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How In-House Counsel Should Handle Leaked Documents

Law360, New York (December 13, 2013, 1:09 PM ET) -- Imagine that you are the general counsel for a major U.S. corporation and you learn that an unknown source has leaked one of your company's most privileged and confidential memos to The New York Times. Worse yet, the newspaper publishes an article about a leaked memo's contents that address the heart of a massive class action your company is currently defending.

Does the unauthorized disclosure destroy the privileged nature of the memo or has your company taken sufficient steps to preserve the privilege notwithstanding the leak? If your company feels it is necessary to defend itself by publicly commenting on the article, does it run the risk of waiving privilege as to the entire memo?

Introduction

The unauthorized disclosure of internal company documents — especially documents ostensibly protected by the attorney-client and work-product privileges — can be a nightmare for in-house counsel. Although a waiver typically involves voluntarily relinquishing a known right or privilege, courts have traditionally taken an expansive view of waiver in such situations (i.e., once the cat is out of the bag they do not care how it got out and have no interest in putting it back in). A 2013 order issued in the landmark Dukes v. Wal-Mart Stores Inc. case provides an effective roadmap for how in-house counsel can best shield the company from waiver of the privileges and further disclosure of protected documents.

Factual Background

At Wal-Mart's request, the law firm of Akin Gump Straus Hauer & Feld analyzed Wal-Mart's exposure to potential lawsuits alleging gender discrimination in pay and promotions among its Wal-Mart and Sam's Club stores.[1] In a 1995 memo, Akin Gump determined that Wal-Mart was subject to hundreds of millions of dollars of exposure each year and recommended that Wal-Mart make certain changes to defend itself against such claims.[2] Wal-Mart's in-house counsel provided numbered copies to a limited set of outside counsel and certain executive-level company employees only.[3] The recipients were specifically instructed not to reproduce the privileged and highly confidential memo.[4] In 2001, six years after the memo was drafted, Betty Dukes brought the largest gender discrimination suit in history against Wal-Mart on behalf of a nationwide class of plaintiffs.[5]

In 2010, while the Dukes litigation continued onward, The New York Times obtained a copy of the memo, solicited comment from Wal-Mart and published an article titled "Lawyers Warned Wal-Mart of Risks Before Bias Suit." The memo was reportedly provided to The New York Times by "someone not

involved in the lawsuit who said that Wal-Mart had not done enough to address the issues it raised."[6] The article discussed certain contents and findings from the memo, but did not publish the memo itself or quote from it extensively.[7]

In 2011, a copy of the memo arrived at the desk of the Dukes plaintiffs' lead counsel in a brown envelope with no return address.[8] Plaintiffs' counsel observed that the memo was written by Akin Gump, directed to Wal-Mart and contained "Confidential" and "Attorney Client" markings.[9] Recognizing that the document was likely the memo described in The New York Times article, plaintiffs' counsel refrained from reading the memo further and instructed his office manager to lock the memo in a secure location.[10] A couple of days later, he wrote to counsel for Wal-Mart to disclose his receipt of the memo.[11] Wal-Mart's counsel asserted privilege and demanded its return.[12] Plaintiffs' counsel declined to return the memo and filed a motion for declaratory relief regarding whether the memo's attorney-client privilege had been waived.[13]

Attorney-Client Privilege

The attorney-client privilege "protects [from disclosure] confidential communications between attorneys and clients ... which are made for the purpose of giving legal advice."[14] The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law," and "[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[15] Attorney-client materials are "permanently protected ... from disclosure by [the client] or the legal adviser ... unless the protection [is] waived."[16] Federal common law governs a claim of privilege in federal question cases.[17]

"Courts will grant no greater protection to those who assert the privilege than their own precautions warrant."[18] The attorney-client claimant bears the initial burden of establishing the basic elements of the privilege.[19] The party seeking to establish that a document is privileged bears a significant initial burden of proof, which requires more than self-serving assertions of counsel or company representatives.[20] If that burden is met, the party seeking disclosure then has the burden to prove waiver.[21] Courts are "constrained to approach contentions that a party has waived the protections of privilege or the work product doctrine cautiously, resolving doubts against finding waiver."[22] After a prima facie case for waiver is established, the burden shifts back to the privilege's proponent to demonstrate that the privilege is still viable.[23]

In 2008, Congress amended the Federal Rules of Evidence to place limitations on waiver of the attorney-client privilege.[24] Rule 502(b), Inadvertent Disclosure, expressly states,

When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

- the disclosure is inadvertent;
- the holder of the privilege or protection took reasonable steps to prevent disclosure;
- the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(6)(5)(B).

