

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD J. HOLLAND, JR,

Plaintiff-Appellee/Cross-Appellant,

v

THE GORDY COMPANY, MOTOWN RECORD CORPORATION, JOBETE MUSIC COMPANY, INC., BERRY GORDY, JR., BACH LIBERMAN WAREHOUSE ASSOCIATES, STONE DIAMOND MUSIC CORPORATION, ROBERT L. GORDY, ESTER G. EDWARDS, LESTER SILL, FRANK FERENC BANYAI, VINCENT LOUIS PERRONE, ROBERT CRAIG ROSENTHAL, and ERLINDA ANN BARRIOS,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED

April 29, 2003

No. 231183

Wayne Circuit Court

LC No. 92-233992-CK

BRIAN HOLLAND,

Plaintiff-Appellee/Cross-Appellant,

v

JOBETE MUSIC COMPANY, THE GORDY COMPANY, BERRY GORDY, ROBERT L. GORDY, JR., ESTHER G. EDWARDS, ERLINDA ANN BARRIOS, STONE DIAMOND MUSIC CORPORATION, and VINCENT LOUIS PERRONE,

Defendants-Appellants/Cross-Appellees,

No. 231184

Wayne Circuit Court

LC No. 93-300180-CK

and

SIDNEY NOVECK and SIDNEY NOVECK & COMPANY,

Defendants.

LAMONT H. DOZIER and OCTOPODA, INC.,

Plaintiffs-Appellees/Cross-
Appellants,

v

No. 231185
Wayne Circuit Court
LC No. 92-235544-CK

JOBETE MUSIC COMPANY, INC., THEE
GORDY COMPANY, BERRY GORDY, JR.,
ROBERT L. GORDY, ESTHER G. EDWARDS,
STONE DIAMOND MUSIC CORPORATION,
and, VINCENT LOUIS PERRONE,

Defendants-Appellants/Cross-
Appellees,

and

SIDNEY NOVECK and SIDNEY NOVECK &
COMPANY,

Defendants.¹

Before: O'Connell, P.J., and Fitzgerald and Murray, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's order denying their motion for disqualification of plaintiffs' attorneys.² Plaintiffs each cross-appeal from the trial court's ruling denying defendants' motion for disqualification and also from the trial court's order denying their motion for entry of default judgment against defendants. We affirm in all respects.

I. Introduction

Unfortunately, the subject of this appeal does not concern the merits of this case. Rather, the issues raised in the instant appeal concern professional ethics issues surrounding plaintiffs'

¹ Because Sidney Noveck and Sidney Noveck & Company are not parties to this appeal, the term "defendants" refers only to defendants-appellants.

² For ease of reference and unless otherwise noted, we will refer to "plaintiffs" and "defendants" collectively in these consolidated cases.

retention of defendants' litigation files that were allegedly inadvertently produced during a formal discovery request. The underlying suits arise from song writing contracts entered into by plaintiffs with defendants. Plaintiffs allege that defendants defrauded them of royalties generated from songs plaintiffs wrote. These suits were filed in 1992 and 1993 and have required almost a decade of litigation.

At issue in this appeal is a document production that occurred on August 10, 1999, pursuant to a formal discovery request. Defendants intentionally provided plaintiffs with access to documents in twelve boxes. While reviewing the documents, plaintiffs obtained documents from defendant's confidential litigation files contained in a thirteenth box (box thirteen), which the trial court found defendants had inadvertently placed with the twelve other boxes subject to discovery. Defendants did not learn that plaintiffs had possession of the documents contained in box thirteen until a deposition in October 1999 when defendants' counsel observed copies of two of the confidential documents attached to a fax received by plaintiffs' counsel. Defendants immediately wrote to plaintiffs demanding the return of those documents and any other confidential documents in their possession. When plaintiffs did not return any of the documents, defendants filed motions to compel the return of the documents, to compel the deposition testimony of plaintiffs' counsel in order to ascertain how they had obtained the documents, and to disqualify plaintiffs' counsel because of their unethical conduct in retaining and concealing defendants' privileged documents.³ At the same time, plaintiffs filed a motion for sanctions, requesting entry of a default judgment against defendants for destroying relevant documents that plaintiffs had previously requested during discovery.⁴ Following two hearings on the parties' respective motions on November 19, 1999, and December 17, 1999, the trial court determined that an evidentiary hearing was necessary to resolve the issues. The evidentiary hearing began on January 18, 2000, and lasted for fifteen inconsecutive days, concluding on October 20, 2000.

II. Evidentiary Hearing Proofs

The relevant testimony concerning the document production revealed the following facts. Plaintiff Lamont Dozier's attorney, Thomas Bishoff of Dykema Gossett, arrived at the offices of Dickinson Wright on August 10, 1999, in response to a discovery request in which plaintiffs sought the production of certain documents. He was accompanied by a paralegal, Natalie Levin. In reviewing the documents, Bishoff came across several red well folders (also referred to as red rope files) in a separate box.⁵ There were twelve boxes of documents inventoried by Levin and a

³ Defendants did not learn how plaintiffs had obtained the documents until the November 19, 1999 hearing on its motion. Defendants argued that box thirteen had been inadvertently produced and that plaintiffs committed ethical violations in copying the documents when they knew the documents were from litigation files, failing to inform defendants about the production of such documents, and thereafter retaining the documents even after defendants had requested their return.

