IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO. 2013-019836-CA-01
SECTION: CA 06

Mccrea, Kevin Eddie, et al.
Plaintiff,
vs.

Maley, Terry, et al.
Defendant.
_____/

ORDER ON MOTION TO DISQUALIFY DEFENSE COUNSEL

THIS CAUSE has come before this Court on "Plaintiff's Motion to Disqualify Defense Counsel, and for Sanctions, Including the Striking of Defendants' Defenses and the Entry of a Default on Liability." The Court, having considered the motion, the Defendants' response in opposition to the motion, and the Plaintiff's reply, having considered evidence presented in a two-part evidentiary hearing on June 7, 2018 and August 24, 2018, having heard arguments of counsel, and being otherwise fully advised in the premises; hereby finds as follows:

1. In 2013, the Plaintiff, Kevin Eddie McCrea, handwrote answers to interrogatories sent by the Defendants, and although he intended for his handwritten answers to be seen only by his counsel, he unintentionally had them faxed to Defendants' counsel. The Plaintiffs' counsel was unaware that the Defendants had the handwritten answers until March 29, 2018, when Defendants produced a copy of them with the materials

that they intended to introduce at trial. On April 2, 2018, Plaintiffs' counsel sent a letter to Defendants' lead counsel advising them that the handwritten answers had been inadvertently faxed, arguing that the handwritten responses were privileged, and demanding that the Defendants return or destroy all copies of the document. On the same day, Defendants' lead counsel sent a letter replying to the Plaintiffs' counsel, refusing to return or destroy the handwritten answers.

2. This resulted in the parties filing a number of motions concerning whether the handwritten answers were privileged and whether the Defendants' counsel should be disqualified. This Court held a hearing on April 26, 2018 on the motions regarding whether the handwritten answers were inadvertently-disclosed, privileged materials. Subsequent to the hearing, the Defendants provided this Court with a copy of the handwritten answers for *in camera* inspection. In addition, the Defendants' written opposition to the Plaintiffs' motion to disqualify directly quoted the most relevant portion of the handwritten answers.
3. After taking the matter under consideration, and reviewing the copy of the handwritten answers submitted for *in camera* inspection, this Court, on May 18, 2018, entered an "Order Determining Privilege of Interrogatory Answers." This Court determined that the handwritten answers were a draft intended not to be disclosed to anyone other than Plaintiff's counsel, and were protected by the attorney-client privilege. This Court ordered the Defendants to immediately destroy all but one copy of the handwritten interrogatory answers, and ordered the Defendants to preserve that one copy in a sealed envelope in a secure

location. It also ordered the Defendants to retrieve and destroy any copies of the handwritten orders provided to any third parties.

4. The May 18, 2018 Order only addressed whether the handwritten interrogatory answers were privileged, and did not address whether Defendants' counsel should be disqualified from representing the Defendants in this case.
5. This Court held an evidentiary hearing on June 7, 2018, which continued on August 24, 2018, to determine the issues regarding disqualification. At these evidentiary hearings, the sworn testimony of Defendants' lead counsel was taken.
6. Although the Plaintiffs' motion seeks to disqualify Defendants' counsel from this case, to strike Defendants' defenses, and to obtain a default, only the portion of the Plaintiff's motion arguing that Defendants' counsel should be disqualified was argued at the hearings on this matter. No argument was presented on the portion of the motion seeking to strike pleadings and obtain a default.
7. This Order addresses the arguments and evidence concerning whether Defendants' counsel's receipt of the inadvertently-disclosed handwritten answers to interrogatories requires their disqualification from this case.
8. "A two-part test governs the determination of whether receipt of an inadvertent disclosure warrants disqualification. . . . The movant must establish [1] that 'the inadvertently disclosed information is protected, either by privilege or confidentiality' and [2] that 'there is a "possibility" that the receiving party has obtained an "unfair" "informational advantage" as a result of the inadvertent disclosure.'" *Constr. Systems of Am., Inc. v. Travelers Casualty & Surety Co. of*

America, LLC, 118 So. 3d 942 (Fla. 3d DCA 2013) (quoting *Moriber v. Dreiling*, 95 So. 3d 449, 454 (Fla. 3d DCA 2012). As noted, this Court has previously determined that the inadvertently disclosed information in the instant case was protected by the attorney-client privilege. Accordingly, it is only the second part of the test that is currently at issue.

