A Quick Lesson on Responding to (and Avoiding) Inadvertent Document Productions

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(by **Joseph Schaeffer**)

Whether attorneys have encountered an inadvertently produced privileged document in their own practice, it is a common enough occurrence that the procedure is well established: Suspend further review, sequester the document, and notify opposing counsel. What is not well-established is what attorneys should do when they encounter inadvertently produced non-privileged documents. A New York trial court recently dealt with this situation in a case of first impression.

In Pursuit Credit Special Opportunity Fund, L.P. v. Krunchcash, LLC et al., No. 615070/2022 (N.Y. Sup. Ct. Oct. 4, 2023), the plaintiff's financial consultant had responded to a subpoena from the defendants by producing multiple emails with a Dropbox link in the message body. As the defendants discovered early in their review, the Dropbox link not only was "live," it provided access to a bevy of the plaintiff's sensitive internal files—including folders named "Legal," "Tax," and "Financial." Rather than immediately notify plaintiff's counsel, though, the defendants reviewed the Dropbox (with the exception of the "Legal" folder) and sent the plaintiff a letter about a week later that referenced the internal documents as part of a demand for voluntary dismissal of the litigation. The plaintiff responded by moving the trial court to order the defendants to show cause why they should not be sanctioned for accessing the Dropbox files.

The trial court granted the plaintiff's motion and entered a sanction against the defendants of nearly $156,000, representing the plaintiff's costs in bringing the motion. Though acknowledging the absence of directly applicable authority, the trial court found guidance in Rule 4.4 of the New York Rules of Professional Conduct. That rule imposes a notification obligation on New York attorneys who receive documents, writings, or electronically stored information that they reasonably should know to have been inadvertently produced—notably without providing for any limitation to privileged documents. The trial court found that the defendants should reasonably have known that the plaintiff could not have intended to provide access to its internal file system through a Dropbox link contained in email messages found by a third party. From there, the trial court concluded fairly easily that the defendants had failed to properly notify the plaintiff of the inadvertent production and, in fact, exacerbated matters by leveraging the inadvertent production as the basis for demanding voluntary dismissal of the litigation.

There are several lessons to be drawn from this case. One lesson is that the entire matter could have been avoided had the plaintiff implemented stronger security measures from the outset. Indeed, the plaintiff's maintenance of internal files on an "open" Dropbox, which it then shared with third parties using non-expiring links, seems nothing short of negligent. But another lesson is that attorneys have a duty to notify opposing parties of documents that reasonably appear to have been inadvertently produced—no matter how negligent the inadvertent production. The parties' failure to follow those respective lessons here led to an expensive (and embarrassing) series of events that they now surely wish to have avoided.

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