⁴ Plaintiffs claimed that the documents found in box thirteen conclusively established that defendants ordered the destruction of relevant and material documents in contravention of discovery requests and court orders. Plaintiffs further argued that under the crime fraud exception to the attorney-client privilege or because defendants waived any privileges, they should be allowed to retain the documents contained in box thirteen.

⁵ There were thirteen red-rope folders in box thirteen.

separate box thirteen that contained the red well folders. Bishoff “flipped” through all the red well folders and reviewed a number of documents contained in those folders. Specifically, Bishoff made extensive notes and photocopies of a particular “internal memorandum” prepared by defendants’ counsel, Yakub Hazzard (the memo), and a July 30, 1999, letter prepared by defendants’ counsel Drew Breuder (the letter), both directed to defendants’ co-counsel.⁶ Upon discovering the memo, Bishoff called colleagues, Ron Torbert and Craig John at Dykema to discuss whether a copy could be made. Bishoff testified that he “was somewhat excited to find the memo” and thought it was significant.⁷ John instructed Bishoff to write down in detail the information contained in the memo and destruction guidelines that were attached to the memo just in case the documents “would never see the light of day again.” Bishoff further testified that in the course of reviewing the red well folders, he considered the possibility that he was looking at his adversaries’ legal files, but at no time did he alert any of defendants’ counsel that such materials were in the conference room for inspection.⁸

Before leaving Dickinson, Bishoff took a handwritten inventory of box thirteen containing the red well folders⁹ and requested copies of all the documents, including box thirteen. On returning to his office at Dykema, Bishoff faxed a copy of the memo and the letter to plaintiffs’ co-counsel, Jeffrey Morganroth. Thereafter, Bishoff and Morganroth contacted defendants’ counsel, Thomas McNeil at Dickinson and requested that the documents in all thirteen boxes be copied by an outside service. On August 18, 1999, Bishoff and Morganroth received a duplicate set of copies from Copy Corps of all the documents including those in box thirteen.¹⁰ At some point, plaintiffs’ counsel, Clarence Tucker, received a copy of the memo, but did not receive a complete set of copies of the documents from Copy Corps. However, prior to the evidentiary hearing proceedings, plaintiff Brian Holland’s counsel, Hallison Young, did not discuss the contents of box thirteen with any other counsel for plaintiffs, nor did he ever receive or see copies of the documents.

III. The Trial Court’s Findings of Fact and Conclusions of Law

Following extensive arguments by all counsel involved, the trial court issued its opinion. The trial court found that box thirteen contained lawyers’ litigation files and defendants had produced it by mistake. There was no question in the court’s mind that box thirteen was inadvertently produced. The trial court rejected plaintiffs’ arguments that they were entitled to keep the documents because they were intentionally produced, evidenced fraud and disregard for

⁶ Bishoff asked the Dickinson legal assistant, who was present in the conference room supervising the document production, to make copies of these two documents for him.

⁷ It appeared to Bishoff that the memo contained information regarding the location of 128 boxes of missing documents that the parties had been feuding over and guidelines for destruction of documents (the destruction guidelines).

⁸ During the telephone conversation with Torbert and John, Bishoff raised the issue of inadvertent disclosure, but concluded that the documents were intentionally produced by defendants, along with the entire box of files.

⁹ Interestingly, Bishoff’s written inventory included a verbatim copy of the memo.

¹⁰ Copy Corps delivered the copies to plaintiffs’ counsel with Bates numbers.

court orders, or because defendants were negligent or reckless in producing them. The trial court found it incredible that any attorney would believe their adversaries intended to produce their litigation files for discovery, especially under the circumstances of this case where box thirteen and the red rope files in it looked physically different from all the other boxes and contained correspondences to clients and memorandum to the file for the benefit of co-counsel. The files were marked as “litigation” files and a glimpse of the documents inside should have alerted plaintiffs that box thirteen may have been inadvertently produced. The court agreed with John that had these documents been brought to the attention of defendants, they would not “have seen the light of day” because they were not intentionally produced. Moreover, the trial court found that plaintiffs’ attorneys’ actions in copying the memo verbatim, requesting a copy from a paralegal, and then requesting that copies be made from an outside source demonstrated that plaintiffs knew that the documents were not intentionally produced.

The trial court thus concluded that because the confidential documents in this case were clearly not intended for plaintiffs, plaintiffs were obligated to both refrain from examining the material and to notify defendants about the documents, regardless of what impropriety may have been contained in those documents. The trial court further concluded that the documents did not have to be privileged for such a duty to apply, but only confidential, defining confidential in broad terms. The trial court remarked that an attorney’s litigation files could not be more confidential. As a result, the trial court did not reach a specific finding with regard to whether the documents in question (the memo, the letter, and the rest of the documents in box thirteen) were privileged under the attorney-client privilege or work-product doctrine because it was immaterial to its analysis. The trial court noted that plaintiffs do not get to rifle through defendants’ litigation files on the chance that they might innocently find something that is not privileged. Because plaintiffs failed to even notify defendants, the trial court found that plaintiffs had violated an “ABA opinion.”¹¹ However, the trial court was hesitant to disqualify plaintiffs’ counsel, taking into account the age of the case, the practicality of such a remedy, and the fact that defendants could be protected from any prejudice resulting from the production of box thirteen. As a result, the trial court denied defendants’ motion to disqualify plaintiffs’ counsel, and instead, ordered that all copies of the documents in box thirteen, including the letter and the memo, be returned to defendants, and any memorandum of any kind recording or referring to any of the contents of the documents be destroyed. The trial court refused to disqualify plaintiffs’ counsel at that time, but reserved the right to change his ruling if it was later proven wrong regarding the ability to protect defendants from the disclosure.

