FURTHER, THE PRIVILEGE BELONGS TO THE CLIENT

BY DAVID MICHEL

In *Vigor Works LLC v. White Skanska JV,* Suffolk C.A. No. 16-02146-BLS1 (Mass. Super. Ct. Feb. 12, 2019), the Superior Court Business Litigation Section considered whether a plaintiff's accidental production of privileged materials was an inadvertent disclosure subject to the parties' clawback agreement or a waiver of privilege. The scenario described reflects common, if not ubiquitous, practices in commercial litigation, and the errors that ultimately led to the disclosure of privileged documents are the stuff of litigation attorneys' nightmares.

Discovery in the parties' underlying construction sub-contract dispute was extensive. Plaintiff engaged a litigation support vendor to assist with imaging and sorting documents for review and potential production. The litigation support vendor ran keyword searches against the resulting image files in order to identify potentially privileged documents. The keywords included the names of all involved attorneys, and their law firms, in order to flag potentially privileged materials in the document set. Any documents that were flagged as potentially privileged were set aside and reviewed by counsel. After the review, documents identified as privileged were logged and withheld; those determined to be responsive and not privileged were produced.

The erroneous production began with errors by the litigation support vendor. First, the vendor scanned three separate documents into a single image file for review so that the separate documents appeared to be a single integrated item. The three documents were a FedEx cover sheet addressed to an executive of the defendant, a letter to defendant enclosing a marked-up draft of the parties' contract, and a four-page email from plaintiff's counsel to an executive of the plaintiff. The resulting image file was flagged as potentially privileged and set aside for counsel to review.

A second document, a draft letter from plaintiff to defendant, with the previously mentioned four-page privileged email pasted into the text of the draft, slipped past the litigation support vendor's keyword searches altogether. The email was not identified as potentially privileged, thus apparently not reviewed by any of plaintiff's attorneys prior to production.

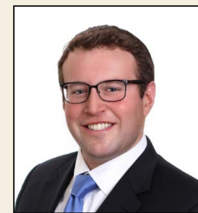
Counsel did review the amalgamated email/FedEx image file, but, relying on the FedEx cover sheet, believed that the entire document had previously been provided to defendant. As a result, the attorney decided that the file was not privileged and should be produced.

After more than a year had passed, after summary judgment was briefed and argued, plaintiff realized for the first time that the draft email had been produced. Further investigation revealed that the email was not included in the original FedEx package to defendant containing the letter and marked-up contract. Plaintiff's counsel, upon realizing the error, requested that defendant return or destroy all copies of the draft letter and the amalgamated email/FedEx documents. Defendant refused, and plaintiff moved to compel the return of the documents pursuant to the parties' clawback agreement and Mass. R. Civ. P. 26(b)(5)(B).

The court found that the draft letter, which was not flagged for further review as a result of the vendor's error, was to be a quintessential example of inadvertent disclosure, and should be returned. The privileged email scanned with the FedEx package into a single image file presented a closer question.

The court noted that perhaps the "oddity" of sending, via FedEx, an email from one's counsel that contains legal advice about ongoing contract negotiations, to the party with which one is negotiating that contract, should have been picked up when the documents were scanned into electronic format. Nevertheless, in a large-scale document collection, the court presumed that the scanning was not performed by an attorney. The court also noted that the aforementioned "oddity" likely should have warranted further inquiry at the time by the initial reviewing attorney.

Nevertheless, the plaintiff's privilege review protocol complied with the parties' clawback agreement, and the court found the safeguards employed by plaintiff to be reasonable and consistent with practices frequently employed in modern complex civil litigation. Further, neither the parties' clawback agreement nor Mass. R. Civ. P. 26 squarely addressed whether the present scenario, where a document was flagged, reviewed by counsel, and consciously included in a document production because counsel made an analytical error, constituted inadvertent disclosure. The court was not directed to any caselaw that it considered useful when applied to the circumstances here, where reasonable precautions were put in place to identify documents that may be privileged and set them aside for attorney review. The precautions worked, and a lawyer reviewed the documents, mistakenly assumed the privilege did not apply, and produced the document, yet further investigation prior to production would have revealed that the document was, in fact, privileged. Ultimately, given the nature in which the documents were imaged with a FedEx cover sheet and letter to defendant, the court found that the reviewing attorney's belief that they were not privileged was "not an unreasonable conclusion."



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The court cited to the SJC's opinion in *Matter of the Reorganization of Electric Mutual Liability Ins. Co. Ltd (Bermuda)*, 425 Mass. 419 (1997), which discarded the prior rule that any disclosure of a privileged communication destroys the privilege in favor of the "modern trend" (embodied in Mass. R. Civ. P. 26(b)(5)(B) and (C) and Fed. R. Evid. 502) that, so long as reasonable precautions are taken, inadvertent disclosure does not "impair the privilege." As such, the court in *Vigor Works* explained that "[w]hile lawyers may of necessity become the guardian of privileged documents during discovery, if reasonable precautions for security are in place, a lawyer's mistake that seems reasonable under the circumstances ought not prejudice the client." Ultimately, the *Vigor Works* court concluded that "[u]nder the circumstances presented here, the disclosure, while arguably preventable with more careful attention, was nonetheless inadvertent," and ordered that all copies of both inadvertently disclosed privileged documents be destroyed or returned.