9. As to the possibility that the party who received inadvertently disclosed privileged documents obtained an unfair informational advantage, "a movant is 'not required to demonstrate specific prejudice in order to justify disqualification.'" *Abamar Hous. and Dev., Inc. v. Lisa Daly Lady Decor, Inc.*, 724 So. 2d 572 (Fla. 3d DCA 1998) (quoting *Junger Utility & Paving Co., Inc. v. Myers*, 578 So. 2d 1117, 1119 (Fla. 1st DCA 1989)). Since it is difficult to measure how much of an informational advantage was obtained by a party due to inadvertent disclosure of privileged documents, the mere *possibility* that such an advantage accrued warrants resort to the drastic remedy of disqualifying an attorney. *See Atlas Air, Inc. v. Greenberg Traurig, P.A.*, 997 So. 2d 1117, 1118 (Fla. 3d DCA 2008) (Rothenberg, J., concurring); *Abamar*, 724 So. 2d at 573-74.[1]

10. To determine whether there is a possibility that an unfair informational advantage was obtained, a court must look to the content of the inadvertent disclosure, as well as the actions taken by the receiving lawyers. *Moriber*, 95 So. 3d at 454. This includes the extent to which

[1] *See also Coral Reef of Key Biscayne Developers, Inc. v. Lloyd's Underwriters at London*, 911 So. 2d 155 (Fla. 3d DCA 2005) (contrasting inadvertent disclosure cases, in which "the mere possibility of an unfair tactical advantage" gives rise to disqualification, with cases in which opposing counsel receives privileged documents by a court order which is later vacated, in which a "higher standard," requiring evidence of actual harm, applies in order to disqualify a receiving attorney.)

the receiving lawyers "reviewed, copied, or disseminated the inadvertent disclosure" as well as whether the receiving lawyers complied with the rules of professional conduct (which establishes whether the informational advantage was obtained "unfairly"). *Id.* at 454-55. Thus, an attorney who is recalcitrant in rectifying an inadvertent disclosure is more likely to be disqualified than an attorney who complies with the applicable rules. *See id.* at 455.

11. In *Moriber*, a legal assistant inadvertently attached a confidential mediation statement to an email sent to the Defendants' attorney. *Id.* at 451. Only one receiving attorney reviewed the statement, skimming it without realizing that it had been sent inadvertently. *Id.* at 452. When she was informed that the statement had been sent in error, she replied that she would destroy all copies of it, and then she did so. *Id.* A special master was tasked with determining whether the Defendants may have obtained an unfair informational advantage through its counsel's receipt of the mediation statement. The special master determined, and the Third District Court of Appeal agreed, that there was nothing within the mediation statement that gave rise to any possibility that the Defendants obtained any unfair advantage by receiving the statement, noting that "'[t]here is nothing in the Confidential Mediation Statement that hints of any weakness in the Plaintiff's case or which, in the hands of Defendants, would afford any tactical, strategic or legal advantage.'" *Id.* (alteration of special master's quotation made in *Moriber*). The Third District Court of Appeal also determined that the conclusion that there was no possibility that the Defendants obtained an unfair informational advantage was supported by the brevity of their exposure to the information, and the minimal degree to which they handled,

reviewed, and disseminated it. *Id.* at 456. The Third District Court of Appeal also determined that the receiving attorneys had not violated Rule of Professional Conduct 4-4.4(b), which requires a lawyer who knows or reasonably should know that he received a document that was inadvertently sent, because the attorney's lack of knowledge that the mediation statement was inadvertently sent was reasonable under the circumstances. *Id.* It explained that "there is nothing inherent about a mediation statement, in and of itself, that would **automatically** place a recipient on notice of the statement's confidential nature. It is not uncommon for a party to send a mediation statement to opposing counsel so as to enable the opposing party to better understand a particular point." *Id.* (emphasis in original). Finally, the Third District Court of Appeal noted that upon being notified that the documents were confidential, the attorney immediately had all copies destroyed, and was entirely cooperative, rather than recalcitrant, in rectifying the disclosure. *Id.* at 457. As such, the Third District Court of Appeal determined that the trial court correctly found that there was no possibility that the Defendants obtained an unfair informational advantage, and upheld the trial court's decision not to disqualify their attorneys.