At the same time, the trial court denied plaintiffs’ motion for default judgment, finding that plaintiffs had failed to establish that defendants intentionally destroyed relevant and material documents that were ordered by the trial court to be produced. First, the trial court noted that the destruction guidelines were written under circumstances that provided an explanation –the sale of Jobete to EMI and the downsizing process. Second, the heart of plaintiffs’ complaint alleged off-book transactions, which would not show up on documents anyway. Further, defendants

¹¹ The trial court relied on Michigan ethics opinion CI-970 and an ABA opinion, which was not cited by the trial court, but the parties cite as ABA Opinion 92-368. The trial court noted that nothing in Michigan detracted from the ABA opinion, but rather, supported the conclusion in the ABA opinion.

presented evidence that plaintiffs were aware that documents were being disposed of and that the documents were nonetheless still available on computer. Third, the court noted that it did not order a company-wide production of documents such as the kind that was involved in the destruction guidelines. Rather, the court ordered the production of certain documents regarding plaintiffs, which the trial court found were not “congruent with the destruction guidelines.” Last, the trial court found that 128 boxes were produced to plaintiffs at one time and plaintiffs failed to look at them, supporting the conclusion that defendants did not destroy or hide evidence.

IV. Analysis

Defendants argue that the trial court erred in denying their motion for disqualification of plaintiffs’ attorneys after concluding that plaintiffs’ attorneys had violated their ethical duties under the rules of professional conduct in reviewing, copying, and retaining defendants’ confidential litigation files. At the same time, plaintiffs argue that the trial court erred in finding an ethical violation and requiring plaintiffs to return and make no use of the documents in box thirteen that conclusively establish that defendants intentionally destroyed material documents and which documents were voluntarily produced by defendants during discovery. We disagree with both arguments.

The trial court’s findings of fact in regard to a motion for disqualification of counsel are reviewed for clear error. *Buchanan v Flint City Council*, 231 Mich App 536, 547; 586 NW2d 573 (1998). However, we review how the trial court applied the facts to the relevant law de novo. *Brandon Charter Twp v Tippett*, 241 Mich App 417, 421 n 1; 616 NW2d 243 (2000). Further, the application of “ethical norms” to a decision whether to disqualify counsel is reviewed de novo. *General Mill Supply Co, v SCA Services, Inc*, 697 F2d 704, 711 (CA 6, 1982). Similarly, this Court reviews for an abuse of discretion the determination whether a document is privileged. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 614; 600 NW2d 66 (1999). However, whether the attorney-client privilege or work-product doctrine applies to protect a communication or document is a question of law that we review de novo. *Leibel v General Motors Corp*, 250 Mich App 229, 236, 244; 646 NW2d 179 (2002).

After a review of the entire record, we conclude that the trial court properly determined that plaintiffs’ counsel had committed ethical violations in reviewing defendants’ litigation files and failing to notify defendants’ counsel of its production. The trial court also properly determined that the contents of box thirteen should be returned to defendants and all notes and memorandum referring to such documents be destroyed. However, we hold that the trial court did not err in refusing to disqualify plaintiffs’ counsel under such circumstances.

A. Privileges

Defendants’ argue that disqualification is mandated by plaintiffs’ ethical misconduct. Before addressing this argument, there are several other issues raised by plaintiffs on cross-appeal that must be addressed. First is the question of whether the disputed documents were privileged. Plaintiffs argue that they committed no misconduct because the documents reviewed, specifically the memo and the letter, were not privileged and were subject to discovery.

MCR 2.302(B)(1) generally provides that privileged matters are not discoverable. The trial court did not explicitly determine whether the memo, the letter, or the remaining contents of

box thirteen were privileged. Rather, the trial court determined that such a specific finding was unnecessary where it was clear on their face that the documents were “secret and confidential,” invoking plaintiffs’ duty to refrain from reviewing them and notifying defendant’s counsel. Nonetheless, because the trial court discussed the private, confidential, and privileged nature of an attorney’s litigation files and the attorney-client privilege with regard to waiver, it is implicit in the trial court’s ruling that it found the documents were privileged. As a result, it is disputed on appeal whether the documents were protected under the attorney-client privilege or work-product doctrine.

1. Attorney-Client Privilege

The following principles apply to the attorney-client privilege:

The attorney-client privilege is designed to permit a client to confide in his attorney, knowing that his communications are safe from disclosure. The rationale behind the privilege is that “if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.” [*McCartney v Attorney General*, 231 Mich App 722, 730-731; 587 NW2d 824 (1998) (citations omitted).]

