

**WAIVER OF EVIDENTIARY
PRIVILEGES THROUGH INADVERTENT
OR UNAUTHORIZED DISCLOSURES**

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PROGRAM**

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- I. Inadvertent Disclosure of Documents Protected by the Attorney-Client Privilege¹
- A. Although a trial court decision, Trilogy Communications, Inc. v. Excom Realty, Inc., 279 N.J. Super. 442, 443-44 (Law Div. 1994), is the starting point for analysis of whether the inadvertent production of a confidential attorney-client communication constitutes waiver of the privilege.
- B. Three distinct lines of authority have developed as to whether inadvertent disclosure constitutes waiver of the attorney-client privilege. Trilogy, 279 N.J. Super. at 444 (Law Div. 1994); Ciba-Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 410 (D.N.J. 1995).
1. The attorney-client privilege is destroyed by any involuntary disclosure, including a mistaken one. Trilogy, 279 N.J. Super. at 444 (citing cases from the federal courts of the states of Virginia, Indiana, Illinois, and the District of Columbia); Ciba-Geigy, 916 F. Supp. at 410.
 2. Documents may lose their privileged status if the disclosing party did not take reasonable steps to insure and maintain their confidentiality. Trilogy, 279 N.J. Super. at 445 (citing a federal appellate decision from the Fourth Circuit); Ciba-Geigy, 916 F. Supp. at 410.
 - a. The federal courts in New Jersey have adopted this approach. See Koch Materials Co. v. Shore Slurry Seal, Inc., 208 F.R.D. 109, 117-18 (D.N.J. 2002) (citing Ciba-Geigy, 916 F. Supp. at 410-11).
 - b. “While an inadvertent disclosure is, by definition, an unintentional act, if such a disclosure results from gross negligence, courts following [this] approach will deem the disclosure to be intentional, thus constituting a waiver of the privilege.” Ciba-Geigy, 916 F. Supp. at 411.
 - c. The factors a New Jersey federal court considers in determining whether an inadvertent disclosure constitutes a waiver of the attorney-client privilege are set forth in Ciba-Geigy, 916 F. Supp. at 411. They include:
 - (i) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production;
 - (a) “The reasonableness of the precautions adopted by the producing party must be viewed principally

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from the standpoint of customary practice in the legal profession at the time and in the location of the production, not with the 20-20 vision of hindsight.” U.S. ex rel. Bagley v. TRW, Inc., 204 F.R.D. 170, 179-80 (C.D. Cal. 2001).

- (b) “The Court must assess whether the procedures followed in maintaining the confidentiality of the documents were so lax, careless, inadequate or indifferent to consequences as to constitute a waiver.” U.S. Fidelity & Guaranty Co. v. Braspetro Oil Servs. Co., Nos. 97 Civ. 6124 , 98 Civ. 3099, 2000 WL 744369, 2000 WL 744369 (S.D.N.Y. June 8, 2000) (quotations and alterations omitted).
 - (c) “The mere fact of an accidental disclosure does not automatically render the precautionary measures unreasonable at the time they were performed.” U.S. v. Rigas, 281 F. Supp. 2d 733, 739 (S.D.N.Y. 2003).
 - (d) The segregation of the privileged documents into a clearly marked privilege file is a sufficiently reasonable precaution against inadvertent disclosure. Turner v. Brave River Solutions, Inc., No. Civ. 02-148-D, 2003 WL 21418540, at *2 (D.N.H. June 8, 2003) (unpublished opinion).
 - (e) Having an attorney review and flag privileged documents and thereafter having a paralegal remove the privileged documents is an adequate precaution to prevent inadvertent disclosure. Fidelity & Deposit Co. of Md. v. McCulloch, 168 F.R.D. 516, 522 & n.8 (E.D. Pa. 1996).
- (ii) The number of inadvertent disclosures;
 - (iii) The extent of the disclosure;
 - (iv) Any delay and measures taken to rectify the disclosure; and
 - (v) Whether the overriding interests of justice would or would not be served by relieving the party of its error.