12. In *Castellano v. Winthrop*, 27 So. 3d 134 (Fla. 5th DCA 2010), a mother in a paternity case illegally obtained a USB flash drive belonging to the father, which contained the electronic equivalent of thousands of pages of documents and communications, including attorney-client communications, client litigation notes, and attorney work product. *Id.* at 135. She provided the USB drive to the law firm representing her, which spent in excess of 100 hours reviewing the files contained on it.

Id. The law firm then filed a petition to vacate an order of modification, alleging fraud based upon information obtained in the USB drive. *Id.* The father demanded the immediate return of the USB drive, but the law firm refused to return it and instead filed the contents of the USB drive in the court file and delivered the drive to law enforcement. *Id.* The trial court found that it was apparent to the law firm, within moments of inspection, that the USB drive belonged to the father and contained attorney-client communications, strategy, work product, and confidential communications. *Id.* at 136. The trial court determined that disqualification of the law firm was required because an informational advantage was obtained. *Id.* The Fifth District Court of Appeal upheld the decision, explaining that "[g]iven the nature of the information obtained by the [law f]irm from the USB drive, it cannot be reasonably disputed that an informational and tactical advantage was obtained by the Mother." *Id.* at 137.

13. In *Abamar Hous. and Dev., Inc. v. Lisa Daly Lady Decor, Inc.*, 698 So. 2d 276 (Fla. 3d DCA 1997) (*Abamar I*), petitioner's counsel inadvertently sent two files containing 23 privileged documents to opposing counsel. *Id.* at 277-78. Upon discovery, the petitioners promptly requested the return of the documents but the request was refused. *Id.* at 278. Subsequently, the respondents, over the objection of the petitioners, introduced the documents at depositions and attached them as exhibits. *Id.* The trial court denied a motion seeking the return of the documents, and the Third District Court of Appeal quashed the order. *Id.* at 277. On remand, the trial court entered an order granting the disqualification of the petitioners' attorneys, but then on motion for reconsideration vacated the disqualification order. *Abamar Hous. and*

Dev., Inc. v. Lisa Daly Lady Decor, Inc., 724 So. 2d 572 (Fla. 3d DCA 1998) (*Abamar II*). However, on petition for writ of certiorari, the Third District Court of Appeal determined that the requirements for disqualification had been met, given the respondents' recalcitrance in rectifying the inadvertent disclosure, and the unfair tactical advantage gained from the disclosure. *Id.* at 574.

14. As noted, one of the factors listed in the *Moriber* case to be examined, in order to determine whether there is a possibility that an unfair informational advantage was obtained, is the content of the inadvertent disclosure. *Moriber*, 95 So. 3d at 454. In the instant case, the inadvertently disclosed material was draft answers to interrogatories handwritten by the Plaintiff, meant to be shared only with his attorneys. At the August 24, 2018 portion of the evidentiary hearing on this matter, Defendants' lead counsel testified that when he discovered that he had two versions of the interrogatory answers, he found the differences to be alarming, and he agreed that he viewed the difference between the two as the difference between the Plaintiff either being at fault or having no fault at all. August 24, 2018 Hearing Transcript at 9-10. Discovering the two sets of interrogatories caused him to desire a second deposition of the Plaintiff. *See* Defendant Kidde Fire Trainers, Inc. Opposition to Plaintiff's motion to Disqualify at 17. He continued to place importance on the handwritten interrogatory answers after the Plaintiff was notified that he had them, as demonstrated by his response to the Plaintiff's request that he return them, stating in his response letter:

> [T]he vigor in which you are claiming this discovery needs to be ignored and discarded is frankly alarming. These are your

clients' sworn answers to interrogatories. I assume you do not like something in these responses that Mr. McCrea said in 2013, but sworn answers are still sworn answers. I don't know how we can, or why we should, just ignore his sworn testimony.

Defendants' lead counsel also has relied on the difference between the two versions of the interrogatory answers during the course of these proceedings, relying on them to show that the Plaintiff's story of what happened has changed. Given the importance that the Defendants' lead counsel places on the inadvertently disclosed material, it cannot be disputed that its content is highly significant.

15. Another factor that must be examined is the actions taken by the lawyers who received the inadvertently disclosed material. *Moriber*, 95 So. 3d at 454.