One of the new rule's stated purposes was to "resolve some longstanding disputes in the courts"

regarding “inadvertent disclosure and subject matter waiver.”[25] The Advisory Committee notes explain that rule 502(b) was intended to resolve a three-way split among the courts on whether an inadvertent disclosure constitutes a waiver of the attorney-client privilege.[26] While “[m]ost courts find waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner,” a few courts find that a waiver does not occur absent an intentional waiver, while others find that any inadvertent disclosure — even by a third party — automatically constitutes a waiver of the privilege.[27]

The rule adopted the majority middle ground position,[28] whereby “[c]ommunications which were intended to be confidential but are intercepted despite reasonable precautions remain privileged.”[29] Under this approach, even where excerpts of a privileged and confidential document are published in a notable newspaper, publication should not constitute a waiver absent any indication that the attorney-client proponent voluntarily gave the privileged material to the newspaper.[30] Similarly, courts following the majority “middle ground” position will not find waiver where “confidential information is disclosed to a third party despite all possible precautions.”[31]

Plaintiffs’ Arguments For Waiver

Plaintiffs made three principal arguments that the privilege had been waived. They initially argued that any noncompelled disclosure waives the privilege and cited a line of cases using this “traditional” approach. For example, courts had found that only “court compelled disclosure ... or other equally extraordinary circumstances” can preserve the privilege once a document ends up in the hands of a third party”;[32] [i]f the information ends up in the hands of a third-party, courts don’t want to hear how it got there”;[33] “[o]nce in the hands of a third party, the privilege, if it ever existed, is lost”;[34] and the parties “must treat the confidentiality of attorney-client communications like jewels — if not crown jewels.”[35] Plaintiffs abandoned this argument in response to the authority cited in Wal-Mart’s response, which demonstrated that those cases applied only to inadvertent, rather than unauthorized, disclosures.

Plaintiffs next argued that Wal-Mart had waived the privilege under a totality of the circumstances test.[36] While this test technically applies to inadvertent disclosures during the course of discovery under rule 26, some courts have extended the approach to other unauthorized disclosures.[37] Under such a test, courts look to the conditions surrounding disclosure of the privileged documents, including: 1) the extent of the disclosure, 2) the reasonableness of precautions taken to prevent inadvertent disclosure, 3) the time taken to rectify the error, 4) the scope of discovery and 5) the overriding issue of fairness.[38]

Plaintiffs’ third argument, which was centered on subject-matter waiver, asserted that Wal-Mart waived any privilege by publicly commenting on the memo’s contents.[39] Subject-matter waiver generally occurs in one of two ways — implicit waiver, whereby a party relies on privileged materials for a claim or defense, or express waiver, whereby a party intentionally or unintentionally discloses privileged information to a third party.[40] Before it published the article, The New York Times contacted Wal-Mart asking for comment.[41] The article published several comments from the spokesperson:

The memo “deliberately mimicked the type of statistical analysis done by plaintiffs’ lawyers in class-actions” and that “[e]ven using that methodology, … Akin Gump did not find significant disparities between the hourly wages of men and women”;

The memo was "15 years old and ha[d] no bearing or relevance to the [Dukes case] or [Wal-Mart's] strong employment practices and diversity programs"; "confidential and privileged"; and "deeply flawed"; Wal-Mart has told its managers to promote more women and minorities; 15 percent of managers' bonuses are tied to achieving diversity goals; Women held 45.8 percent of assistant store manager jobs — a pipeline to higher-level jobs; Wal-Mart received repeated recognition for its performance on diversity in recent years; Wal-Mart uses "state-of-the-art hiring and promotional systems ... to make sure that every applicant has the opportunity to apply and be considered for any position they're qualified for and are interested in."[42]

Plaintiffs asserted that, despite Wal-Mart's insistence to both The New York Times and plaintiffs' counsel that the memo was privileged and confidential, Wal-Mart waived its privilege as to the entire document by voluntarily commenting publicly on its contents. Some courts have found this type of subject-matter waiver to occur because "it would be unfair to allow a party to disclose facts beneficial to its case, but then assert the attorney-client privilege or work-product protection in refusing to disclose facts adverse to its case."[43] Plaintiffs argued subject-matter waiver as a stand-alone reason that Wal-Mart had waived its privilege and also as a factor undermining Wal-Mart's position under the totality of the circumstances test.

