A plaintiff sued his neighbor in state court for negligently disposing of engine oil and polluting the groundwater in their neighborhood. During discovery, the plaintiff's attorney inadvertently disclosed a letter sent by the plaintiff to the attorney containing the plaintiff's mental impressions on the case. The attorney took no immediate steps to rectify the error but eventually recovered the letter. Under the law of the state where the disclosure occurred, the attorney's actions did not waive the attorney-client privilege.

The plaintiff later sued a farm located in an adjoining state in federal court for allegedly spraying its crops with a banned pesticide that contaminated the groundwater in the plaintiff's neighborhood. Upon learning of the lawsuit, the neighbor shared a copy of the plaintiff's letter with the farm. The farm now seeks to introduce the plaintiff's letter into evidence at trial. The plaintiff objects to the introduction of the letter, claiming it is privileged.

Should the letter be admitted?

A. No, because a document containing a person's mental impressions is nearly always privileged.

B. No, because the disclosure did not constitute a waiver under state law.

C. Yes, because the disclosure waived the privilege under the federal rules.

D. Yes, provided there is evidence that the farm has a substantial need for the letter.

Explanation:

The **attorney-client privilege** protects communications between an attorney and a client that were (1) made for the purpose of obtaining or providing legal assistance for the client and (2) intended to be and kept confidential. If such a communication was disclosed in a **state court proceeding** and is now being offered in a **federal proceeding** (as seen here), the federal court will review the federal rules *and* the law of the state where the disclosure occurred. Whichever **law offers more protection** will **determine** the **effect of the disclosure**.*

Under the federal rules, a disclosure of a privileged communication will operate 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 (not seen here).

However, the attorney's disclosure here did *not* waive the attorney-client privilege under the law of the state where the disclosure occurred. Since the state law offers more protection, it will determine the effect of the disclosure in this later federal proceeding **(Choice C)**. Therefore, the letter should not be admitted into evidence.

**This procedural rule applies to all federal cases, even those based on diversity jurisdiction*. But it does not apply if the state court issued an order concerning the effect of the disclosure. In that case, the state court order would control.

(Choice A) Under the attorney work-product doctrine, opinion work product—ie, material containing an *attorney's* mental impressions—is privileged and discoverable only in rare instances or compelling circumstances. But this protection does not apply to a letter containing a *client's* mental impressions.

(Choice D) In civil suits, the production of ordinary work product may be compelled by showing a substantial need and that the materials cannot be obtained without undue hardship. Ordinary work product refers to *facts* gathered by or for an attorney in anticipation of litigation (eg, witness statements)—not a client's mere *opinions*.

Educational objective:

If a privileged communication was disclosed in state court and is now being offered in federal court, the federal court will review the federal rules *and* the law of the state where the disclosure occurred. Whichever law offers more protection determines the effect of the disclosure.

References

Fed. R. Evid. 502(c) (limitations on waiver of attorney-client privilege).

Determining the effect of a disclosure at a prior state-court proceeding