The decision concludes with a note of caution, seemingly aimed at plaintiff, despite a disclaimer to the contrary. The court noted that it declined, as defendant requested, to consider the contents of plaintiff's privileged communications in its determination of whether to order the documents returned. Presumably, defendant argued for the court to consider the communication's contents because the document contained statements that defendant believed would be helpful to its case. The court recognized that, despite its order on plaintiff's motion, to a certain extent the disclosure was "like the bell that cannot be unrung." Thus, the decision ends with a warning that no witness ought to testify in a manner that is inconsistent with the information contained in the

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COMCOM HOSTS 'CONFLICTS OF INTEREST IN COMPLEX COMMERCIAL LITIGATION' PROGRAM

BY JESSICA KELLY

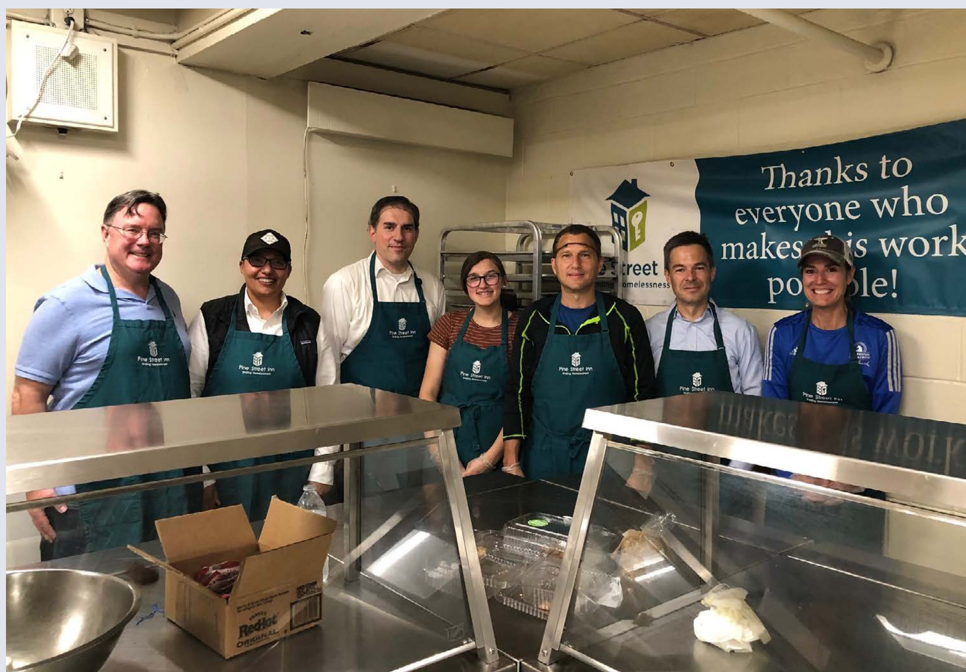
The Complex Commercial Litigation Section Council hosted a CLE program titled "Conflicts of Interest in Complex Commercial Litigation" on Tuesday, May 14, highlighting important ethical rules and considerations that face business, bankruptcy and intellectual property litigators. The panelists included Richard Rosensweig (director and general counsel, Goulston & Storrs LLP), Christopher Blazejewski (partner, Sherin and Lodgen LLP), Heather LaVigne (assistant bar counsel, Board of Bar Overseers) and Hon. Debra Squires-Lee (associate justice of the Superior Court). The program was moderated by Section Council member Jessica Gray Kelly (partner, Sherin and Lodgen LLP).

LaVigne began the program outlining the rules that business litigators need to pay particular attention to when representing business clients, including Rules 1.7-1.11, 1.13 and 1.18. LaVigne also discussed the prevalence of conflicts issues in bar discipline matters and noted that practitioners can always call the Board of Bar Overseers hotline when faced with a difficult conflicts issue.

Rosensweig, who is also his firm's general counsel, highlighted particular conflict of interest issues that arise when engaging new clients or during the representation of two clients, and explained how attorneys and firms can protect themselves from liability for conflicts of interest. Blazejewski presented an overview of the Supreme Judicial Court decision in *Maling v. Finnegan, Henderson, Farabow & Dunner LLP* (2015) and discussed some recent high-profile, high-damages cases involving conflicts of interest. Finally, Judge Squires-Lee provided an overview of how courts handle motions to disqualify based on conflicts of interest arising during litigation.

This CLE program was attended in person by MBA members and non-members as well as streamed online. The program is available on the MBA's website at www.MassBar.org. ■

COMCOM VOLUNTEERS AT THE PINE STREET INN



Continuing an annual tradition, the Complex Commercial Litigation Section Council served dinner at the Pine Street Inn on June 25. Council members (from left) Frank Morrissey, Corrina Hale, Dakis Dalmanieras and his daughter Julia, Matt Ginsburg, Derek Domian and Jessica Kelly volunteered.

CLOSELY HELD LLCs
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'closely-held entity,' was a close corporation under *Donahue*." (citations omitted)).

4. *See* R.W. Southgate & D.W. Glazer, Massachusetts Corporation Law and Practice § 19.9[e] n.147c (2d ed. 2012 & Supp. 2018) ("In *Pointer* the Court referred to the LLC as a close corporation . . . without acknowledging the many differences between the rights of members of a Massachusetts LLC and those of shareholders of a Massachusetts corporation. . . . Instead, ignoring (or perhaps not understanding) the differences between the rights of shareholders of a corporation and the rights of members of an LLC, the Court wrote, 'Whatever the advantages of the corporate form, its very structure may suppl[y] an opportunity for the majority stockholders to oppress or disadvantage minority stockholders . . . .'"). ■

PRIVILEGE
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clawed-back communications. Should a witness do so, much like a criminal defendant's suppressed statements can be used to impeach credibility should he testify inconsistently with those statements, the contents of the privileged emails (which remained under seal with the court) could be used to impeach that witness's credibility, and potentially be admitted to evidence at trial, albeit for that limited purpose. ■

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