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COURT OF APPEALS  
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08 JUN -2 AM 9:56

NO. 36218-0-II

STATE OF WASHINGTON  
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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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DAVID B. SITTERSON, d.b.s.,  
"DBS FINANCIAL SERVICES",

Plaintiff/Appellant/Cross-Respondent

v.

EVERGREEN SCHOOL DISTRICT NO. 114,

Defendants/Respondent/Cross-Appellant

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REPLY BRIEF ON CROSS-APPEAL

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## I. REPLY ON CROSS-APPEAL

The central issue raised on cross-appeal is whether Evergreen's inadvertent disclosure of privileged documents waived the privilege. The parties agree that there is no controlling Washington authority, and that courts elsewhere are divided on the issues. In its opening brief, Evergreen explains why this court should follow the lead of those courts that have concluded that the inadvertent production of a privileged document never waives the privilege. Sitterson responds that this court should adopt a balancing test for waiver, and then submits that the application of that test favors his client. Evergreen's opening brief or cross-appeal explains why application of that test favors a finding of non-waiver under the circumstances of this case.

Evergreen's opening brief, and Sitterson's answering brief, paint a comprehensive picture of the various tests for waiver, and the rationales that have persuaded courts to favor each. This brief will not revisit that debate at length, but offers this response to one of Sitterson's core themes.

Sitterson contends that the balancing test best comports with the adoption of RPC 4.4(b). That rule requires an attorney

who inadvertently obtains a privileged document to promptly inform the adversary of the disclosure. Although he waited three years to disclose that he had received privileged documents, Sitterson contends that prompt notice of an inadvertent disclosure facilitates application of the balancing test for waiver. Evergreen agrees. However, Sitterson contends that the prompt notice required by RPC 4.4(b) would be meaningless unless this court adopts the balancing test. That is not so.

The interests of justice and fairness are always served by an adversary's prompt notice of having received a privileged communication. That disclosure will alert opposing counsel to a potential leak that can be plugged, or document security flaw that can be fixed. Prompt notice will also allow the parties to resolve any questions concerning whether the disclosure was intended, or whether a disclosed communication was truly privileged. If a document is privileged, the responsibility for maintaining the future security of the document rests with the attorney who inadvertently produced it. Prompt notice of the disclosure will facilitate return of the privileged document to its rightful guardian. Finally, prompt notice of the disclosure will also discourage intentional, or

unintentional, misuse of privileged information by the unintended recipient. Thus, RPC 4.4(b) would not, as Sitterson contends, be meaningless if this court rejected the balancing test.

Should this court nevertheless decide to apply a balancing test, Sitterson proposed application of that test is fundamentally flawed. This brief addresses the deficiencies in Sitterson's argument. If this court concludes that there was no waiver, Sitterson also asserts that Evergreen failed to establish prejudice. This brief also addresses that erroneous contention, and briefly revisits the discussion concerning the standard of review.

## **II. APPLYING THE BALANCING TEST**

Sitterson improperly analyzes the balancing test factors. A correct analysis of those five factors shows that Evergreen did not waive the attorney-client privilege.

### **A. Precautions**

One of the factors considered under the balancing test is whether the disclosing party had precautions in place to prevent the disclosure. If disclosure occurred, the precautions, whatever they may have been, failed. Thus the balancing test must focus on the abstract quality of the precautions, not on their efficacy.

Sitterson contends that Evergreen failed to show that it took any precautions to prevent the disclosure. That is true, but not surprising considering the three-year delay between the time Sitterson received the privileged documents and the time that Sitterson revealed that he possessed them. Because Sitterson did not promptly inform Evergreen of the inadvertent production, Evergreen could not retrace its steps to reconstruct how the documents were being managed and safeguarded.

As fully explained in Evergreen's opening brief, the balancing test imposes onerous and unfair procedural and evidentiary burdens because a person who inadvertently produces a privileged document typically will not discover that until the adversary reveals the disclosure. By that time, it may be impossible to reconstruct how the inadvertent disclosure occurred, or precisely what document controls were in use at the time of the disclosure. If the adversary reveals the disclosure shortly before trial, as occurred in this case, the press of other required case preparation activities may also impede development of the record required to perform a meaningful balancing test.

Even if the court is inclined to adopt the balancing test, this factor should not be weighed against the disclosing party unless the non-disclosing party promptly revealed the inadvertence. That way, the non-disclosing party cannot reap the benefit of delayed revelation of the disclosure .