3. The mere inadvertent production of a privileged document by the attorney does not waive the client's privilege. Trilogy, 279 N.J. Super. at 445; Ciba-Geigy, 916 F. Supp. at 410.
 - a. The Trilogy court adopted the third interpretation and held that "inadvertent disclosure through mere negligence or misfortune should not be deemed to abrogate the lawyer-client privilege." Trilogy, 279 N.J. Super. at 445 (citing State v. J.G., 261 N.J. Super. 409 (App. Div. 1993)).
 - b. It reasoned that because the privilege belongs to the client, not the attorney, the attorney's inadvertent production cannot result in a waiver of the client's privilege. Trilogy, 279 N.J. Super. at 446-47 ("To hold that the inadvertent production of a privileged document is a waiver of the lawyer-client privilege would render nugatory this state's strong public policy favoring the confidentiality of lawyer-client communications embodied in statute, rules of evidence, rules of professional ethics, and case law.")
 - c. The Trilogy court stated: "There can be no dispute, in New Jersey it must be shown the party charged with the waiver knew [its] legal rights and deliberately intended to relinquish them." Trilogy, 279 N.J. Super. at 447 (citing Shebar v. Sanyo Bus. Sys. Corp., 111 N.J. 276, 291 (1988)).
 - d. The Trilogy court concluded: "Inadvertent disclosure through mere negligence should not be deemed to abrogate the attorney-client privilege which is deeply embodied in New Jersey law and public policy." Trilogy, 279 N.J. Super. at 448 ("To hold otherwise would ignore the realities of modern litigation; the need to resolve matters quickly and inexpensively; time requirements of the court rules for the production of documents discovery strictly enforced by case management orders and other techniques; and the volume of documents often required to be produced in complex litigation.").
 - e. Several other New Jersey Courts have cited Trilogy for the proposition that inadvertent disclosure by an attorney does not result in waiver of the attorney-client privilege. *See, e.g.,* Seacoast Builders Corp. v. Rutgers, 358 N.J. Super. 524, 550-51 (App. Div. 2003); Schilaci v. First Fidelity Bank, 311 N.J. Super. 396, 407 (App. Div. 1998); Nat'l Util. Serv., Inc. v. Sunshine Biscuits, Inc., 301 N.J. Super. 610, 614 n.2 (App. Div. 1997); Adler v. Shelton, 343 N.J. Super. 511, 519 (Law Div. 2001); *see also* 42 N.J. Prac., Discovery § 3.19 (2003) ("For discovery purposes, it is important

to note the movement in the law to the position that inadvertent disclosure will not waive a privilege.”).

- C. What are an attorney’s duties, responsibilities, and obligations when he or she realizes that the opposing party has inadvertently produced his or her client’s attorney-client privileged documents.
1. Both the Trilogy and Seacoast Builders courts, as well as the New Jersey Practice Series, 42 N.J. Prac., Discovery § 3.19 (2003), cite to American Bar Association Formal Opinion No. 92-368, Inadvertent Disclosure of Confidential Materials (Nov. 10, 1992).
 2. “A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.” ABA Opinion.

II. Unauthorized Disclosure of Documents Protected by the Attorney-Client Privilege

- A. This situation involves circumstances by which an attorney obtains his or her adversary’s attorney-client privileged documents outside of the discovery process, either from a third party or through the wrongful misappropriation, retention, or use by his or her client.
- B. Ethical obligations of the lawyer who receives wrongfully obtained or retained privileged documents:
1. New Jersey Advisory Committee on Professional Ethics (the “Committee”), Opinion 680 (Jan. 16, 1995), provides some guidance.
 - a. Pursuant to New Jersey Rule of Professional Conduct (“RPC”) 8.4(a), which prohibits an attorney from doing indirectly that which is prohibited directly, a “lawyer cannot be involved in the subsequent review of evidence obtained improperly by the client.”
 - b. Allowing a client’s improper actions in the context of litigation to benefit that client in litigation constitutes “conduct that is prejudicial to the administration of justice” in violation of RPC 8.4(d).
 2. American Bar Association’s Committee on Ethics and Professional Responsibility (the “ABA Committee”), ABA Formal Opinion No. 94-382 (July 5, 1994), titled “Unsolicited Receipt of Privileged or Confidential

Materials” is instructive and provides similar guidance to that provided in NJ Committee 680. See infra.

