asserting the privilege must also provide the receiving party with a basis for its assertion as to each document withheld. Upon notice that it has received an inadvertently produced privileged document, the receiving party is then required to return, sequester, or destroy the information promptly and is barred from disclosing it until the privilege claim is resolved. The clawback procedure of Rule 26(b)(5)(B) does not, however, address waiver, and the privilege asserted can be challenged.

Producing Party Must Take "Reasonable Steps" to Avoid Waiver

Where a privilege dispute arises, Rule 26 must be considered in tandem with Federal Rule of Evidence 502(b), which provides that when a privileged document is accidently disclosed, the disclosure will not act as a waiver of the privilege, so long as the disclosure was "inadvertent" and the holder of the privilege "took reasonable steps" to prevent disclosure and to rectify the error. Rule 502 applies only to attorney-client privilege and work product doctrine and not to other kinds of privileges. See Fed. R. Evid. 502(a).

Whether "reasonable steps" sufficient to avoid waiver have been taken is a highly fact-intensive inquiry that can lead to unpredictable outcomes. While a "reasonable steps" analysis is guided by the substantive law of the controlling jurisdiction, most jurisdictions follow the middle ground approach suggested by the committee notes to Rule 502(b) and consider a variety of factors, including: (1) the "reasonableness" of the precautions taken to prevent inadvertent disclosure, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) any delay in measures taken to rectify the disclosure, and (5) the ever amorphous "overriding interests in justice" factor. See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 259 (D. Md. 2008).

Perfection Not Required, but Carelessness Can Be Costly

Reasonableness in this context does not mean that preventative measures have to be foolproof. Rather, "[t]he reasonableness of the precautions adopted by the producing party must be viewed principally from the standpoint of customary practice in the legal profession at the time and in the location of the production." Johnson v. Ford Motor Co., No. 3:13-cv-06529,
2015 U.S. Dist. LEXIS 49975, at *41–42 (S.D. W. Va. Apr. 14, 2015). Although the Rule 502(b) test does not require perfection, carelessness can be costly and may result in waiver of privilege protections. In a large ESI case, examples of kinds of carelessness that have resulted in waiver are failure to test the reliability of keyword searches with appropriate sampling and inadvertently producing a large number of privileged documents. See *Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 271 F.R.D. 125 (S.D. W. Va. 2010).


**Clawback Agreements and Rule 502(d) Orders Increase Protection Against Waiver**

Given the uncertain outcome of a Rule 502(b) "reasonable steps" analysis, every effort should be made early in the litigation to engage opposing counsel in cooperative dialogue to enter into a clawback agreement. With clawbacks, parties agree to return inadvertently produced documents without waiver, regardless of the degree of care taken by the disclosing party. See *Zubulake III*, 216 F.R.D. at 290. Parties may, for example, agree that all protected information may be clawed back. Alternatively, parties can agree to certain specific steps that must be taken to make the outcome of a potential Rule 502(b) reasonableness analysis more predictable. Timing, procedures, protocols, how disputes will be resolved, and whether any nonwaiver agreement will bind third parties are all examples of the kinds of things that can be addressed in a clawback agreement.

Any clawback agreement should be incorporated into a protective order under Rule 502(d). Taking these preventative steps can help parties avoid litigation over inadvertent production issues and give the producing parties "heightened protection" with regard to inadvertently produced privileged documents. *Alliance Indus. Ltd. v. A-1 Specialized Servs. & Supplies, Inc.*, No. 13-2510, 2015 U.S. Dist. LEXIS 45983 (E.D. Pa. Apr. 8, 2015). In *Dover v. British Airways, PLC*, No. CV 2012-5567 (RJD) (MDG), 2014 U.S. Dist. LEXIS 114121, at *7–9 (E.D.N.Y. Aug. 15, 2014), for example, where the parties entered into a stipulated protective order that addressed inadvertent disclosure and contained a provision promising to "avoid litigation of inadvertent production issues," the court found that no implied waiver resulted, even where the party that
produced a privileged document conceded that it produced that document twice and admitted it was careless.