16. When examining the actions taken by the receiving lawyers, a court should include the extent to which the receiving lawyers "reviewed, copied, or disseminated the inadvertent disclosure." *Id.* at 454-55. In the instant case, Defendants' lead counsel has stated that, although the handwritten answers to interrogatories were received by his former law firm in 2013, they were placed in a file and he was not aware that he had them until about September of 2016. Accordingly, the handwritten answers were not reviewed, copied or disseminated during the first few years after disclosure. However, subsequent to discovering the existence of the handwritten answers in 2016, Defendants' lead counsel obviously reviewed them thoroughly, as he is very familiar with their contents and has relied heavily upon them, including in his arguments to this Court. In addition, the handwritten answers were distributed to

the Defendants' experts. At the June 7, 2018 portion of the evidentiary hearing, Defendants' lead counsel was unable to answer how many lawyers and staff, other than himself and one of the firm's name partners, participated in this case. Later, at the August 24, 2018 portion of the hearing, he agreed that it was as many as three lawyers, and that any lawyers and staff working on the case would have had access to the file that contained the handwritten answers. Additionally, he testified that the information contained within the interrogatories was also shared with the Defendants.

17. Another factor to consider when examining the actions taken by the lawyers who receive inadvertently disclosed material is whether those lawyers complied with the rules of professional conduct (which establishes whether the informational advantage was obtained "unfairly"). *Id.* at 454-55. Rule of Professional Conduct 4-4.4(b) provides that "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent must promptly notify the sender." This Court does not agree with the Plaintiff's position that the Defendants' counsel should have known that the handwritten interrogatories were inadvertently sent immediately upon receiving them, given that they were handwritten and that they were faxed rather than formally served via e-service. Although this was unusual, the Court does not believe that the Defendants' counsel necessarily should have realized that the handwritten answers were mistakenly sent, until the point that they received a second set of answers (or realized that they had two sets of answers). Nevertheless,

upon learning that they had two sets of answers to the same interrogatories, one of which was hand-written and faxed, and one of which was typed and formally served, a reasonable attorney would have been put on notice that the handwritten answers were a draft and would have realized that they were likely inadvertently sent. Therefore, pursuant to Rule 4-4.1(b), by September 2016, when the Defendants' counsel realized that they had the two versions of the interrogatory answers, they were required to notify the Plaintiff's attorneys. They did not. The Plaintiff was not notified that Defendants had the handwritten interrogatory answers until March 29, 2018.

18. Shortly after finding out that the Defendants had a copy of the handwritten interrogatory answers, on April 2, 2018, Plaintiffs' counsel sent a letter to Defendants' lead counsel advising him that the handwritten responses had been inadvertently faxed, asserting that the handwritten responses were privileged, and demanding that he return or destroy all copies of the handwritten responses.

19. Rule 1.285(b) provides, in part, that: "A party receiving notice of an assertion of privilege under subdivision (a) shall promptly return, sequester, or destroy the materials specified in the notice, as well as any copies of the material." It also provides that "[t]he party receiving the notice shall also promptly notify any other party, person, or entity to whom it has disclosed the materials of the fact that the notice has been served and of the effect of this rule. That party shall also take reasonable steps to retrieve the materials disclosed." As noted in the Court's May 18, 2018 Order, Rule 1.285 sets forth a procedure for a party who receives notice that it has inadvertently received privileged materials,

and that procedure does not allow the party to ignore the requirement to return, destroy or sequester the materials claimed to be privileged.

20. However, in his response letter, also dated April 2, 2018, the Defendants' lead counsel, refused to return or destroy the handwritten answers, and indicated that intended to use them rather than sequestering them, by stating "I don't know how we can, or why we should" ignore them. Nonetheless, at the evidentiary hearing on this matter, Defendants' lead counsel stated that he sequestered the answers because he did not give them to anyone else after receiving the notice. June 7, 2018 transcript at 18-19. This Court determines, however, that he did not sequester the answers, as he utilized them, including in his arguments to this Court.

21. When asked whether, upon receiving the notice, he notified any parties to whom the handwritten answers had been disclosed, Defendants' lead counsel answered that "at some point" he told the experts, who were the only people outside of the firm who had received the copies. *Id.* at 21. He stated that he did not "recall when, but [he was] sure that [he] did." *Id.* Informing his experts "at some point" that a document provided to them was claimed to be inadvertently-disclosed, privileged materials, does not appear to comply with Rule 1.285's requirement of prompt notice.

