

**TO BE PUBLISHED  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION**

STEVE PICK,

Plaintiff,

vs.

CITY OF REMSEN, et al.,

Defendants.

No. C13-4041-MWB

**ORDER**

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This case is before me on defendants' motion (Doc. No. 37) for order directing destruction of an inadvertently-produced privileged document. Plaintiff has filed a resistance (Doc. No. 42). I heard oral arguments by telephone on April 22, 2014. Attorneys Michael Jacobsma and Judy Freking appeared on behalf of plaintiff while attorney Douglas Phillips appeared on behalf of defendants. The matter is fully submitted.

***I. BACKGROUND***

Plaintiff Steve Pick filed this case in the Iowa District Court for Plymouth County on or about April 19, 2013. His state court petition named six defendants: City of Remsen (City), Paige List, Rachael Keffler, Jeff Cluck, Craig Bartolozzi and Kevin Rollins. Pick asserted the following claims: (1) libel/slander, (2) violations of constitutional rights (brought pursuant to 42 U.S.C. § 1983), (3) intentional infliction of emotional distress, (4) wrongful termination (violation of employee manual), (5) wrongful termination (disability), brought pursuant to the Iowa Civil Rights Act, (6) wrongful termination (age), also brought pursuant to the Iowa Civil Rights Act and (7) retaliation. Doc. No. 2-2 at 3-16.

The defendants removed this action to this court on May 9, 2013, invoking federal question jurisdiction with regard to the constitutional claims and supplemental jurisdiction over the remaining, state law claims. Doc. No. 2. Defendants then filed an answer to the state court petition. Doc. No. 4. Following removal, plaintiff amended his complaint numerous times. He added federal disability and age discrimination claims as well as a gender discrimination claim under the federal and Iowa civil rights acts. Doc. No. 32 at 12-13. In their answer to Pick's fourth amended complaint, defendants deny Pick's allegation that he was discharged from employment and assert that the City's Utility Board decided to eliminate Pick's position, Operations Director, based on legitimate, non-discriminatory business purposes. Doc. No. 33 at 2, 8.

Pick served his first request for production of documents directed to the City on August 9, 2013. Pl.'s Ex. 1; Doc. No. 42-2. Among his requests were Utility Board minutes from October 2011 to the present and "all relevant non-privileged emails initiated by or received by the City of Remsen in regard to the Plaintiff and/or any of the issues set forth in Plaintiff's complaint." *Id.* Defense counsel produced responsive documents in electronic form on January 22, 2014. Pl.'s Ex. 2; Doc. No. 42-3.

On March 25, 2014, Pick served supplemental discovery responses, which indicated he intended to offer at trial an email communication dated July 14, 2012, from Doug Phillips to Utility Board members and others discussing the upcoming Utility Board meeting (the "Communication"). Doc. No. 37-3. Mr. Phillips responded within the hour, stating that the Communication had been inadvertently produced and was protected by attorney-client privilege. Doc. No. 37-4. He asked that any paper and digital copies of the Communication be destroyed. *Id.* Pick's counsel suggested the Communication could be redacted to protect "advice relating to procedure," but indicated he intended to rely on the remainder of the Communication absent an order from the court. Doc. No. 37-5. He agreed to sequester the Communication until the issue is resolved. The Communication has been filed under seal as Defendants' Exhibit A. Doc. No. 38.

## II. ANALYSIS

As noted above, this court's subject matter jurisdiction arises from the fact that Pick asserts claims under federal law, along with state law claims over which the court has supplemental jurisdiction. Because this is a federal question case, federal law governs all issues of privilege, including the alleged waiver thereof. *See* Fed. R. Evid. 501; *accord Hansen v. Allen Memorial Hosp.*, 141 F.R.D. 115, 121 (S.D. Iowa 1992) (citing cases). Here, there is no dispute that the Communication was protected by the attorney-client privilege. However, Pick contends that the privilege was waived when the defendants produced the Communication to his counsel in the course of discovery.

Typically, the attorney-client privilege is waived "by the voluntary disclosure of privileged communications." *PaineWebber Group, Inc. v. Zinsmeyer Trusts Partnership*, 187 F.3d 988, 992 (8th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000). However, Federal Rule of Evidence 502(b) provides:

**(b) Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Federal Rule of Civil Procedure 26(b)(5)(B) states:

**(B) Information Produced.** If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any

copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

The Eighth Circuit Court of Appeals has not explicitly adopted a particular standard to apply to the inadvertent disclosure of privileged documents in federal question cases, but it has used a “middle of the road” approach in diversity cases when state law was silent. *See Engineered Prods. Co. v. Donaldson Co.*, 313 F. Supp. 2d 951, 1020 (N.D. Iowa 2004) (citing *Gray v. Bicknell*, 86 F.3d 1472, 1483 (8th Cir. 1996)). The same approach is described in the Advisory Committee’s Notes for Federal Rule of Evidence 502(b). This approach requires the court to consider the following five factors in determining the “proper range of privilege to extend.” *Engineered Prods. Co.*, 313 F. Supp. 2d at 1021.

