New York Law Journal

Tales of Woe: An Update on Two Disturbing Issues

By Anthony E. Davis
New York Law Journal
May 3, 2017

As published on Page 3

This article returns to update two topics that have been addressed in previous articles in this column. Most recently, the article titled "In-State Office Requirement: Gap Between Theory and Reality," (NYLJ May 9, 2016) discussed the decision in *Schoenefeld v. Schneiderman,* (11-4283-cv, April 22, 2016), dealing with the subject of the differing office requirements for New York admitted lawyers who reside outside New York and the rules governing identically qualified lawyers who do reside in the state. We return to the subject here in order to consider the implications of the U.S. Supreme Court's denial of certiorai. The second topic is inadvertent disclosure, and particularly the duties of lawyers who, through no fault of their own, receive messages or documents that were not intended for their eyes, previously considered in "Inadvertent Disclosure—Regrettable Confusion" (NYLJ Nov. 7, 2011). We return to the issue in light of the recent decision from the California Court of Appeal in *McDermott Will & Emery v. The Superior Court of Orange County* (Super. Ct. Nos. 30-2015-00785773 & 30-2015-00785872, filed 4/18/2017) (the McDermott Will case).

'Schoenefeld' Case

Ekaterina Schoenefeld, a New York admitted lawyer who resides in New Jersey, sought a judicial declaration that the office requirement imposed by §470 of New York's Judiciary Law on nonresident members of the New York bar, in contrast to the absence of any office requirement for New York lawyers residing in the state, violates the Constitution's Privileges and Immunities Clause by infringing on nonresidents' right to practice law in New York. The district court agreed and, on the parties' cross-motions for summary judgment, declared §470 unconstitutional. The state appealed to the Second Circuit, which reversed the District Court's decision, finding the statute constitutional. The U.S. Supreme Court denied her petition for certiorari on April 16.

In this author's view, the outcome is regrettable and makes no rational sense in 2017, when lawyers (like everyone else) work remotely away from their physical offices (if they have one). Apart from anything else, the outcome reduces client choice. Removal of New York's barrier to practice based on a lawyer's decision to reside outside the state would necessarily enlarge access to legal services—an objective often strongly endorsed both by bar leaders and the courts.

In addition, the New York Court of Appeals recently amended the Rules of Court to permit temporary practice in New York by non-New York lawyers, but because the rule is explicitly limited to lawyers not admitted in New York, New York lawyers who reside in other states cannot even benefit from this rule.

Perhaps the only remedy is to persuade the New York legislature to change the statute. Readers may think it worthwhile to lobby the New York State Bar Association to use its influence to seek a change to the Judiciary Law.

Inadvertent Disclosure

The earlier article on this subject addressed the dilemma lawyers face if they inadvertently receive confidential or privileged information relating to adversaries or third parties through no fault of their own. The article noted that there is no consistency on this subject among the states. Furthermore, because of the application of Rule 8.5, which establishes choice of law rules and which is itself not uniform among the states, when an inadvertent disclosure is made, the receiving lawyer may face inconsistent outcomes in different jurisdictions in determining the permissible use of the information. It is for this reason that the McDermott Will case is noteworthy even for New York lawyers.

In the McDermott Will case, the relevant facts as stated by the California Court of Appeal, were as follows:

> The real party in interest in the dispute, "Dick [Hausman] forwarded [an email from his attorney] Blaskey… from his iPhone to [his sister-in-law at her] e-mail address. Dick's transmission did not include any additional text other than 'Sent from my iPhone.' That same day [she] forwarded the e-mail to [her husband]

> at his e-mail address." … In connection with the initial transmission of the email to his sister-in-law, "Dick testified he did not intend to forward the Blaskey e-mail to [his sister-in-law or her husband], and did not know he had done so until the forwarded e-mail came to light approximately a year later. Dick was nearly 80 years old when he forwarded the e-mail and he explained multiple sclerosis had limited his physical dexterity."