22. At the evidentiary hearing, Defendants' lead counsel testified that one of his experts, Mr. Long, was given the handwritten interrogatory answers in November, 2017 (which is more than a year after the September 2016 date that the Defendants realized that that they had two sets of interrogatories and should have informed the Plaintiff of such). He did not state exactly when he gave the other expert a copy of the

handwritten answers, but he testified that he did not retrieve them until after this Court's May 18, 2018 Order. June 7, 2018 Transcript at 25. Thus, instead of promptly retrieving the documents upon receiving the Plaintiff's April 2, 2018 notice of assertion of privilege, as required by Rule 1.285, Defendants' lead counsel waited until after May 18, 2018, when this Court entered its order determining privilege, to retrieve the handwritten answers from Defendants' experts. *Id.* at 25.

23. Furthermore, Defendants' lead counsel acknowledged during his testimony at the August 24, 2018 hearing in this case that, as of that date, he was not certain whether a copy of the handwritten interrogatory answers had been retrieved from Dr. Corey, who had also received them from Defendants' counsel. August 24, 2018 Transcript at 20, 42-43.

24. At the evidentiary hearing, when asked if he agreed that pursuant to Rule 1.285, there was no provision for him to allow his expert to maintain possession of and rely on materials to which there is a claim of privilege, Defendant's lead counsel stated that the Plaintiff "trapped us." June 7, 2018 Transcript at 31. Defendants' lead counsel explained that he was frustrated because he was participating in a deposition of his expert for a trial that was scheduled to start in less than two weeks and was told that he could not use a document unfavorable to the Plaintiff. *Id.* at 33. He stated that his conduct "doesn't exactly comply [with Rule 1.285] – I guess if you want to parse out the 'promptly,' under the rules, that's one thing, but nevertheless, I didn't immediately seize the documents and throw them all away. We went forward with the deposition." *Id.* The Court concludes that Rule 1.285 required Defendants' lead counsel to promptly notify his expert that the Plaintiff was claiming that the handwritten answers were privileged and

inadvertently disclosed, and promptly retrieve them from him. The Court finds that Defendants' lead counsel did not do so.

25. Finally, despite having received the Plaintiff's notice of assertion of privilege on April 2, 2018, the Defendants, in their opposition to the Plaintiff's motion to disqualify defense counsel, filed on April 20, 2018, relied on the handwritten answers, directly quoting from them.

26. In sum, in the instant case, the handwritten answers inadvertently disclosed to the Defendants' counsel are highly significant, as is demonstrated by the importance placed upon them by Defendants' lead counsel. However, at the time that Defendants' counsel knew or should have known that the handwritten answers were inadvertently disclosed, they failed to disclose to the Plaintiffs that they had them, in violation of Rule 4-4.1. Instead, they waited a year and a half (from September, 2016 to March, 2018) to notify the Plaintiffs of such, in the meantime sharing the material with the other attorneys and staff in the law firm and with their experts and the Defendants. Then, after the Plaintiffs were notified that the Defendants had the handwritten answers and asked for them to be returned or destroyed, the Defendants' lead counsel was recalcitrant in doing so, refusing to return or destroy them, failing to retrieve the copies that were provided to the experts, and quoting them in a memo filed in this case, thus failing to comply with Rule 1.285.

27. Both the content of the inadvertent disclosure in this case and the actions taken by the Defendants' counsel, particularly their recalcitrance in rectifying the disclosure in accordance with the applicable rules, convince this Court that there is a possibility that an unfair informational advantage was obtained. As such, disqualification

of Defendants' counsel is warranted in this case. Disqualification of the entire firm is required. *See Atlas Air v. Greenberg Traurig, P.A.*, 997 So. 2d 1117 (Fla. 3d DCA 2008).

WHEREUPON, it is **ORDERED** and **ADJUDGED** that the Plaintiff's Motion to Disqualify Defendant's Counsel is **GRANTED**. The law firm of Shapiro, Blasi, Wasserman & Hermann, P.A., and all of the members of the firm, are disqualified from further representing the Defendants in this case.

DONE AND ORDERED in chambers, at Miami-Dade County, Florida, this 10th day of October, 2018.

)836-CA-01

ABBY CYNAMON
CIRCUIT COURT JUDGE

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