- (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 the disclosures
- (4) the promptness of measures taken to rectify the disclosure, and
- (5) whether the overriding interest of justice would be served by relieving the party of its error.

*Id.* (citing *Hydraflow, Inc. v. Enidine Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993)). I will discuss each of these factors separately below.

**A. Reasonableness of Precautions**

In any case involving an inadvertent disclosure, it is easy to assume that the

precautions taken to prevent that disclosure must have been unreasonable. In other words, the fact that the mistake happened seems to show that the disclosing party was careless. *See, e.g., Draus v. Healthtrust, Inc.*, 172 F.R.D. 384, 388 (S.D. Ind. 1997) (“It is difficult for a party to show that it took reasonable precautions to prevent production of privileged documents where those precautions obviously failed.”). Of course, hindsight is 20/20. It is a gross oversimplification to state that because an error occurred, the actor must have been negligent. A closer examination of how the inadvertent disclosure occurred is necessary.

Here, Mr. Phillips argues that he personally took precautions designed to ensure that only non-privileged documents were produced. He asked the individual defendants to perform a second search of their home and office computers for relevant emails. They compiled and printed the emails and forwarded them to him. Mr. Phillips also asked for paper copies of minutes from Remsen City Council and Remsen Utility Board meetings for the relevant period of time. Paper copies of the emails and minutes were scanned and saved in pdf format.

Mr. Phillips then “reviewed each email to make certain that it was in fact relevant and not privileged.” Doc. No. 37-1 at 3. He states that the requested documents totaled 440 pages, including 183 pages of email messages. Some pages contained more than one email. For example, the Communication at issue started halfway down one page, under a different, non-privileged message. It then continued through a second page and ended with a few lines at the top of a third page. Doc. No. 38.

Pick argues that Mr. Phillips’s screening process was unreasonable. He points out that Mr. Phillips was the only person who reviewed the documents and that he has not stated whether he made any effort to physically separate privileged documents from non-privileged documents. He also notes that Mr. Phillips was not under any substantial time pressure, as the initial request was made on August 9, 2013, and the documents were not produced until January 22, 2014. Finally, he points out that several parts of the email should have alerted Mr. Phillips that it contained privileged information. The beginning

of the email indicates it was sent from “Doug Phillips” and the recipients included the Utility Board members. The end of the email contains the name, address, phone number and website of Mr. Phillips’s law firm along with a confidentiality notice. Pick claims this should have stood out to Mr. Phillips because the majority of emails did not have a confidentiality notice. Finally, Pick argues the precautions were unreasonable given the relatively few number of documents produced, which he contends totaled 398 pages.<sup>1</sup>

During the hearing, Mr. Phillips explained that he did not physically separate privileged documents from non-privileged ones, or create a privilege log, because he found no privileged documents. Thus, no documents were withheld on that basis. There is no dispute that the Communication at issue is the only document contained in the batch Mr. Phillips received from his clients that was subject to any claim of privilege.

Under these circumstances, I find that Mr. Phillips took reasonable precautions in reviewing and producing the documents. While he obviously missed one, this mistake does not make his process *per se* unreasonable. Nor does the fact that Mr. Phillips was the only person to conduct a privilege review before producing the documents render that review unreasonable. Mr. Phillips is a licensed, experienced attorney who states that he personally reviewed each page before producing the documents at issue. Had he delegated this task to a non-lawyer, with no review by an attorney, I would have no trouble finding that the process was unreasonable. However, litigation is already expensive enough. When an experienced attorney personally reviews every document before production, I am not going to find that he or she acted unreasonably simply because another person was not asked to repeat the same task.

The nature of the documents at issue also weigh in favor of a finding that the error occurred despite reasonable precautions. As noted above, the Communication was inconspicuously located among various non-privileged email messages. It begins halfway

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<sup>1</sup> As noted above, Mr. Phillips states that the production totaled 440 pages. No one has explained this discrepancy. For purposes of this analysis, however, the difference is not material.

down one page, with a non-privileged email message located at the top of that page. There is no horizontal line or other obvious indicator that separates the privileged message from the non-privileged one above it. Moreover, the message at issue turned out to be the only privileged communication contained within a stack of hundreds of pages of materials. While the sheer number of pages is hardly excessive, the fact that no other privileged communications were included may have contributed to the error. If other pages also contained privileged information, Mr. Phillips would have (or at least should have) been especially alert to the risk of inadvertent disclosure. The fact that only one privileged communication was contained in several hundred pages of documents makes it more understandable it was overlooked.

In short, while it is unfortunate that the disclosure occurred, I find that it occurred despite reasonable precautions. As such, I find that this factor weighs in favor of non-waiver.