Wal-Mart's Response

Wal-Mart filed a response and cross-motion to compel the immediate release of the Memo to Wal-Mart based on two fundamental arguments: the unauthorized publication of the memo did not waive privilege and the federal rules expressly reject the "crown jewels" subject-matter waiver rule.[44]

Wal-Mart distinguished the standard that courts apply to involuntary or unauthorized third-party disclosures from the "standard that some courts have applied to inadvertent disclosures by the party holding the privilege."[45] Wal-Mart argued that the "attorney-client privilege was not waived because some unknown person, without authorization from Wal-Mart, apparently transmitted the memorandum to The New York Times." Quoting Pacific Pictures Corp. v. U.S. District Court, 679 F.3d 1121, 1130 (9th Cir. 2012), Wal-Mart argued, "[i]t is axiomatic that 'involuntary disclosures do not automatically waive the attorney-client privilege.'"[46] Pointing to two factually similar district court cases — Resolution Trust Corp. v. Dean and In re Dayco Corp Derivatives Security Litigation — Wal-Mart further noted that "[d]isclosure of privileged information to the press without authorization is by definition an 'involuntary disclosure.'"[47]

In response to plaintiffs' assertion that The New York Times article constituted an automatic subject-matter waiver, Wal-Mart noted that rule 502(a) "rejects the result in In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject-matter waiver," i.e., the "crown jewels" rule.[48] Moreover, the Ninth Circuit has not embraced the traditional minority rule that any non-compelled disclosure waives the privilege.[49] Rather, most courts have rejected this line of cases as an "extreme position."[50]

The Court's Ruling

Attorney-client privilege is not automatically waived by disclosure.

Relying on the factually similar Dayco case, the court determined that the "disclosures to the New York Times and Plaintiffs were unauthorized and involuntary and thus did not waive Wal-Mart's attorney-client privilege in the memo."[51] The court also disagreed with plaintiffs' contention that the court

"should infer from the disclosures themselves that Wal-Mart 'has not safeguarded its attorney-client communication like "crown-jewels."'"[52] Doing so, the court explained that Federal Rule of Evidence 502(a) rejected the result in In re Sealed Case and quoted the Advisory Committee's notes for the proposition that "an inadvertent disclosure of protected information can never result in a subject matter waiver" under the rule.[53]

Rather, the court found that, like the attorney-client claimant in Resolution Trust, Wal-Mart had submitted sworn evidence of its "extensive efforts" to maintain the memo's confidentiality, and the "memo was so distinctively marked as confidential and attorney-client privileged" that plaintiffs' counsel "did not read past the top of the first page."[54] The court further reasoned that plaintiffs' reliance on Federal Election Communication v. Christian Coal, 178 F.R.D. 61, order aff'd in part, modified in part, 178 F.R.D. 456 (E.D. Va. 1998), was "misplaced," because the disclosures at issue there were not unauthorized.[55]

Wal-Mart's comments did not waive privilege as to the entire memo

The court then addressed plaintiffs' contention that Wal-Mart's comments to The New York Times had waived its privilege as to the subject matter of the entire memo. Although the court determined that certain of Wal-Mart's public comments to The New York Times regarding Akin Gump's methodology were an intentional disclosure of privileged information,[56] the court ultimately determined that Wal-Mart had not, as plaintiffs contended, waived its privilege as to the subject matter of the entire memo.[57] Because Wal-Mart was not relying on the memo or its contents in the Dukes litigation, the court analyzed the effect of Wal-Mart's express waiver of Akin Gump's methodology to determine the waiver's scope.[58]

The court first cited Federal Rule of Evidence 502(a), which addresses the scope of waiver:

When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication [here, the entire memo] or information in a federal proceeding only if:

- The waiver is intentional;
- The disclosed and undisclosed communications or information concern the same subject matter; and
- They ought in fairness to be considered together.[59]

The fairness requirement "aims 'to prevent prejudice to a party and distortion of the judicial process that may be caused by the privilege-holder's selective disclosure during litigation of otherwise privileged information. Under the doctrine, the client alone controls the privilege and may or may not choose to divulge his own secrets."[60]

Rule 502(a) is technically limited to disclosures in a federal proceeding or to a federal office or agency. The court, however, found persuasive WI-LAN Inc. v. Kilpatrick Townsend & Stockton LLP, 684 F.3d 1364, 1369 (Fed. Cir. 2012), where the court determined after an exhaustive review of case law that the Ninth Circuit would use the fairness balancing test in "determining the scope of privilege waivers arising from extrajudicial express disclosures."[61]

