

Utah Bar. JOURNAL



Volume 30 No. 4
Jul/Aug 2017

Fragile Contents: Dropping the Box Can Waive Privileges; Opening the Box Can Get You Sanctioned

by Keith A. Call

The Virginia federal district court just issued a decision that should make every litigator shiver. The court ruled that a seemingly innocent mistake when using a file sharing site waived the attorney-client privilege and work-product protection. At the same time, the court sanctioned the receiving party for the way it handled the now unprotected material. *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, No. 1:15CV00057, 2017 WL 1041600, at *8 (W.D. Va. Feb. 9, 2017). This case provides a warning to all attorneys who handle electronically stored information (ESI).

"Innocent" Mistake

When the Holding Funeral Home in Castlewood, Virginia, burned down, Harleysville Insurance Company suspected arson. *Id.* at *1. To further the investigation, a Harleysville agent sent a video of the fire to the National Insurance Crime Bureau (NICB). *Id.* It delivered the video by uploading it to a cloud storage and file sharing service operated by Box, Inc. (the Box Site). *Id.* On September 22, 2015, the Harleysville agent emailed a hyperlink to the video to an NICB investigator (the September 22 email), who was then able to view and download the video. *Id.* The Box Site was not password protected. *Id.*

Seven months later, a Harleysville agent used the same Box Site to transfer the entire claims file to its outside counsel. *Id.* at *2. A few weeks after that, lawyers for the Funeral Home issued a subpoena to NICB, requesting NICB's entire file. *Id.* In response, NICB produced all documents it had received from Harleysville, including a copy of the September 22 email that contained the hyperlink to the Box Site. Funeral Home's counsel checked out the hyperlink, which now contained Harleysville's entire claims file. *Id.* Funeral Home's counsel downloaded and reviewed the entire file without notifying Harleysville or its counsel. *Id.*

Privilege Waived

Harleysville's counsel filed a motion to disqualify Funeral Home's counsel. *Id.* The court ruled that Harleysville had waived any attorney-client privilege or work-product protection that had attached to the file. *Id.* The court reasoned that Harleysville had taken no precautions to prevent the unwanted disclosure. *Id.* at *3. Rather, Harleysville knowingly uploaded the claims file to a folder that was accessible to anyone with access to the internet. *Id.* The court rules this was not an "inadvertent" disclosure. *Id.* The court was especially critical of Harleysville's failure to use password protection. *Id.* The court described this as the "cyber world equivalent of leaving its claims file on a bench in the public square and telling its counsel where they could find it." *Id.* at *5.

This case demonstrates how easy it is to waive privileges when dealing with electronic information. Harleysville's counsel never dreamed that its innocent email containing the hyperlink would, many months later, somehow find its way into its adversary's hands. And at the time Harleysville uploaded its claims file to the Box Site, it was certainly not thinking about the poisonous email it had "innocently" sent several months earlier. Harleysville and its counsel also overestimated the privacy attached to the Box Site.

There is at least one simple lesson here: Never put privileged material on any cloud storage or file sharing site without using

KEITH A. CALL is a shareholder at Snow Christensen & Martineau, where his practice includes professional liability defense, IP and technology litigation, and general commercial litigation.



appropriate passwords or other privacy protection.

Sanctions Issued

Funeral Home's counsel did not get away unscathed. Even though Harleysville had waived any privilege, the court still sanctioned Funeral Home's counsel for mishandling the information. *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, No. 1:15CV00057, 2017 WL 1041600, at *8 (W.D. Va. Feb. 9, 2017).

Harleysville's September 22 email contained a confidentiality notice, similar to boilerplate notices most sending attorneys now use on their emails—and most receiving parties completely ignore. The notice stated:

CONFIDENTIALITY NOTICE: This e-mail contains information that is privileged and confidential, and subject to legal restrictions and penalties regarding its unauthorized disclosure or other use. You are prohibited from copying, distributing or otherwise using this information if you are not the intended recipient. If you received this e-mail in error, please notify me immediately by return e-mail, and delete this e-mail from your system.

Id. at *1.

The court stated that this notice gave Funeral Home's counsel adequate notice that Harleysville was asserting privilege. *Id.* at *8. “[B]y using the hyperlink contained in the email also containing the Confidentiality Notice to access the Box Site, defense counsel should have realized that the Box Site might contain privileged or protected information.” *Id.* The court concluded that the receiving counsel should have contacted Harleysville's counsel and revealed that it had access to this information. *Id.* They also should have asked the court to decide the privilege issue before making any use of the information. *Id.* It was not enough that Funeral Home's counsel had called the Virginia state bar ethics hotline for advice. The court seemed to be on the edge of disqualifying Funeral Home's counsel but ultimately imposed costs as a sanction, along with an unflattering written decision. *Id.*

The lesson here is that lawyers should notify opposing counsel if there is any doubt about whether documents were inadvertently produced. It is much better to raise the issue and involve the court if necessary, rather than risk sanctions. Moreover, Utah lawyers must comply with Utah Rule of Professional Conduct 4.4(b), which states, “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 shall promptly notify the sender.”

Stay Tuned

In a future installment of this column, I will address a recent ethics opinion that also addresses a lawyer's duties when handling ESI. This landscape changes fast, so lawyers must pay attention to these evolving issues.

Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the author.