3. Thus, a lawyer who receives an adversary’s obviously-privileged documents from his or her client should undertake an immediate investigation into how the client procured those documents.
- C. What can an attorney who comes into possession of his or her adversary’s obviously-privileged documents do to comply with his or her ethical obligations?
1. No New Jersey Rules of Professional Conduct or Committee Opinions that provide guidance.
 2. ABA Formal Opinion No. 94-382 is instructive.
 - a. A lawyer who receives, on an unauthorized basis, materials of an adverse party that he or she knows to be privileged or confidential, satisfies his or her professional responsibilities under the ABA’s Model Rules of Professional Conduct by “(a) refraining from reviewing materials which are probably privileged or confidential, any further than is necessary to determine how appropriately to proceed; (b) notifying the adverse party or the party’s lawyer that the receiving lawyer possesses such documents; (c) following the instructions of the adverse party’s lawyer; or (d) in the case of a dispute, refraining from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.”
 - b. The ABA Committee based the above procedures on the rationale that “[i]n almost all cases a party should be able to protect its proprietary interests, as in the case of confidential materials, and its privileges, as in the case of material falling within the attorney-client privilege, despite the unauthorized efforts of others to undermine or sabotage them.”
 - c. The ABA Committee suggested procedures to “afford the adverse party a reasonable and timely opportunity to resort to judicial remedies to determine legal rights and allow the receiving lawyer, under appropriate circumstances to use relevant material in the prosecution or defense of an action on behalf of his client.”
 - d. The situations in which a lawyer may be able to use documents obtained outside of the discovery process, according to the ABA Opinion, may include:

- (i) Where the documents were provided to the attorney by a third-party and should have been, but were not produced during discovery; or
 - (ii) Where the documents were provided to the lawyer by a third-party acting under the authority of a whistleblower statute.
 - e. The ABA Opinion, however, does not discuss any situation in which a lawyer can use privileged documents that were improperly obtained by his or her client.
 - f. According to the ABA Opinion, at least three states (Maryland, Virginia, and Michigan) have held, at least in the past, that when a lawyer receives an adversary's privileged documents from a third-party, that lawyer does not have an obligation to disclose to a court or his adverse party that he possesses the adverse party's privileged or confidential documents.
 - (i) Those cases, however, do not discuss the situation where a client improperly procures or retains the privileged documents.
 - (ii) The Michigan opinion expressly states that an attorney who comes into the possession of an adversary's privileged document may not use the documents if "his client in any way procured the removal of the document from the possession of the opposing party."
- D. What remedies are available to secure the return of the privileged documents and ensure that the documents are not used to the disadvantage of the client?
 - 1. Send a letter to opposing counsel demanding the immediate return of all documents, and any copies thereof, that are in opposing counsel's possession and are protected by the attorney-client and any other applicable privilege.
 - 2. Consider moving for the disqualification of opposing counsel.
 - a. ABA Opinion 94-382 suggests that disqualification of an attorney who reviews the privileged communications of his adversary can be a proper remedy depending upon the circumstances.
 - b. The ABA Opinion states that the mere receipt and/or initial review of privileged materials may also form the basis of a disqualification motion.

- c. It further states that even a lawyer who complies with the above-mentioned procedures outlined in the ABA Opinion may be the subject of a disqualification motion.
 - d. The ABA opined that a court “may err on the side of caution—by granting the motion—in order to preserve inviolate the attorney-client privilege and in light of the ethical obligations of a lawyer to avoid the appearance of impropriety.”
3. Request that the court exclude the introduction of the privileged documents and preclude any mention of the information contained therein.