"[F]airness must be the touchstone in determining whether Wal-Mart's disclosure of certain findings in the memo compels the disclosure of the entire memo."[62] To evaluate fairness, the court turned to In re von Bulow, 828 F.2d 94, 103 (2d Cir. 1987), where the Second Circuit held that "where ... disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed."[63]

Because Wal-Mart had not attempted to use the memo in the Dukes litigation, the court found no unfairness to the plaintiffs. "[D]isclosures made in public rather than in court — even if selective — create no risk of legal prejudice until put at issue in the litigation by the privilege holder."[64]

The court concluded, "[n]either the unauthorized disclosures of the memo to The New York Times and plaintiffs' attorneys, nor Wal-Mart's subsequent comments to The New York Times, waived Wal-Mart's privilege over the memo."[65] As a result, the court ordered plaintiffs to relinquish their copy of the memo to Wal-Mart.[66]

Lessons Learned

A different ruling could have had devastating consequences for Wal-Mart in the decertified Dukes litigation. What steps can you take right now to ensure that your company's critical privileged and confidential documents are protected?

Clearly, the perfunctory attorney-client privilege or attorney work product confidentiality stamp alone would not have sufficed to preserve the memo's privileged status in the face of the unauthorized disclosure. However, a number of lessons can be gleaned from the Dukes court's analysis.

Conspicuously mark memos as privileged and confidential.

When plaintiffs' counsel found the memo on his desk, he did not read past the top of the first page because the memo was so distinctively marked as confidential and attorney-client privileged; "The cover of the document bears the Akin Gump firm name and contains the words PRIVILEGED & CONFIDENTIAL ... DO NOT REPRODUCE WITHOUT THE EXPRESS CONSENT OF LESTER C. NAIL" in large block letters; The first page inside the cover is marked in bold letters "Privileged and Confidential — Do Not Reproduce"; and "Each subsequent page of the 42-page document repeats in bold type, at the bottom of the page, 'Privileged & Confidential,' and 'Do not reproduce without the express consent of Lester C. Nail.'"

Maintain memos in a secure location.

Wal-Mart designated an in-house gatekeeper responsible for securing and protecting the memo; when that individual left the company, a replacement gatekeeper was assigned; the memo was kept in a locked file cabinet in Wal-Mart's legal department; and electronic copies were protected by the legal department's separate firewall.

Maintain tight control of the distribution for and access to the memos.

Only five copies were initially produced — each copy was individually numbered on the cover as "Copy 1 of 5," "2 of 5," etc.; copies were distributed on a need-to-know basis only — Wal-Mart limited copies to "a very limited set of outside counsel, select in-house attorneys and certain executive-level Wal-Mart employees"; and everyone who received the memo was advised that the document was "privileged and highly confidential, and that it should not be forwarded."

Submit affidavits in support of reasonable precautions.

Wal-Mart submitted affidavits from current and former associate general counsel for the litigation division attesting to their efforts to tightly control distribution of and access to the memo.[67]

Execute a quick and definitive response to unauthorized leaks.

Wal-Mart immediately advised The New York Times that the memo was privileged and confidential and requested its return; Wal-Mart endangered its privilege by commenting publicly on the memo. Tread very carefully if you are inclined to make public comments on the contents of a privileged and confidential document — you will expressly waive privilege of the contents discussed, and you could risk subject-matter waiver of the entire document; upon learning that plaintiffs' counsel had received a copy of the memo, Wal-Mart immediately reasserted privilege and requested its immediate return; and Wal-Mart then negotiated an agreed order to secure and protect the memo while the parties litigated the privilege issues.

Experts in corporate investigations and compliance offer additional strategies for establishing and preserving the privilege of corporate investigation documents:

- Management should document up front (in an engagement letter with outside counsel or board of directors minutes, etc.) that the purpose of the investigation is to provide legal advice;

- Prepare from the beginning for the possibility that investigation documents may be disclosed — think carefully about what is reduced to writing and consider limiting to the facts;

- Store privileged documents separately from non-privileged documents; and

- Corporate investigative counsel must ensure that unambiguous Upjohn[68] warnings are given before interviewing corporate employees.[69]

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[1] Def's Resp. to Pl.'s Mot. For Declaratory Relief and Cross-Mot. to Compel Delivery of Privileged

Memo. (“Def.’s Mot.”) at 2.

[2] Stephen Greenhouse, Report Warned Wal-Mart of Risks Before Bias Suit, N.Y. Times, June 3, 2010, at 1-2.