Courts elsewhere have concluded that an attorney has an implied ethical obligation to promptly disclose the inadvertent receipt of a privileged document, and that the breach of that duty warrants harsh sanctions. In *Rico v. Mitsubishi Motors Corp.*, 42 Cal.4th 807, 171 P.3d 1092, 68 Cal.Rptr.3d 758 (2007), the California Supreme Court concluded that an attorney who does not promptly report receiving an inadvertently produced privileged document should be disqualified from continuing to represent the client.

Sitterson's counsel waited three years to disclose that he had inadvertently received privileged documents. Nevertheless, Sitterson contends that Evergreen should be penalized for the inability to offer evidence of what happened three years before. To the contrary, because Sitterson did not promptly disclose his receipt of inadvertently produced documents, and thereby

prevented Evergreen from proving its precautions and safeguards, this factor of the balancing test must be weighed against Sitterson.

**B. Promptness**

The balancing test also considers whether the disclosing party acted promptly to recover the privileged documents. Sitterson contends this factor weighs in his favor because Evergreen waited three years to claw back the documents.

This argument assumes that Evergreen was aware of the inadvertent disclosure when it occurred. There is no evidence of that. Rather, the record established that Evergreen did not discover the inadvertent disclosure until Sitterson identified the privileged documents on the exhibit list he produced shortly before trial. Sitterson does not, and cannot, assert that Evergreen failed to act promptly to claw back the documents after that exhibit list was produced.

Sitterson argues that a delay in discovering an inadvertent disclosure is equivalent to a delay in acting to claw back the documents. None of the courts that have adopted the balancing test have so held, and it would be manifestly unfair and unreasonable to do so. That would encourage the recipient of the

inadvertently produced document to conceal the disclosure for as long as possible, and would reward that deception. That would also place an obligation on attorneys to continually revisit and audit document production, thereby wasting attorney resources at the client's expense. It also might not be possible for an attorney to determine if a document was inadvertently produced. If the attorney's only copy of a privileged document was sent to the opponent's attorney, the disclosing party might only discover the disclosure when it is revealed by the recipient of the privileged document.

To encourage attorneys to comply with their express and implied ethical obligations to reveal the receipt of a privileged document, this element of the balancing test must focus on delay after discovery of the inadvertent disclosure. Conversely, delay in discovery is of no importance. There is no evidence that Evergreen discovered the inadvertent disclosure before Sitterson produced his exhibit list. Because Evergreen acted promptly to claw back the privileged documents after that discovery, this factor also weighs in Evergreen's favor.

**C. Scope**

The scope of discovery also bears on whether there has been a waiver. In a discovery intensive case, inadvertent disclosure may be more justifiable than in a less discovery intensive case.

Sitterson contends that this factor weighs in favor of finding a waiver because Evergreen only produced 439 pages of documents. That is not a substantial number. However, the intensity of document production cannot be gauged solely by the number of documents produced. It is a rare case that a party responding to a document request has all of the responsive documents in a single file maintained by a single witness. It is much more common for responsive documents to be located in multiple files, maintained by numerous witnesses. It is also common for responsive documents to be intermingled with non-responsive documents, and with privileged documents. Thus, the intensity of document production also depends on the number of files that must be reviewed, the volume of documents in those files, and the number of witnesses who maintained those files.

Here again, Sitterson's three-year delay in disclosing that he had obtained privileged documents prevented Evergreen from reconstructing, and relating to the court, the efforts required to compile the 439 pages of documents that were produced. The intensity, and timing, of those efforts may have revealed reasons for the inadvertent production.

Just as Sitterson's delayed revelation of its receipt of the privileged documents prevented Evergreen from reconstructing in document safeguards, that delay prevented Evergreen from reconstructing the document compilation process. That being so, Sitterson should not be allowed to capitalize on the delay by claiming that the discovery burdens in this case were minimal. To the contrary, because Sitterson's delay prevented a reconstruction of the discovery process, the scale on this factor tips in Evergreen's favor.

**D. Extent**

The extent of a disclosure is the next factor to weigh in the balancing test. Sitterson contends that extent is determined by comparing the number of privileged documents that were disclosed with the number of privileged documents that remained concealed.

He offers no supporting authority for this proposition, or any supporting rationale.