The privilege attaches only to confidential communications by the client to his attorney, which are made for the purpose of obtaining legal advice and applies only where necessary to achieve its purpose. *Id.* at 731. Where a client is a organization or company, the privilege extends to those communications between attorneys and all agents or employees of the organization authorized to speak on its behalf in relation to the subject matter of the communication. *Leibel, supra* at 236 (citations omitted).

2. Work-Product Doctrine

The second asserted privilege is the work-product doctrine. The work-product doctrine protects from discovery any notes, working papers, memoranda or similar materials, prepared by an attorney in anticipation of litigation. *Leibel, supra* at 244 (citations omitted). Under MCR 2.302(B)(3)(a), the trial court “*shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.*” *Id.* at 244-245 (emphasis added).

In this case, the memo and many of the documents contained in box thirteen were privileged under either the attorney-client privilege or work-product doctrine. The Breuder letter, which was written by attorney Breuder to co-counsel McNeil regarding the August 10, 1999 document production does not appear protected under the work-product doctrine. It contains no legal strategy, conclusions, opinions, or communications between attorney and client. Rather, it is a transmittal and confirmation letter between co-counsel regarding a discovery issue. However, the Hazzard memo and destruction guidelines attached are clearly work-product as the memo was prepared for the file and the benefit of co-counsel as part of Hazzard’s investigation into the “missing” 128 boxes. The memo included Hazzard’s mental impressions, opinions, and conclusions. Additionally, the guidelines are subject to the attorney-

client privilege because attorney Harold Noveck prepared the destruction guidelines at the request of client, Jobete, for the purpose of obtaining legal advice. *McCartney, supra*. These documents were contained within the litigation files of attorney Dan Noveck, who testified that box thirteen contained his personal litigation files. As Noveck testified, the red rope files contained memoranda and correspondences to and from clients and fellow attorneys that revealed defendants' strategies and opinions concerning the litigation, including, (1) a memo from co-counsel Petrocelli regarding the status and strategy of the cases, (2) a memo from Petrocelli to defendant Berry Gordy analyzing the case,¹² and (3) a letter from former co-counsel Nelson regarding the viability of the RICO count in plaintiff Edward Holland's complaint. Accordingly, the record supports the trial court's conclusion that many of the documents contained in box thirteen were confidential and an independent conclusion that many of the documents in box thirteen were privileged. Thus, we find no abuse of discretion and no error in the trial court's failure to conduct an individual document inspection of all the documents contained in box thirteen.¹³

3. Crime Fraud Exception

Nevertheless, plaintiffs argue that any claim of privilege in regard to the destruction guidelines is destroyed by the crime-fraud exception. "The crime-fraud exception to the attorney-client privilege is predicated on the recognition that where the attorney-client relationship advances the criminal enterprise or fraud, the reasons supporting the privilege fail." *People v Paasche*, 207 Mich App 698, 705; 525 NW2d 914 (1994). However, the attorney-client privilege ceases to operate under this exception where the advice from the attorney refers to future, not past, wrongdoing. *Id.* In order for the crime-fraud exception to apply, plaintiffs "must show that there is a reasonable basis to (1) suspect the perpetration or attempted perpetration of a crime or fraud and (2) that the communications were in furtherance thereof." *Id.* at 707. "This showing must be made without reference to the allegedly privileged material." *Id.*

Here, plaintiffs failed to present any evidence to establish either prong. Indeed, the trial court made no finding of wrongdoing or fraudulent conduct by defendants, which is supported by the record. Even if the destruction guidelines could be used as evidence of a crime or fraud, the evidence presented established that the destruction guidelines were prepared in response to defendant Jobete's sale to EMI and were necessary during its downsizing process when storage facilities containing paper records had to be eliminated. There was evidence presented, and the trial court found, that no documents relating to these plaintiffs or this case were destroyed.

¹² Interestingly, this memo is labeled in bold print, "ATTORNEY WORK PRODUCT" and "ATTORNEY-CLIENT PRIVILEGE."

¹³ A different result may have been reached had plaintiffs' counsel refrained from reviewing the disputed documents in box thirteen, notified defendants, and brought the documents to the attention of the trial court for an in camera determination of whether they were protected by any privilege and whether the privilege was waived. This approach would have allowed plaintiffs to preserve the argument of privilege and waiver, while ensuring that they satisfied their ethical obligations. See *Resolution Trust Corp v First of America Bank*, 868 F Supp 217, 220 n 3 (WD Mich, 1994). See discussion, *infra*.

Further, there was no evidence presented that any documents were actually destroyed pursuant to the destruction guidelines. Accordingly, plaintiffs failed to establish that the crime-fraud exception applies to otherwise privileged documents. See *id.*

B. Waiver

Next, plaintiffs argue that any claim of privilege, either attorney-client or work-product, was waived when the documents were voluntarily turned over to plaintiffs and where defendants' counsel took no precautionary measures to protect the privilege. The question of what constitutes a waiver of such privileges is a question of law that we review de novo. *Leibel, supra* at 240. Moreover, this Court grants more deference to a trial court's decision whether the facts of a particular case demonstrate a valid waiver of the privilege. *Id.* at 240 n 13. It is well settled in Michigan that the attorney-client privilege applies where there has been an inadvertent disclosure of privileged material and an implied waiver of privilege must be judged by standards as stringent as for a "true waiver." *Id.*, quoting *Franzel, supra* at 615-616.¹⁴ At the very least, waiver through inadvertent disclosure requires a finding of no intent to maintain confidentiality or circumstances evidencing a lack of such intent. *Sterling v Keidan*, 162 Mich App 88, 96; 412 NW2d 255 (1987). "Thus, a document inadvertently produced that is otherwise protected by the attorney-client privilege remains protected." *Leibel, supra* at 241. Accordingly, defendants' alleged failure to take reasonable precautions to protect the contents of box thirteen from disclosure is not enough to find a "true waiver." Instead, the disclosure must have been an intentional, voluntary act. See *id.* at 240-241.