Clawback agreements in Rule 502(d) protective orders thus help to minimize the uncertainty of a "reasonable steps" analysis and reduce costs by avoiding future discovery battles. Federal Rule of Civil Procedure 26(f), which requires counsel for parties to confer and work together to develop a joint discovery plan, provides the perfect opportunity to open a dialogue to address waiver and inadvertent production issues before they happen.

Effective E-Discovery Management and Protocol Are Critical

It is also important to have a system and protocol in place for identifying, preserving, collecting, selecting, and evaluating ESI. Having an e-discovery management plan—early in the pretrial process and before discovery is exchanged—is critical for effectively capturing privileged documents in the face of voluminous ESI. The Electronic Discovery Reference Model (EDRM) is the gold standard in providing guidelines for improving quality and efficiency and for reducing cost and manual work associated with e-discovery. While even the best e-discovery management systems are not perfect, having such a system in place increases the likelihood of preserving and protecting against inadvertent disclosure and goes a long way toward laying the groundwork for a successful Rule 502(b) "reasonable steps" analysis should a discovery dispute over waiver later arise.

Identifying Privileged Material and Decreasing the Likelihood of Inadvertent Disclosure

Using keyword searches is one technique for identifying categories of documents that are likely to be privileged. Discovery disputes can often be avoided or minimized by negotiating keyword searches and protocols with opposing counsel early in the litigation. Working closely with clients to identify all relevant internal and external counsel and other key custodians of potentially privileged documents is also an important early step in the collection of responsive ESI. Once key people and search terms are identified, targeted searches of communications, email addresses, and domain names will likely lead to privileged communications, as will searches for commonly used legal terms and terms or phrases pertinent to a given case.

Other techniques, such as predictive coding and clustering, can also help capture privileged documents without a document-by-document review. Predictive coding is a computer-assisted review whereby decisions by human beings—who mark and identify certain representative samples of documents—are input into a predictive coding engine so that a computer can make those decisions across the entire group of documents. In effect, through sample searches of particular terms, a computer is "trained" to identify the types of documents (in this case, privileged ones) that need to be pulled from a much larger database of responsive ESI. Another technique is clustering, which involves technology that groups large document collections by
concept or topic. Courts have recognized use of these technologies as an acceptable way of reducing the burdens associated with reviewing massive ESI collections. See, e.g., Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125, 127 (S.D.N.Y. 2015); Dynamo Holdings L.P. v. Comm’r, 143 T.C. 183 (2014); Krentz v. Carew Trucking, Inc., No. 13-C-1373, 2014 U.S. Dist. LEXIS 69001 (E.D. Wis. May 20, 2014). Regardless of the methods employed, the protocols used for identifying privileged documents should be memorialized, and any such processes used should be subject to quality control and assurance. These steps are critical to providing support for a Rule 502(b) "reasonable steps" analysis, should there be a dispute that requires one.

Conclusion
When faced with a potentially large ESI case, best practices should be followed to avoid inadvertent disclosure and inadvertent waiver of privilege:

- Being proactive at the early stages of discovery is crucial for minimizing litigation risk and avoiding costly and unnecessary discovery disputes.
- Working with opposing counsel and clients early in the case to identify and resolve potential ESI issues can help reduce motion practice and protracted litigation.
- Entering into clawback agreements and obtaining Rule 502(b) protective orders before discovery is exchanged offers further protection against waiver from inadvertent disclosure.
- Having sound methodologies for identifying and capturing potentially privileged ESI not only protects against inadvertent disclosure but also better prepares a producing party for explaining its methodologies to a court should a privilege dispute arise over inadvertent disclosure.
- Finally, when all else fails, if privileged documents do slip through, it is critical not to delay but to take immediate steps to correct the error.

