

During an interview, a company's chief executive officer (CEO) made a prepared statement denying that the company was in merger talks with one of its competitors. After the interview aired, the company's stock price dropped, and an investor sold his stock in the company at a great loss. Two weeks later, the company announced that it was merging with its competitor.

The investor filed a lawsuit against the company in an appropriate federal court based on misrepresentation. After the parties held their initial planning conference, the investor requested that the company produce all documents and data related to the CEO's prepared statement and the subsequent announcement of the merger. In response, the company carefully screened its records and produced approximately three million documents, including electronically stored information. It also produced a privilege log of documents withheld. After production, the company realized that it had inadvertently produced 102 potentially privileged documents.

The company immediately notified the investor of the inadvertent disclosure, provided a basis for its privilege claim, and asked that the documents be immediately returned. The investor, who disputed the company's privilege claim, immediately isolated the documents from the rest of the production but refused to return them.

The investor has presented the documents and the parties' privilege arguments to the court for a determination of the privilege claim. A hearing was scheduled to be held in 15 days. In response, the company promptly moved for an injunction that would require the investor to immediately return the documents to the company and destroy any copies in his possession before the hearing.

How should the court rule on the company's motion?

- A. Deny the motion, because the company has waived attorney-client privilege by disclosing the documents to a third party.
- B. Deny the motion, because the investor promptly sequestered the documents and presented the information to the court.
- C. Grant the motion, because the investor has failed to return the documents.
- D. Grant the motion, because the party that produced the privileged information determines whether it is returned, sequestered, or destroyed.

Explanation:

When **privileged information** is **inadvertently produced**, FRCP 26(b)(5)(B) permits the producing party to **promptly notify** the receiving party of the disclosure and **provide the basis** for the privilege claim. After being notified, the **receiving party must**:

- promptly **return, sequester, or destroy** the information and any copies
- **not use or disclose** the information until the privilege claim is resolved *and*
- take **reasonable steps** to retrieve information already disclosed to others.

This rule gives the receiving party the option to return, sequester, or destroy the documents at issue because the rule contemplates that the receiving party may dispute the privilege claim. In this situation, sequestering the documents achieves the purpose of the rule—protecting the potentially privileged information—while enabling the receiving party to present the documents and the disputed privilege claim to the court for resolution.

Here, the investor properly sequestered the documents and presented the parties' privilege dispute to the court for resolution. Therefore, the court will likely deny the company's motion for an injunction requiring the investor to immediately return and destroy the purportedly privileged documents before a hearing on the privilege claim.*

*However, the investor may still have to return or destroy the documents if the court later determines that they are in fact privileged.

(Choice A) An inadvertent disclosure does not waive the privilege so long as the disclosing party took reasonable steps to prevent disclosure—eg, carefully screened its records and produced a privilege log—and promptly rectified the disclosure (as seen here).

(Choice C) Since the investor sequestered the privileged documents, he is not required to immediately return them to the company.

(Choice D) The party that *received* (as opposed to produced) the privileged information determines whether it is returned, sequestered, or destroyed when disputing the producing party's privilege claim.

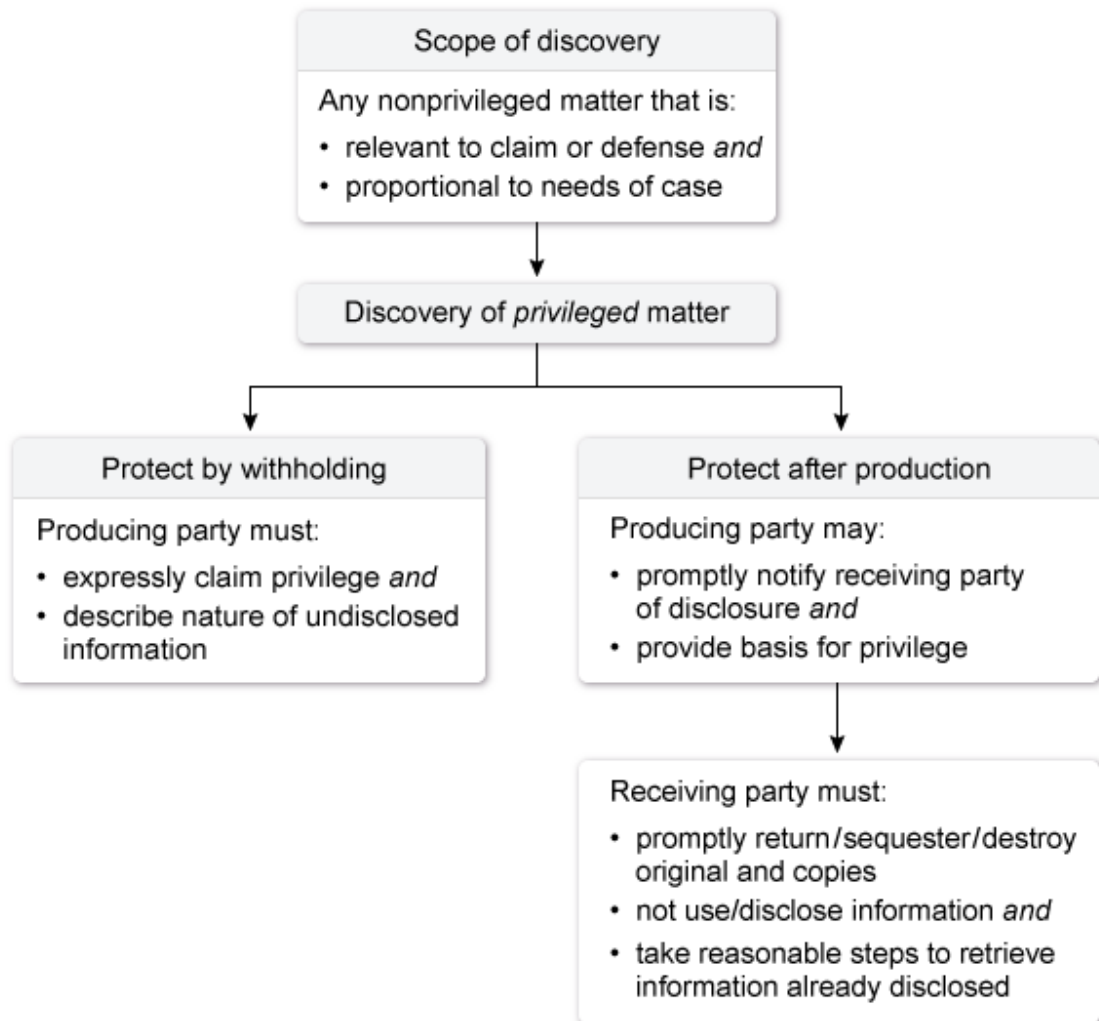
Educational objective:

After being notified that privileged information was produced, the receiving party must (1) promptly return, sequester, or destroy the information and any copies, (2) not use or disclose the information until the claim of privilege is resolved, and (3) take reasonable steps to retrieve information already disclosed.

References

- Fed. R. Civ. P. 26(b)(5) (production of privileged materials).
- Fed. R. Evid. 502(b) (describing inadvertent disclosure).

Discovery of privileged information (FRCP 26(b))



FRCP = Federal Rule of Civil Procedure

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