***B. Number of Inadvertent Disclosures***

The Communication is the only inadvertent disclosure at issue. There is no evidence of other inadvertent disclosures by the defendants in this case. This factor also weighs in favor of non-waiver.

***C. Extent of Disclosures***

The entire contents of the Communication were fully disclosed to Pick's attorneys. The disclosure was complete and total. While the Communication does not appear to have been disclosed to others, this factor weighs in favor of waiver.

***D. Time Taken to Rectify Error***

Mr. Phillips contacted Pick's counsel almost immediately after learning of the inadvertent disclosure. Pick served his supplemental answer to Interrogatory Number 28

by email on March 25, 2014, at 9:01 a.m., indicating that he intended to rely on the Communication at trial. Doc. No. 37-4. At 9:35 a.m., Mr. Phillips advised Pick's counsel that the Communication was privileged and had been inadvertently produced. He asked that it be destroyed. *Id.* While the error was not rectified until two months after the inadvertent disclosure, it was rectified almost immediately after Mr. Phillips learned of the error. This factor weighs in favor of non-waiver.

***E. Overriding Interest of Justice***

This vaguely-phrased factor can mean virtually anything. Pick focuses on the substance of the Communication, arguing that it supports his case and that it would be unfair to deprive him of the opportunity to rely on it at trial. Of course, no one would bother to fight about an *irrelevant* communication. If the Communication simply discussed scheduling issues, or provided legal advice about an unrelated situation, I suspect the current dispute would not be before the court. The fact that the contents of the Communication arguably support Pick's theory of his case does not automatically weigh in favor of finding that the attorney-client privilege was waived.

In my view, the appropriate analysis is whether Pick would suffer unfair prejudice if the parties were restored to the position they would have been in absent the inadvertent disclosure. Pick did not know of the Communication, and thus could not have anticipated using it at trial, until it was inadvertently disclosed. It only came to him by way of a mistake, which I have determined did not involve negligence. Pick filed suit and prosecuted this action for over nine months without the benefit of the Communication. He clearly has other evidence that he intends to rely on in support of his various claims.

Moreover, even after receiving the Communication, Pick had no reasonable basis to rely on its availability at trial as he continued to prepare his case. Any attorney reviewing the Communication, as produced with a large number of non-privileged communications, would realize that its disclosure was likely inadvertent. Upon that

realization, the Iowa Rules of Professional Conduct<sup>2</sup> require prompt notification to the disclosing party. *See* Iowa Rule of Professional Conduct 32:4.4(b).<sup>3</sup> While it is not clear when Pick’s counsel first discovered that they were in possession of the Communication, Mr. Phillips’s immediate response upon notification made it clear that Pick’s use of the Communication at trial was by no means a “sure thing.” Therefore, any reliance Pick may have had on using the Communication at trial would be unjustified.

Absent the mistaken disclosure, Pick and his attorneys would not know, and would not have the right to know, the contents of the Communication. There is no indication that Pick’s ability to present his case at trial has been impaired by the fact that the disclosure occurred. He simply does not get to benefit from opposing counsel’s mistake. This factor weighs in favor of non-waiver.

#### ***F. Summary***

The rules providing for the return or destruction of inadvertently-disclosed privileged documents are in place for precisely this type of situation. “The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J.

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<sup>2</sup> The Iowa Rules of Professional Conduct apply to attorneys practicing before this court. *See* Local Rule 83.1(g)(1).

<sup>3</sup> The comments to Rule 32:4.4 include the following explanation:

Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived.

*See* Iowa Court Rule 32:4.4, comment 2.

Wigmore, Evidence § 2290 (McNaughton rev. 1961)). “Its purpose 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.” *Id.* I find this purpose would be frustrated by finding that the inadvertent disclosure of privileged communications constitutes a waiver under the circumstances present here. Mr. Phillips took reasonable precautions to prevent the disclosure, he acted quickly to seek relief upon discovering his error and Pick will not be unfairly prejudiced by the requested relief. Granting the defendants’ motion simply restores the parties to where they would have been if the mistaken disclosure had not occurred. I find that no waiver occurred as a result of the disclosure and, therefore, that the Communication is protected by the attorney-client privilege.

### ***III. CONCLUSION***

For the reasons explained above, defendants’ motion (Doc. No. 37) for order directing destruction of an inadvertently-produced privileged document is **granted**. Plaintiff and his counsel shall destroy all physical and electronic copies of the Communication in their possession and shall not disclose the contents of the Communication to any person or party without prior leave of court.<sup>4</sup>

**IT IS SO ORDERED.**

**DATED** this 25th day of April, 2014.



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**LEONARD T. STRAND**  
**UNITED STATES MAGISTRATE JUDGE**

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<sup>4</sup> The Communication shall continue to be maintained under seal on the Court’s docket (Doc. No. 38) so it may be made part of the record for purposes of any appeal from this order.