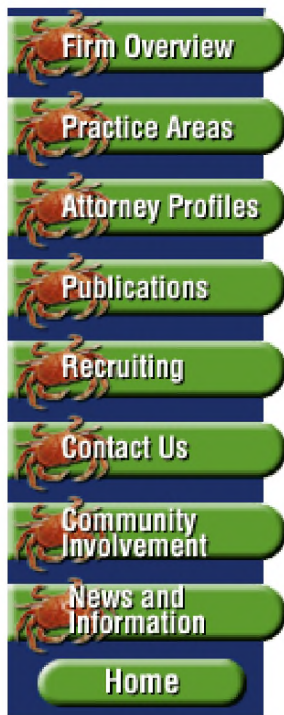


ATTORNEYS AT LAW

TYDINGS & ROSENBERG LLP



An Inadvertent Disclosure May Result In Waiver Of Attorney/Client Privilege

Maryland litigators and lawyers in other states who find themselves in Maryland courts should be aware of the decision of the Court of Special Appeals of Maryland in *Elkton Care Center Associates Limited Partnership t/a Medpointe (Medpointe) v. Quality Care Management, Inc. (QCM)* (145 Md.App. 532, decided August 29, 2002).

In that case, Medpointe constructed a nursing home in Elkton, Maryland and entered into a nursing center management agreement with QCM. The agreement contained an extensive termination clause, a portion of one section of which reads as follows:

"(7) At the completion of the first twenty-four month period of operation Owner shall review the past twenty-four (24) months performance of the Manager. If the operational and economical goals as agreed between parties at the inception of this Agreement have not been met Owner has the unequivocal right to terminate or amend this Agreement..."

In the discovery phase of the case a lawyer for Medpointe produced a box that contained a number of documents, and it was agreed that counsel for QCM would examine the documents in the box, identify which documents they wanted copied, and then Medpointe would copy and deliver to QCM's counsel a copy of each document that was tabbed. Included in these documents was a memo from a lawyer that had been retained by Medpointe to identify what defenses would be available to Medpointe if QCM filed a wrongful termination action. That memo was expressly designated as "**ATTORNEY/CLIENT PRIV-ILEGE, ATTORNEY WORK PRODUCT PREPARED IN ANTICIPATION OF LITIGA-TION.**"

At trial, QCM's counsel referred to that document in his cross-examination of the president of Medpointe. Upon objection, and after the trial judge inquired into how QCM got the document, and learning that QCM had received "... a half full box, bankers box of documents that the other side produced," the objection was overruled and the jury reached a

verdict that Medpointe had breached the contract.

The Court of Special Appeals then discussed "The Consequences of Inadvertent Disclosure."

Medpointe argued that the doctrine of attorney/client privilege and/or work product privilege was not waived by the inadvertent disclosure. The Court pointed out that neither the Court of Appeals nor the Court of Special Appeals had decided the issue of whether attorney/client privilege is waived by the inadvertent disclosure of a document protected by that privilege.

Other courts are divided on the issue-some courts have adopted a "strict test" or "waiver test," while others have followed a "lenient" or "non-waiver" test.

The Court of Special Appeals articulated an "intermediate" view, which depends very much on the circumstances of each case-by looking mostly to the following three factors.

- (i) The degree of care exercised by the claimant;
- (ii) The presence of extenuating circumstances (such as the press of massive discovery going forward under the pressure of deadline; and
- (iii) The behavior of a privilege claimant in taking remedial steps after disclosing the material.

The Court rejected the "lenient" test and the "strict" test as not being fair and adopted the intermediate test. Applying that test to this case, the Court concluded that:

"Factors one, two and three-the reasonableness of precautions taken to prevent inadvertent disclosure, the number of inadvertent disclosures, and the extent of the disclosure-all strongly favor waiver."

This case signals a strong warning to all litigators: Be doubly careful during the discovery process.

For more information on this and other litigation questions, contact [William H. Engelman](mailto:wengelman@tydingslaw.com) at 410/752-9729 or via e-mail at wengelman@tydingslaw.com.

[Firm's Commercial and Business Litigation Practice](#)

[\[Firm Overview\]](#) [\[Practice Areas\]](#) [\[Attorney Profiles\]](#) [\[Publications\]](#)
[\[Recruiting\]](#) [\[Contact Us\]](#) [\[Community Involvement\]](#)
[\[News and Information\]](#) [\[Disclaimer\]](#) [\[Home\]](#)