Study K-500 May 16, 2001

First Supplement to Memorandum 2001-29

Disclosure of Privileged Materials: Comments of Professor Mendez

Attached is a letter from Professor Miguel Mendez (Stanford Law School) commenting on the standard for determining whether a privilege has been waived through disclosure of a privileged communication. He opposes a strict liability approach to waiver. At least within the context of discovery, he "would favor at least a negligence approach: waiver of the privilege would occur only if the holder (or his agent, the lawyer) knew or should have known that confidential information was being disclosed." (Exhibit p. 1.)

Prof. Mendez also expresses reservations about the "intentional relinquishment of a known right" approach:

> The problem with the "relinquishment of a known right" approach is the unlikelihood that parties will know that their disclosure will waive the privilege's protection. That reduces significantly the chances of a waiver occurring. I think that is what bothered Wigmore. If you voluntarily disclose to the whole world what you told your lawyer, how can you then complain about being forced to tell the same story on the stand? Upholding the privilege under these circumstances strikes some as unfair, since the holder has already let the secret out voluntarily.

(*Id.*)

We will discuss Prof. Mendez's comments in greater detail at the upcoming meeting.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Exhibit

Email message from Prof. Miguel Mendez to Barbara Gaal (May 15, 2001), regarding Memorandum 2001-29

Barbara, I just finished reading your memo. You did a very good job laying out the issues.

As you can tell from my book, I don't favor a strict liability approach to waiver. At least within a discovery context, I would favor at least a negligence approach: waiver of the privilege would occur only if the holder (or his agent, the lawyer) knew or should have known that confidential information was being disclosed. If the party (as opposed to his or her lawyer) is the one disclosing the confidential information, I suppose that an argument could be made that no waiver should be found unless the party was aware that the disclosure would waive the privilege. The problem with the "relinquishment of a known right" approach is the unlikelihood that parties will know that their disclosure will waive the privilege's protection. That reduces significantly the chances of a waiver occurring. I think that is what bothered Wigmore. If you voluntarily disclose to the whole world what you told your lawyer, how can you then complain about being forced to tell the same story on the stand? Upholding the privilege under these circumstances strikes some as unfair, since the holder has already let the secret out voluntarily.

If the negligence approach is adopted, then the terms "without coercion" would have to exclude inadvertent, faultless disclosures, as can occur in discovery or in the use of some of today's electronic communications (e.g., sending the sensitive e-mail to the wrong lawyer because the "reply to all" icon was inadvertently hit). The approach, however, would not help the party who erroneously believes that telling his best friend in confidence what he told his lawyer preserves the privilege. I don't know how big this problem may be or how one might get good data on it. Good lawyers, after all, advise clients not to disclose their conversations to anyone. But if it is a problem, then some consideration may have to be given to whether waiver by a party (as opposed to waiver by the party's lawyer) should require an awareness that disclosure will result in the loss of privilege.

A final point. In your memo you mention waiver by failure to object when the holder (or his lawyer, etc.) is present (at the hearing, for example) and has an opportunity to object. Waiver under these circumstances does not bother me much. It is simply a specific formulation of the settled rule that the failure to object timely to objectionable matter waives the objection.

I hope you find these comments useful.