However, the trial court found that defendants did not intentionally or voluntarily disclose the documents in box thirteen. In fact, the record amply supports the trial court's finding that the contents of box thirteen were inadvertently produced. Defendants' counsel testified that the documents were not intentionally produced. When defendants' learned of the inadvertent production, they immediately contacted plaintiffs' counsel and requested the return of the documents. Other than the mere fact that the documents were turned over, there is no evidence in the record that discloses that defendants intentionally produced box thirteen. Further, the testimony of Bishoff and John and their actions in obtaining the documents reflect that they were aware that the documents were likely not intentionally produced. Bishoff testified that in the course of reviewing the red well folders, he considered the possibility that he was looking at his adversaries' legal files and that they were likely privileged. Nonetheless, at John's instructions, Bishoff took extensive handwritten notes on the documents and had them copied. Interestingly, John instructed Bishoff as such because he thought the documents would not "see the light of day" again. Accordingly, this Court finds no clear error in the trial court's finding that defendants inadvertently produced box thirteen. As such, the trial court properly rejected plaintiffs' argument regarding waiver.

C. Ethical Misconduct

¹⁴ "A 'true waiver' requires 'an intentional, voluntary act and cannot arise by implication' or 'the voluntary relinquishment of a known right.'" *Leibel, supra* at 241.

This brings our analysis to the propriety of the trial court's ruling regarding plaintiffs' ethical misconduct.¹⁵ The trial court found that plaintiffs had committed a "clear absolute violation" of ABA Formal Opinion 92-368 when they examined and copied the documents without notifying defendants' counsel. On cross-appeal, plaintiffs argue that there is no basis for the trial court's finding of ethical violations because ABA opinion 92-368 does not apply in this case and Michigan authority does not impose an ethical duty to notify defendants of the voluntary production of court ordered documents or to return the documents after they have been voluntarily produced.

In *Resolution Trust Corp v First of America Bank*, 868 F Supp 217 (WD Mich, 1994), the court was presented with the defendant's motion for a protective order, in connection with a privileged and confidential letter inadvertently sent to the plaintiff's attorney by the defendant's law firm. *Id.* at 218. The letter was clearly labeled on its face "privileged and confidential," was addressed to a senior vice president of the defendant, contained the caption of the case, and detailed defense strategy.¹⁶ *Id.* The trial court found that the plaintiff's attorney would be required to destroy the original letter, all copies of the letter, and all notes relating to the letter, but denied the defendant's motion to disqualify the plaintiff's counsel. *Id.* at 220-221.

In reaching its decision, the district court also relied on ABA Formal Opinion 92-368, noting that the State of Michigan has largely drawn its Rules of Professional Conduct from the American Bar Association Model Rules of Professional Conduct. ABA Formal Opinion 92-368 advises that

[a] lawyer who receives materials that on their face appear to be subject to the attorney-client privilege *or otherwise confidential*, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer if the sending lawyer remains ignorant of the problem and abide the sending lawyer's direction as to how to treat the disposition of the confidential materials. [*Id.* at 219, quoting *Inadvertent Disclosure of Confidential Materials*, ABA Form Op., 93-368 (emphasis added).]

Agreeing with the reasoning and conclusion in ABA Formal Opinion 92-368, the district court found that

common sense and a high sensitivity toward ethics and the importance of attorney-client confidentiality and privilege should have immediately caused the plaintiff's attorneys to notify defendant's counsel of his office's mistake. The lawyers who received the document must have known by the markings and the contents of the document that a clerk or secretary in the defendant's lawyer's

¹⁵ In deciding this issue, we do not include any conduct on the part of Hallison Young, counsel for plaintiff Brian Holland, as there is no dispute that Young was never privy to these documents nor any pre-hearing discussions about the documents.

¹⁶ Although plaintiff's counsel reviewed the letter and concluded that the attorney-client privilege was waived, "out of a sense of fairness," he notified defendant's counsel that plaintiff had the letter. *Resolution Trust, supra* at 218.

office mistakenly included the privileged letter within the documents intended for the plaintiff's lawyers. Thus, plaintiff's lawyers must have known that neither the defendant nor its lawyer intended to waive the attorney-client privilege. [*Id.* at 220.]

The district court added that “[w]hile lawyers have an obligation to vigorously advocate the positions of their clients, this does not include the obligation to take advantage of a clerical mistake in opposing counsel’s office where something so important as the attorney-client privilege is involved.” *Id.* at 220.