Keywords: litigation, commercial, business, e-discovery, electronic discovery, ESI, inadvertent, litigation, privilege, waiver

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PRACTICE POINTS

Attorney Rating Sites: Do They Matter or Can They Get You in Trouble?

By Florence M. Johnson – August 30, 2017

On a recent afternoon, I received a flurry of calls from an attorney rating service claiming that my online profile was in need of an update. This was surprising, as I was unaware that I had an outdated profile listing at all. I hurriedly went to the site and looked up my rating as a lawyer. Wait a minute ... why I am a six?! I am most absolutely a ten! What gives? The voice on the phone assured me that after a few tweaks my rating would rise to an acceptable level. It did, and I am now a ten in the attorney rating world. However, my relief was short-lived. That call opened me up to months of calls and emails soliciting advertising on the site, billed at a monthly fee. Our firm ultimately opted not to buy space on their site, but many lawyers do in fact gain clients through these types of sites.

Consider New York state's take on these practices. In August 2017, the New York Supreme Court allowed a limited partnership with a lawyer and a third-party service. However, the court came down squarely against the rating site AVVO (www.avvo.com), ruling that it is not in the same category as a third-party service. The New York court's main concern was that a high rating on AVVO could imply that its endorsement of a particular attorney is a result of an advertising and ratings trade, or that a lead-generation agreement is in place that unfairly spotlights any one lawyer's services. The court ruled that because AVVO financially gains from these agreements, it is not a third party but in fact the main party to benefit.

Another question under consideration by the New York Supreme Court was whether a lawyer could be considered as engaging in client solicitation that violates the Local Rules. The NYSC Ethics Opinion stated:

A lawyer may pay a for-profit service for leads to potential clients obtained via a website on which potential clients provide contact information and agree to be contacted by a participating lawyer, as long as (i) the lawyer who contacts the potential client has been selected by transparent and mechanical methods that do not purport to be based on an analysis of the potential client's legal problem or the qualifications of the selected lawyer to handle that problem; (ii) the service does not explicitly or implicitly recommend any lawyer, and (iii) the website of the service complies with the requirements of Rule 7.1. A lawyer who purchases such a lead to a potential client may
telephone that potential client if the party has invited a telephonic communication by the lawyer selected by the service.

New York is one of the few jurisdictions that has grappled with the ethical consideration of such rating services. Florida, Ohio, Pennsylvania, and South Carolina have also issued opinions on these issues. North Carolina, however, seems to have ruled in favor of the AVVO model, citing First Amendment concerns. In July 2017, the North Carolina courts considered the following elements before proposing amendments under which AVVO should operate.

- The rating services company, as non-lawyers, control significant aspects of the attorney-client relationship including functions that can constitute the practice of law (see Model Rule 5.5(a)).

- The structure can interfere with the lawyer’s exercise of independent legal judgment on behalf of the client (see Model Rule 5.4(c)).

- The way the fees are managed could constitute or invite commingling of clients' funds and lawyers' funds (see Model Rule 1.15(a)).

- The fee structure makes it difficult to comply with the duty to refund unearned fees at the end of the representation (see Model Rule 1.16(d)).

- A model where the lawyer is paid only after the representation is concluded makes the fees contingent on the outcome, which can violate the prohibition on contingent fees for certain kinds of cases (see Model Rule 1.5(d)).

- Receiving and holding client funds paid in advance may violate the lawyer's duty to hold those funds in a trust account (see Model Rule 1.15(c)).

- Although part of the fee paid by the client and kept by the company may be designated as a "marketing fee," the fact that such fees are calculated as a percentage of the full fee makes the arrangement likely to be impermissible fee-splitting with a non-lawyer (see Model Rule 5.4(a)).

- The business model can threaten the confidentiality of the lawyer-client relationship (see Model Rule 1.6).
Savvy practitioners who wade into legal advertising and client referral services sphere would do well to check their practice jurisdiction rules before agreeing to any arrangement, specifically those rules regarding solicitation of potential clients.

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