

A plaintiff sued a defendant in federal court in connection with the dissolution of a franchise. In response to the plaintiff's request for production, the defendant provided his attorney with thousands of documents pertaining to the franchise. Included in those documents was a letter that the defendant had written to his attorney, which discussed the defendant's understanding of the agreement to dissolve the franchise. The defendant had given the letter to his nephew to proofread before delivering it to his attorney. Before producing these documents to the plaintiff, the defendant's attorney took reasonable steps to redact any privileged information but did not notice the defendant's letter. As a result, the letter was turned over to the plaintiff. The defendant's attorney later learned of the inadvertent disclosure but did nothing to rectify the error.

The plaintiff seeks to introduce the letter into evidence at trial. The defendant has objected, invoking the attorney-client privilege.

Should the court uphold the defendant's privilege claim?

- A. No, because the defendant's attorney waived the privilege by failing to take reasonable steps to rectify the error.
- B. No, because the letter was disclosed to the defendant's nephew and therefore is not privileged.
- C. Yes, because the defendant holds the privilege and the attorney cannot waive the privilege on the defendant's behalf.
- D. Yes, because the defendant's attorney may claim the privilege on the defendant's behalf.

Explanation:

The **attorney-client privilege** protects **communications** between an attorney and a client that were (1) made for the purpose of obtaining legal advice or representation and (2) intended to be and kept confidential. A **communication is confidential** if the circumstances indicate an **intention of secrecy** between the client and the attorney. This means that a communication is **not confidential** if the client **discloses it to a third party** (here, the defendant's nephew). As a result, the defendant's letter is not protected by this privilege.

But even if the letter had been privileged, any protection would have been waived when the defendant's attorney turned the letter over to the plaintiff. That is because the client, as the holder of the privilege, can waive it directly or through an attorney/agent acting with the client's authority. In a federal proceeding, a **disclosure** operates as a **waiver unless**:

the disclosure was inadvertent

the privilege holder had taken **reasonable steps to prevent disclosure** and

the privilege holder promptly took **reasonable steps to rectify** the error.

Here, the letter was inadvertently produced despite the reasonable steps that the defendant, through his attorney, had taken to redact any privileged information. But the attorney made no effort to rectify the error upon learning of the disclosure, so the privilege (had it existed) would have been waived **(Choice A)**. However, since the letter had been shared with the defendant's nephew, it was not privileged. As a result, a waiver analysis is unnecessary. Instead, the court should reject the defendant's privilege claim because the letter was not privileged.

(Choice C) The client, as the holder of the attorney-client privilege, can waive this privilege directly or through an attorney or agent acting with the client's authority. As a result, the defendant's attorney could have waived the defendant's privilege.

(Choice D) An attorney can claim the attorney-client privilege on his/her client's behalf, but this will only protect communications that fall under the privilege (not seen here).

Educational objective:

The attorney-client privilege applies only to *confidential* communications. This privilege is waived when the communication is disclosed to a third party unless the disclosure was inadvertent and the privilege holder took reasonable steps to prevent disclosure and to rectify the error.

References

Fed. R. Evid. 502 (effect of inadvertent disclosure on attorney-client privilege).

Waiving attorney-client privilege

By voluntarily waiving privilege

Discloses to third party



Client

3rd Party

Gives up privilege



Client

By failing to assert privilege

Inadvertent disclosure



Another's disclosure