We find *Resolution Trust, supra*, highly persuasive and analogous to the facts and circumstances present in the instant appeal. Accordingly, applying the *Resolution Trust* reasoning to the case at hand, we conclude that after even a cursory review of box thirteen’s contents, plaintiffs’ counsel should have refrained from reviewing the remaining documents in box thirteen and notified defendants that box thirteen was among the other discovery materials. Similar to the facts in *Resolution Trust*, plaintiffs’ counsel should have known by the physical appearance and initial contents of box thirteen that it was inadvertently included with the other twelve boxes of documents assembled for the August 10, 1999 production. Box thirteen and the red rope files within it looked physically different from the rest of the boxes. On cursory inspection of the documents in the red folders, Bishoff was immediately aware of the possibility that he was looking at his adversaries’ confidential legal files and had concerns regarding whether he was entitled to make copies of them. The files were clearly labeled as “correspondences” to clients and other defense attorneys with the caption of the particular case on each file. The files contained letters to clients and memorandum to co-counsel in the case. In fact, the very first document in the file, labeled “Edward Holland Correspondence 2,” which is the first file on the stack in the box, is a memo to other counsel detailing the history of the case and concluding with a detailed analysis of the viability of plaintiff Edward Holland’s fraud claim.¹⁷ Further, it is implausible that plaintiffs believed that defendants’ counsel intentionally produced an entire box of their confidential and privileged litigation files. Notably, plaintiffs’ counsel’s actions following the discovery of box thirteen do not support their contention that they believed the documents were intentionally produced. Thus, plaintiffs’ counsel must have known that neither defendants nor their lawyers intended to disclose the documents or waive any applicable privilege.

Thus, because plaintiffs’ received materials that on their face appeared to be subject to the attorney-client privilege or that were otherwise confidential, under circumstances where it was clear they were not intended for plaintiffs, plaintiffs’ counsel should have refrained from examining the materials, notified defendants’ counsel at Dickinson, and abided defendants’ instructions until the issue was raised and addressed by the trial court. However, as the trial court noted, plaintiffs did not take even the first step. Consequently, we find no error in the trial court’s decision regarding plaintiffs’ ethical misconduct, including its findings of fact or

¹⁷ It should also be noted that three documents later in the file is the memo from Petrocelli to Noveck and midway through the file is the client letter to defendant Gordy. Thus, the privileged and confidential nature of the files was immediately evident upon a cursory review of the first file in the box.

application of the law to the facts. As such, the trial court correctly found that plaintiffs' counsel had committed ethical violations and properly required the return of all the documents in box thirteen and the Breuder letter to defendants and the destruction of any and all notes or memorandum relating to the documents.

Simultaneously, for several reasons we reject plaintiffs' arguments that even if ABA Formal opinion did apply, it was not clear on the face of the documents that any privilege applied or that the documents were produced under circumstances that made it clear that the documents were not intended for plaintiffs. First, the nature and contents of many of the documents themselves should have caused plaintiffs' counsel to realize that they were likely not intentionally disclosed. Second, the testimony and actions of plaintiffs' counsel, particularly Bishoff and John, belie such an argument. Furthermore, it is not necessary that the documents be expressly marked "confidential" or "privileged" in order for it to be clear that a privilege may apply. As noted, the appearance and contents of the documents in this case clearly indicated the privileged and confidential nature of the files – letters from attorney to client, memos to other members of the defense team. See *Resolution Trust, supra* at 220. Last, as plaintiffs correctly point out, this was not a situation involving the inadvertent disclosure due to a wrong email address or hitting the wrong number on a fax machine, but it was also not a case where plaintiffs ran across a few privileged documents among tens of thousands of unprivileged ones. Rather, the confidential and privileged documents in this case were roped together in red well folders in a completely separate box apart from the twelve boxes subject to discovery. See *Resolution Trust, supra* at 220. Therefore, plaintiffs' arguments are without merit.

While challenging the applicability of ABA Formal Opinion 92-368, plaintiffs argue that the applicable Michigan authority does not impose a duty to return the documents, specifically the Hazzard memo and the attached destruction guidelines, in this case. Plaintiffs rely on Michigan ethics opinion CI-970, which states:

A lawyer who comes into possession of an internal private memorandum of the opposite party during litigation, provided that the lawyer or client did not procure or participate in the removal of the documents, may use the memorandum at trial to impeach the opposite party's witness if the court permits. Mere possession by a lawyer of the opposite party's internal private memorandum does not require the lawyer to withdraw from representation of the client.¹⁸

We conclude that this opinion does not apply under the circumstances of this case. Opinion CI-970 contemplates a situation where the client or the lawyer innocently "comes into possession" of an "internal private memorandum of the opposite party." It does not distinguish a confidential

¹⁸ This opinion arose out the following fact situation:

The claimant in civil rights litigation against a county unit of government comes into possession of an internal evaluation document of the opposing party and advises his lawyer. Neither the client nor the lawyer has had anything to do with the removal of the document, described as "an internal self-evaluating and critical report by the county's affirmative action officer." [Michigan Ethics Opinion, CI-970 (10/5/83).]

or privileged document sent to counsel inadvertently from a document purposefully sent by an unauthorized sender, *Resolution Trust, supra* at 220, nor does it specifically refer to privileged communications. *Id.* Further, CI-970 applies when the lawyer or client did not procure or participate in the removal of the document.