If Sitterson's contention were correct, the application of the balancing test would require a trial judge to conduct an *in camera* review of the files of the inadvertent producer to determine what proportion of privileged documents were revealed. That process would place an undue burden on trial judges, and would preclude the creation of a meaningful record for appellate review. If the party that inadvertently produced a document disagreed with a trial judge's count of privileged documents, or disagreed with a trial judge's assessment of whether a non-disclosed document was privileged, there would be no way to dispute that on appeal without sealing the attorney file and sending it to the appellate court to conduct its own *in camera* review. Also, the party that received a privileged document would have no way to dispute the trial judge's assessment of how many non-privileged documents remained in the file of the inadvertent producer, because those documents would remain privileged and beyond the eyes of opposing counsel.

This unworkable system of trial court and appellate review is not part of the balancing test. The extent of a disclosure is not

gauged by the proportion of privileged documents produced. Rather, the extent of a disclosure is gauged by the number of people who are given access to the privileged documents. As the audience broadens, an assertion that the disclosure was inadvertent becomes less credible. Likewise, as the audience expands, it becomes less likely that the harm of the disclosure can be mitigated by allowing the disclosing party to reclaim the privilege. Conversely, if the disclosure is limited to one or a few, this factor weighs in favor of a finding of inadvertence, and of protecting the privilege.

Evergreen only disclosed the privileged documents to Sitterson. That being so, this factor weighs in Evergreen's favor.

**E. Fairness**

The trial court concluded that it would not be fair to Sitterson to exclude the privileged documents because Sitterson claims to have built his case around those documents. The court reasoned that it was simply too close to trial to require Sitterson to regroup and reorganize. Of course, the exigency was created wholly by Sitterson. If he had disclosed the inadvertent production three years earlier, the trial court would not have given any weight to the

press of the trial date.

For the reasons previously explained, a party who inadvertently receives a privileged document should not benefit from delayed disclosure of that event. Because Sitterson created the exigency that lead the trial court to conclude that it would be unfair for Evergreen to claim the privilege, the fairness element of the balancing test does not weigh in Sitterson's favor.

### **III. PREJUDICE**

In its opening brief, Evergreen explained that the privileged documents were not shown to any witness during the trial. That being so, Sitterson would not have had to restructure his direct or cross-examination of any witness had the trial court sustained Evergreen's objection to admission of the privileged documents. Evergreen made this point to refute Sitterson's assertion that he could not have proceeded to trial without those documents.

Contrary to Sitterson's assertion, Evergreen never minimized the importance of the documents. Sitterson showed the privileged documents to the jury, and used them to support his argument that Evergreen's defenses were fabricated. The trial court observed, and Sitterson conceded, that the documents were devastating to

Evergreen's case. Their potential impact may not have been clear to Evergreen's trial counsel before the case began. But their potential impact was clear to the judge and to Sitterson's counsel, and became clear to Evergreen's counsel. It is difficult to envision a more devastating item of evidence than a letter from opposing counsel that corroborates the opponents theory of the case.

Although Sitterson could have tried the same case without the privileged documents, the admission of those documents eviscerated Evergreen's defenses. That, under any test, is prejudice.

Sitterson also contends that the privileged documents were not prejudicial because they were cumulative of other evidence. Evidence is cumulative when the same facts are established by other evidence. *Bond v. Wiegardt*, 36 Wn.2d 41, 55, 216 P.2d 196 (1950). The privileged documents revealed the opinions and mental impressions of Evergreen's attorney. Because there was no other evidence of those opinions and impressions, the privileged documents were not cumulative.

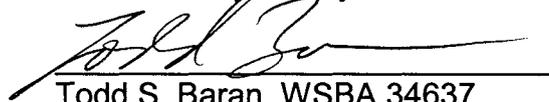
#### IV. STANDARD OF REVIEW

The parties agree that a *de novo* standard of review applies to the trial court's determination that a balancing test should be used to determine waiver. Ordinarily, a court's application of an evidentiary rule is reviewed for an abuse of discretion. However, the determination whether the trial court weighed the correct factors when applying the balancing test would also be subject to *de novo* review. As explained above, the trial court failed to consider the impact that Sitterson's delayed notice of the inadvertent disclosure had on the application of the balancing test. That was a legal error, that warrants a remand for reconsideration if this court concludes that the balancing test should be used to determine waiver.

#### V. CONCLUSION

The court should affirm on the appeal, and reverse and remand this case for a new trial on the cross-appeal.

DATED this 29<sup>th</sup> day of May, 2008.



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**CERTIFICATE OF SERVICE**

I hereby certify that I served the (1) REPLY BRIEF ON CROSS-APPEAL on:

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