[3] Order Re: the Akin Gump Memo. (“Order”) at 5; Declaration of Marshall S. Ney (“Ney Declaration”) in Support of Def.’s Resp. to Pl.’s Mot. For Declaratory Relief and Cross-Mot. to Compel Delivery of Privileged Memo.

[4] Order at 5; Ney Declaration.

[5] Stephen Greenhouse, Report Warned Wal-Mart of Risks Before Bias Suit, N.Y. Times, June 3, 2010, at 1.

[6] Pl.’s Mot. for Declaratory Relief Concerning the Akin Gump Memo (“Pl.’s Mot.”) at 4-5.

[7] Def’s Mot. at 3.

[8] Declaration of Joseph M. Sellers (“Sellers Declaration”) in Support of Pl.’s Mot. For Declaratory Judgment Concerning the Akin Gump Memo at 2.

[9] Sellers Declaration at 2.

[10] Id

[11] E-mail from Joseph M. Sellers to Theodore J. Boutrous, Jr. (Feb. 16, 2011) (Exhibit 6 to Pl.’s Mot. For Declaratory Relief Concerning Akin Gump Memo.

[12] Letter from Theodore J. Boutrous, Jr., to Joseph M. Sellers (Feb. 17, 2011) (Exhibit A to Declaration of Catherine A. Conway in Support of Def.’s Resp. to Pl.’s Mot. For Declaratory Relief).

[13] Def’s Mot. at 5-6.

[14] United States v. Richey, 632 F. 3d 559, 566 (9th Cir. 2011); see also United States v. Graf, 610 F. 3d 1148, 1156 (9th Cir. 2010).

[15] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[16] Graf, 610 F. 3d at 1156.

[17] Fed. R. Evid. 501; see also Weil v. Inv./Indicators, Research and Mgmt., Inc. 647 F. 2d 18, 24 (9th Cir. 1981).

[18] United Mine Workers of Am. Int’l Union, 145 F.R.D. 3, 6 (D.C. Dist. 1992).

[19] Id.

[20] See United Mine Workers, 145 F.R.D. at 6 (holding that a party’s submission of affidavits from its general counsel and senior executives to whom the confidential memoranda were sent, stating that

they did not authorize disclosure of the memoranda to third parties, were insufficient to demonstrate that the party took reasonable precautions to safeguard the documents).

[21] Genentech, Inc. v. Insmed Inc., 442 F. Supp. 2d 838, 840 n.2 (N.D. Cal. 2006) (quoting Paul R. Rice, Attorney–Client Privilege in the United States § 9:20, at 52-53 (2d ed.1999)); see also United States v. Chevron Corp., 1996 U.S. Dist. LEXIS 8646, at *11 (N.D. Cal. 1996) ("party seeking discovery . . . bear[s] the burden of production on the issue of waiver") (emphasis omitted).

[22] GTE Directories Serv. Corp. v. Pac. Bell Directory, 135 F.R.D. 187, 192 (N.D. Cal. 1991); see also Moore's Fed. Prac. 3D §26.49[5][e] (noting that waivers normally require an "intentional or knowing disavowal of a right," although "inadvertent disclosures are, by definition, unintentional." (internal citations omitted).

[23] In re Dayco Corp. Derivative Sec. Litig., 102 F.R.D 468, 470 (S.D. Ohio 1984) (quoting Weinstein & Berger, Weinstein's Evidence ¶ 503(a)(4)[01] at 503-31 (1982 ed.)).

[24] Fed. R. Evid. 502.

[25] Fed. R. Evid. 502, Adv. Comm. Notes (2011 Amd.).

[26] Fed. R. Evid. 502(b), Adv. Comm. Notes (2011 Amd.).

[27] Id.

[28] Id.; see also Weinstein & Berger, Weinstein's Evidence ¶ 502.09 nn. 1-3 (describing the split as the "liberal view," "strict view," and "compromise position").

[29] In re Dayco, 102 F.R.D at 470 (quoting Weinstein & Berger, Weinstein's Evidence ¶ 503(a)(4)[01] at 503-31 (1982 ed.)).

[30] Id. (determining that the publication of a privileged diary, which was prepared at the direction of corporate counsel, in the Dayton Daily News did not constitute a waiver).

[31] United Mine Workers, 145 F.R.D. at 6.

[32] United Mine Workers, 145 F.R.D. at 6 (quoting In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989)).

[33] Fed. Election Comm'n v. Christian Coal., 178 F.R.D. 61, 71-72 order aff'd in part, modified in part, 178 F.R.D. (E.D. Va. 1998)

[34] Id.

