

Ethics & Professionalism

American Bar Association Litigation Section

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Hard Lessons about Hard Copies: Waiving the Privilege at the Front Desk

Since even a partial waiver of the attorney-client privilege can harm a client's case, lawyers should take steps to protect their clients—and themselves—from unintentional waivers of the privilege.

By Thomas G. Wilkinson and Deborah A. Winokur

Even seemingly innocuous or careless acts can result in at least a partial waiver of the attorney-client privilege. [Model Rule 1.6\(c\)](#) requires lawyers to make reasonable efforts to prevent the inadvertent disclosure of information relating to the representation of a client. Because even a partial waiver of the privilege can harm a client's case, lawyers should take steps to protect their clients—and themselves—from unintentional waivers of the privilege.

Waiving the Privilege Is Easier Than You Think

Clients away from their office or traveling for business, especially overseas, face practical challenges when managing business operations and communicating with their legal counsel. You may have heard the cautionary tale of [Fourth Dimension Software v. Der Touristik Deutschland GmbH](#), where the CEO of the plaintiff software company (FDS) was deemed to have waived the attorney-client privilege after forwarding an email from the company's former in-house counsel to the front desk of a hotel in Germany and asking the staff to print a copy in preparation for an important business meeting.

The Northern District of California addressed the question of whether the privilege was waived in this situation. Under the California Evidence Code, a disclosure to a third person may not waive the privilege where it is "reasonably necessary for the transmission of the information or the accomplishment of the purposes for which the lawyer is consulted." Such reasonably necessary transmission routinely involves disclosure to law-firm employees such as clerks, secretaries, interpreters, and others.

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On the other hand, disclosure to “unnecessary” third parties of attorney-client communications destroys the privilege. The court concluded that FDS failed to demonstrate that disclosure of the email to the hotel’s general front desk email address was reasonably necessary to transmit the information.

Perhaps the outcome in the *FDS* case would have been different if the email was properly labeled as attorney-client privileged, forwarded to a specific person at the hotel (as opposed to the hotel’s front desk), and the client was standing by while it printed to confirm that it was not read by the hotel staff member who handled it and then to ensure that the email was deleted once the printing was complete. Unfortunately for the client, these steps were not taken and the privilege was found to be waived.

Mere carelessness by the client can also result in a waiver of the privilege. In [*Parnes v. Parnes*, 80 A.D.3d 948 \(N.Y. App. Div. 2011\)](#), a matrimonial action, a husband who left a printed page containing an email from his lawyer on a desk in an office he shared with his wife was deemed to have waived the privilege with respect to that page. The court found that by leaving a page of a privileged email on the desk where his wife, whom he was divorcing, could see it, the husband had failed to take the steps necessary to preserve the privilege with respect to that page.

The Relevant Rules Regarding a Lawyer’s Duty of Confidentiality

While these examples involve waiver of the privilege by the client, a lawyer’s duty of confidentiality naturally includes educating the client about protecting the privilege. [ABA Model Rule 1.6](#) sets forth the ethical obligations for lawyers to keep information about the representation of a client confidential. Subsection (c) requires lawyers to take reasonable steps to prevent the inadvertent or unauthorized disclosure of confidential information. [ABA Model Rule 1.1](#) requires that lawyers provide competent representation to a client. With the addition of [Comment \[8\]](#) in 2012, the ABA clarified that competence also requires lawyers to be “technologically competent” and stay abreast of the benefits and risks of new technology. Taken together, the duty to “take reasonable steps” and to be “technologically competent” can be said to require lawyers to both (1) put office policies and procedures in place to protect confidential client information and to (2) educate their clients on the scope of the privilege and discuss measures that the client may need to take to avoid inadvertent waiver.

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Reasonable Efforts to Prevent Waiver of the Privilege

One simple way to make sure that you, as the lawyer, do not lead the client to waive the privilege is to leave the client off of emails to third parties (do not “cc” or “bcc” them). In [Charm v. Kohn, 2010 WL 3816716 \(Mass. Super. 2010\)](#), the defendant’s counsel sent an email to opposing counsel with a courtesy copy to his co-counsel and a blind copy to his client, the defendant. The defendant “replied all” to the email, sending his privileged comments to the opposing counsel. The content of the email was clearly intended only for the defendant’s counsel; nonetheless, when the defendant’s counsel demanded that the opposing counsel delete the privileged email, opposing counsel refused and later tried to use the email as an exhibit in the case. The question was, again, whether the client and counsel took reasonable steps to preserve the privilege. The court suggested that blind copying a client created a foreseeable risk that the client would “reply all” and inadvertently communicate with opposing counsel. This is the very issue addressed in the [ABA’s Formal Opinion 503](#), which was the subject of a recent [Practice Point](#) suggesting caution in this exact situation.

Avoiding the inadvertent, mistaken, or simply careless waiver of the privilege requires lawyers to take affirmative steps—both within their office and with the client. Some suggestions are:

- Counsel clients about the scope and limitations of the attorney-client privilege. Make sure they understand that disclosure to third parties, even inadvertent disclosure through carelessness, will likely be deemed to waive the privilege. The above cases give two good examples that most clients can appreciate and understand.
- Review your state and local bar-association opinions on protecting client information so that you know the duties that govern your practice; and read [ABA Formal Opinion 477R*](#) and [Formal Opinion 498](#).
- Put policies and procedures in place within your office to ensure that lawyers and staff are not needlessly printing or carrying documents containing confidential or privileged client information at home or in public places where they could easily be left behind, put in the trash, or viewed by a third party.
- Completely avoid the risk of the client “replying all” by keeping the client off of emails to the opposing counsel or third parties. To make sure that the client is informed about their case, provide a copy of the email to the client by forwarding it after it has been sent.
- Explore technological solutions, such as carrying your own mobile printing or scanning device or downloading an app that turns a photo into a PDF for emailing in order to avoid the need to use a public or third party’s computer or printer.

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