



Supreme Court of Virginia establishes test to determine whether inadvertent disclosure of a privileged document results in waiver of the privilege.

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In *Walton v. Mid-Atlantic Spine Specialists, P.C.*, ___ Va. ___ (2010) decided June 10, 2010, the Supreme Court of Virginia adopted a multi-factor analysis to determine whether a party's inadvertent disclosure of a privileged document results in waiver of the privilege. The Court determined that waiver may occur if the disclosing party failed to take reasonable measures to ensure and maintain the document's confidentiality, or to take prompt and reasonable steps to rectify the error.

Under this approach, the Court established five factors to be included in a court's consideration of waiver: (1) the reasonableness of the precautions to prevent inadvertent disclosures; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) whether the party claiming privilege has used its unavailability for misleading or otherwise improper or overreaching purposes in the litigation, making it unfair to allow the party to invoke confidentiality under the circumstances.

The Court further explained that none of these factors is dispositive and that the trial court must also consider any other factors that have a material bearing.

In *Walton*, a medical malpractice case, the defendant doctor inadvertently produced to plaintiff in discovery a letter he wrote to his attorney regarding his potential negligence in reviewing x-rays of plaintiff's injured wrist. The letter was first produced in response to a subpoena *duces tecum* issued in a worker's compensation case to defendant's medical group. Subsequently, the letter was produced to plaintiff's counsel in the malpractice case. The defendants asserted they did not learn that plaintiff was in possession of the letter until three years later when plaintiff notified them of her intention to use the letter at trial.

Following a series of hearings on a motion for a protective order and a motion *in limine*, the trial court ruled that the letter was privileged and that the privilege had not been waived and restricted questioning by plaintiff's counsel about defendant doctor's recollection of his review of the x-rays. The jury returned a defense verdict.

On appeal, having established the standards for determining whether a waiver has occurred, the Supreme Court applied the standard to the record on appeal and determined that the defendant doctor had waived the attorney-client privilege.