[35] United Mine Workers, 145 F.R.D. at 6 (quoting In Re Sealed Case, 877 F. 2d 976, 980 (D.C. Cir. 1989)).

[36] Pl.'s Mot. at 7-12.

[37] See James M. Fischer, Ethically Handling the Receipt of Possibly Privileged Information, 1 St. Mary's J. Legal Mal. & Ethics 200, 223-24 (2011).

[38] Pl.'s Mot. at 7-12.

[39] See, e.g., Pl.'s Reply in Support of Mot. For Declaratory Relief Concerning Akin Gump Memo ("Pl.'s Reply") at 2-5.

[40] Order at 10 (internal citations omitted).

[41] Order at 2.

[42] Order at 2-3.

[43] Server Tech., Inc. v. Am. Power Conversion Corp., 3:06-CV-00698-LRH, 2011 WL 1447620, at *5 (D. Nev. Apr. 14, 2011).

[44] Def.'s Mot.

[45] Def.'s Mot. at 2

[46] Def.'s Mot. at 7 (citing Pac. Pictures Corp v. United States Dist. Court, 679 F. 3d at 1130; see also United States v. De La Jara, 973 F. 2d 746 (9th Cir. 1992)).

[47] Def.'s Mot. at 7 (citing Resolution Trust Corp. v. Dean, 813 F. Supp. 1426, 1430 (D. Ariz. 1993) (where leak of privileged memorandum to newspaper was "inexplicable," the plaintiff "did not voluntarily waive any attorney-client privilege it would have possessed"); In re Dayco Corp. Derivatives Sec. Litig., 102 F.R.D. 468, 470 (S.D. Ohio 1984) ("[a]bsent any indication that [privilege-holders] voluntarily gave the [document] to the [newspaper], publication of excerpts of same should not be considered a waiver of the privilege")).

[48] Def.'s Mot. at 8 (citing Fed. R. Evid. 502(a), Adv. Comm. Notes (2011 Amd.); 6 James Wm. Moore et al., Moore's Federal Practice § 26.49[5][e] (3d ed. 2012)).

[49] Def.'s Mot. at 8.

[50] Id. (quoting James M. Fischer, Ethically Handling the Receipt of Possibly Privileged Information, 1 St. Mary's J. Legal Mal. & Ethics 200, 222-25 & n.94 (2011)).

[51] Order at 8 (emphasis added).

[52] Order at 8.

[53] Id. n.2.

[54] Order at 9.

[55] Id. at 9-10 (noting that the Federal Election court itself quoted Dayco's determination that "when a company carefully protects its privileged documents but they are stolen or otherwise misappropriated and then revealed, some courts have held that this does not constitute a waiver of the attorney-client privilege.").

[56] Order at 12.

[57] Order at 14.

[58] Order at 12-13.

[59] Order at 13 (quoting Fed. R. Evid. 502(a) and Hernandez v. Tanninen, 604 F. 3d 1095, 1100 (9th Cir. 2010) ("stating that courts apply a fairness balancing test to determine the scope of a waiver of privilege)).

[60] Order at 13 (quoting In re von Bulow, 828 F.2d 94, 101 (2d Cir. 1987)).

[61] Order at 13 (citing 684 F.3d at 1369 (noting that otherwise, fairness balancing would apply to waivers made in litigation but not to extrajudicial waivers)).

[62] Order at 14.

[63] Id.

[64] Id. (quoting In re von Bulow, 828 F.2d at 103)).

[65] Id.

[66] Id.

[67] Simply stamping "Do not copy or further distribute" on the first page of a confidential memoranda is not sufficient. United Mine Workers, 145 F.R.D. at 6 (holding that an attorney-client proponent did not meet its burden to show that it had taken all reasonable precautions where affidavits from its general counsel and senior executives to whom the memoranda were sent did not state that they "never copied or distributed or authorized the copying and distribution of these documents within the firm despite the fact that each memorandum is clearly stamped 'Do not copy or further distribute' on its first page" and that the propend failed to provide affidavits from three prior senior executives who had received the confidential memoranda while they were still employed with the company).

[68] Carol A. Poindexter, Recent Developments in Corporate "Cooperation" Credit: Opening Pandora's Box or Slamming the Privilege Waiver Lid Shut?, 22 No. 3 Health Law. 48, 49 (2010) (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

[69] Id. at (addressing privilege waiver in the context of corporate "cooperation" credits in government-agency investigations).