In our case, plaintiffs' counsel did not obtain possession of the documents by way of an unauthorized sender. Second, the facts of this case do not involve the intended transmission of a single report such as an internal evaluation document prepared by defendant's officer, but rather the inadvertent production of an entire box of lawyer's litigation files containing privileged documents. More importantly, plaintiffs' counsel procured or participated in the removal of the documents. Indeed, plaintiffs' counsel "rifled" through the files, took verbatim notes, and had photocopies made, which Bishoff took with him and faxed to co-counsel. Thus, the Michigan Opinion is distinguishable as it addresses a different scenario than does ABA Formal Opinion 92-368.¹⁹

Additionally, the unsolicited receipt of an internal private memorandum is distinguishable from the inadvertent disclosure of confidential and privileged documents, especially considering the vital importance of the attorney-client privilege. See *Leibel, supra* at 237; *Inadvertent Disclosure of Confidential Materials*, ABA Form Op., 93-368. Accordingly, plaintiffs' argument that the trial court erred in applying ABA Formal Opinion 92-368 and requiring the return of all the disputed documents and disallowing plaintiffs from making use of them in the proceedings must fail.²⁰

D. Disqualification

Having determined that the trial court did not err in concluding that plaintiffs' counsel committed ethical violations in this case, the next question for the trial court was "what to do

¹⁹ However, there appears to be a direct conflict between Michigan Opinion CI-970 and ABA Formal Opinion 94-382, which provides:

A lawyer who receives on an unauthorized basis materials of an adverse party that she knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how appropriately to proceed; she should notify her adversary's lawyer that she has such materials and should either follow instructions of the adversary's lawyer with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court. [*Unsolicited Receipt of Privileged or Confidential Materials*, ABA Form Op., 94-382.]

²⁰ ABA Formal Opinion 92-368 may also be applicable because the ABA's interpretations are binding on ABA members and several of plaintiffs' counsel are members of the ABA. See *Resolution Trust, supra* at 221 (district court noted that even though there is an arguable conflict between Michigan's interpretation of the rules and the ABA's interpretation, the ABA's interpretations are binding on ABA members).

about it.” See *Resolution Trust, supra* at 220. Defendants argue that the trial court erred in failing to disqualify plaintiffs’ counsel. Although this is a much closer question, we are not persuaded that such a result is mandated. A rule of automatic disqualification in cases of inadvertent disclosure or ethical misconduct can constitute a “dangerous doctrine.” *Smith v Arc-Mation, Inc*, 402 Mich 115, 188; 261 NW2d 713 (1978) (finding that if any arguable question regarding the propriety of a lawyer continuing to appear in a case constitutes disqualification, it puts in the hands of an adversary the ability to force an opponent to change counsel if the adversary can advance any grounds for disqualification). Instead, a decision to disqualify must be based on a factual inquiry of each case, which is reviewed under a clearly erroneous standard. *Kalamazoo v Michigan Disposal Service Corp*, 125 F Supp 2d 219, 223 (WD Mich, 2000), aff’d 151 F Supp 2d 913 (WD Mich, 2001) (citations omitted).

The disqualification of plaintiffs’ counsel is a drastic and extraordinary measure.

“[C]ourts have been reluctant to disqualify attorneys because of the severe consequences of a disqualification. This reluctance stems from the fact that disqualification has an immediate adverse effect on the client by separating him from the counsel of his choice. Also, many times such motions are made for tactical, not substantive, reasons and will most likely cause delay in the litigation. Thus, when deciding on a motion for disqualification, a court should proceed with caution.” [*Milford Power Ltd Partnership v New England Power Co*, 896 F Supp 53, 58 (D Mass, 1995) (citations omitted).]

With these principles in mind, we hold that the trial court did not clearly err in declining to disqualify plaintiffs’ counsel. A court has the authority and responsibility of supervising the professional conduct of the attorneys who appear before it. *Id.* In some instances, “[t]he receipt of privileged documents is grounds for disqualification of the attorney receiving the documents based on the unfair tactical advantage such disclosure provides,” *Abamar Housing and Development, Inc v Lisa Daly Lady Décor, Inc*, 724 So 2d 572, 573 (Fla 3rd DCA, 1998) (disqualification of counsel warranted where plaintiffs’ counsel failed to rectify an inadvertent disclosure of privileged documents, gaining an unfair tactical advantage), while in other cases, the trial court will opt for a lesser sanction. *Southeast Banking Corp v FDIC*, 212 BR 386, 395 (SD Fla, 1997) (a court has the authority to preserve the integrity of its judicial proceedings and impose reasonable and appropriate sanctions on errant attorneys practicing before it or attorneys who show bad faith).

Here, the trial court determined that defendants could be protected from any prejudice resulting from the disclosure of box thirteen. See *Resolution Trust, supra* at 220-221 (a finding of substantial prejudice is required in cases of inadvertent disclosure). In fact, the trial court reserved the right to change its ruling if it was later established that plaintiffs had gained a tactical advantage by the disclosure. Moreover, discovery has been completed, which reduces the opportunity to utilize information gained from the documents to obtain other information. Additionally, a motion for costs and attorney fees is pending before the trial court and presumably will be acted upon on remand. For these reasons, we conclude that the trial court provided and will continue to provide an adequate remedy for defendants. We are confident that the trial court will closely monitor plaintiffs’ counsel through the remainder of the proceedings in this case and to the extent defendants establish the requisite prejudice, the trial court will disperse

an adequate remedy. Again, as previously noted, a motion for attorney fees is pending, which may compensate defendants for their counsel's time in resolving this matter.