The email later found its way into the hands of Gibson, *Dunn & Crutcher,* the lawyers for the adverse parties, who believing that the transmission by the adverse party himself (and not his lawyer) constituted a waiver, proceeded to use the document in the underlying dispute.

The trial court found that Dick did not waive the attorney client privilege because his transmission was inadvertent and that he lacked the necessary intent to waive the privilege. The trial court disqualified Gibson Dunn from the case.

California, which has still not adopted any version of the Model Rules of Professional Conduct, has no rule equivalent to Model Rule 4.4.(b)—which is the same as New York's Rule 4.4(b). The Model Rule and the New York rule require a lawyer "who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and *knows or reasonably should know* that it was inadvertently sent shall promptly notify the sender." (emphasis added). By contrast, California's rule, as adopted and incorporated into its common law by the California Supreme Court in *State Comp. Ins. Fund v. WPS* (1999) 70 Cal.App.4th 644 (1999), and subsequent cases imposes far greater duties on the innocent recipient and harsh consequences for failing to observe those duties. *State Fund* established the following "standard governing the conduct of California lawyers":

When a lawyer who receives materials that *obviously* appear to be subject to an attorney-client privilege or otherwise *clearly appear* to be confidential and privileged and where it is *reasonably apparent* that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. We do, however, hold that whenever a lawyer ascertains that he or she *may have privileged attorney-client material* that *was inadvertently provided* by another, that lawyer must notify the party entitled to the privilege of that fact." (italics added by the Court of Appeal).

The Court of Appeal found no reason to disturb the trial court's finding that Dick's transmittal was inadvertent, decided that Gibson Dunn's use of the email violated the *State Fund* rule, and upheld its disqualification, even though there was scant evidence that the firm's use of this email would affect the ultimate outcome the case.

This is an unfortunate result for a number of reasons. First, the policy and reasoning underlying the entire approach of the California courts is flawed. A lawyer's primary duties lie toward the client. Certainly, these duties can be and are limited in some situations, but as between the lawyer's client and the adversary, surely the priority is self-evident. Second the decision rests entirely on the initial finding that there was no waiver. If a mistake was made in transmitting a document, surely the consequences of that mistake should rest upon the head of the person making the mistake, not the innocent recipient? Third, until the ABA issued an opinion in the early 1990s, the basis of the California rule, but withdrawn by the ABA, the question of whether or not the innocent recipient could *ethically* use inadvertently disclosed material was the province of the law of evidence, and not in any way within the purview of legal ethics. Fourth, the operation of the California rule necessarily leads to a ridiculous fiction. The contents of the document are now known, and the client is fully conversant with its content. Nevertheless replacement counsel (who can read court disqualification decisions, even if not the document itself) must pretend ignorance of its existence.

Was this a waiver? There is no doubt that Dick deliberately operated the iPhone (even though the court makes much of his advanced years and illness). In many jurisdictions, when the client releases the otherwise privileged material, that is an end of the question and it is deemed to be waived, without regard to whether the client understood the implications of the disclosure. Here it was the client's transmission which—even if mistaken—let the cat out of the bag. Surely that should be deemed a waiver, and even more surely, Gibson Dunn's assumption that it did constitute a waiver was at least reasonable.

In New York, the ethical duty of lawyers to notify the adverse party of receipt of an inadvertently disclosed confidential or privileged document is clearly enshrined in Rule 4.4(b). But New York case law is much thinner as to whether a violation even of that rule will (or should) necessarily lead to disqualification. The best course, assuming the document relates to litigation, is to tell the other side but then seek direction from the court as to whether the recipient may use the material.

Meanwhile, the McDermott Will case is an important reminder to New York lawyers that the rules and law governing what to do when they receive an adverse party's confidential or privileged information may well not be New York's, but those of another jurisdiction. This may make it even more difficult to decide what to do.

Anthony E. Davis, *a partner of Hinshaw & Culbertson LLP and is a past president of the Association of Professional Responsibility Lawyers.*