Although the conduct of plaintiffs' counsel was egregious, we are not persuaded that disqualification is the prudent course at this time. This case involves not only plaintiffs' acquisition of the documents, but their conduct in concealing it from defendants, refusing to return the documents at defendants' request, and thereafter failing to admit to the trial court that they possessed not just the letter and the memo, but an entire box of defendants' litigation files. We remind plaintiffs' counsel of the importance of professional ethics in the practice of law:

[I]nvolved here is a matter of maintaining the highest standards of professional conduct required to avoid the appearance of impropriety. As members of a profession in which public reliance and trust is so essential and whose members' integrity must be assured to maintain vital public respect, we as attorneys must recognize the importance of a high standard by which our conduct is measured. [*GAC Commercial Corp v Mahoney Typographers, Inc*, 66 Mich App 186, 191-192; 238 NW2d 575 (1975).]

Plaintiffs' counsel had an ethical duty to promptly notify defendants' counsel of the production of box thirteen without exercising any unfair advantage. Because they failed to follow the dictates of the ABA ethics opinion regarding inadvertent disclosures and acted in bad faith, the trial court's finding of ethical misconduct is justified. However, plaintiffs' counsel's ethical misconduct under the specific facts of this case does not warrant disqualification as long as defendants can be protected from any resulting prejudice. Therefore, the trial court did not clearly err in failing to grant the requested relief.

Plaintiff Brian Holland cross-appeals, specifically arguing that the trial court erred in failing to exclude him from its ruling regarding defendants' motion for disqualification when Holland's counsel had no knowledge of the contents of the documents contained in box thirteen and did not receive or review such documents. We disagree, but are careful to point out that it is not because of any improper conduct on the part of Young. Rather, although the trial court correctly found that Young committed no ethical wrongdoing, he was still not entitled to keep the documents or notes taken therefrom as the confidential and privileged documents were inadvertently produced. Due to the above resolution of the issues, the trial court did not err in concluding that Young should not be excluded from the trial court's ruling ordering the destruction of all notes and memorandum relating to the documents in box thirteen. Further, the trial court did not commit any other errors with respect to plaintiff Brian Holland or his counsel.

V. Default Judgment

Last, plaintiffs argue that the trial court erred in denying their motion for sanctions and default judgment when defendants' failed to comply with discovery orders and intentionally destroyed relevant and material documents requested by plaintiffs. We disagree. We review a trial court's decision whether to grant a default judgment as a sanction for discovery abuses for an abuse of discretion. *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 396-397; 484 NW2d 718 (1992).

Plaintiffs argue that the trial court erred in failing to grant its motion for sanctions, particularly the sanction of default against defendants when defendants interfered with and obstructed the discovery process and violated court discovery orders by intentionally destroying relevant and material documents. The following principles apply with regard to the imposition of a default judgment:

Default judgment is a possible sanction for discovery abuses. It is, however, a drastic measure and should be used with caution. When the sanction of a default judgment is contemplated, the trial court should consider whether the failure to respond to discovery requests extends over a substantial period of time, whether there was a court order directing discovery that has not been complied with, the amount of time that has elapsed between the violation and the motion for default judgment, and whether willfulness has been shown. The court must also evaluate on the record other available options before concluding that a drastic sanction is warranted. The sanction of default judgment should be employed only when there has been a flagrant and wanton refusal to facilitate discovery, that is, the failure must be conscious or intentional, not accidental or involuntary. [*Id.*]

In this case, the trial court did not find that defendants had committed any discovery abuses, even in the face of the destruction guidelines, which defendants explained were created in order to assist defendant Jobete in its downsizing process. Nor does the record support such a finding. In fact, the record establishes that defendants produced plaintiffs' requested documents, some on more than one occasion, and complied with the trial court's discovery orders. As the trial court found in support of its decision, the testimony of Dan Noveck established that numerous boxes of documents were made available to plaintiffs' attorneys on more than one occasion, but plaintiffs did not show up to review them.

Second, there is no evidence in the record that defendants willfully destroyed or concealed documents subject to discovery with the intent to defraud plaintiffs. As previously discussed, defendants produced numerous boxes for plaintiffs' review, including the "128 boxes" disputed by plaintiffs. Defendants explained the disposition of the documents requested by plaintiffs and produced what documents existed. Indeed, defendants' counsel explained that several categories of documents requested by plaintiffs never existed. The evidence also established that the documents requested by plaintiffs in the 128 boxes would not have come within the categories of documents to be destroyed under the destruction guidelines, and therefore, would not have been destroyed under the destruction guidelines. Further, the trial court found that it did not order a company-wide document production encompassing the categories of documents involved in the destruction guidelines. In any event, defendants presented evidence that all the information contained in the documents allegedly lost or destroyed is saved and available on computer system and can be regenerated. Accordingly, the trial court did not abuse its discretion or otherwise err in refusing to grant plaintiffs' motion for sanctions.

Affirmed.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray