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Inadvertent Production: Where We've Been and Where We're Going

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When inadvertent production issues surface in civil litigation, they generally fall into three categories. *First*, under the Rules of Professional Conduct, is there an ethical duty to notify opposing counsel of the receipt of what appears to be inadvertently produced privileged material? *Second*, under the applicable procedural rules, how is possible privilege waiver litigated? *Third*, under the relevant evidence code, has privilege been waived by inadvertent production? There have been significant developments on all three fronts over the past year.

Ethical Duties

Before the Rules of Professional Conduct were amended last September, there was not a specific ethics rule governing inadvertent production. Rather, ethical duties were largely set out in a series of American Bar Association formal and Washington State Bar Association informal ethics opinions. On the former, ABA Formal Ethics Opinions 92-368 (1992) and 94-382 (1994) counseled that a lawyer receiving what appeared to be inadvertently produced privileged or otherwise confidential materials from an opponent had a duty to notify the lawyer on the other side. On the latter, WSBA Informal Ethics Opinion 1544 (1993)

found no duty to notify but Informal Ethics Opinion 1779 (1997) later adopted the ABA opinions on notification as the preferred position.

In 2002 and 2003, the ABA amended its influential Model Rules of Professional Conduct. That process produced a specific Model Rule, 4.4(b), and an accompanying comment, Comment 2, on inadvertent production. The new rule directly addresses notification: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Comment 2 leaves to procedural law whether any other actions are necessary and leaves to evidence law whether privilege has been waived. In light of these changes, the ABA withdrew opinions 92-368 and 94-382 and replaced them with two new opinions, 05-437 (2005) and 06-440 (2006), that essentially track Model Rule 4.4(b) and Comment 2. Model Rule 4.4(b), Comment 2 and the new ethics opinions are all available on the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr.

Washington has seen a similar evolution in the duty to notify. When our RPCs were amended in September 2006, they included a new rule, RPC 4.4(b), and a new comment, Comment 2, that are identical to their ABA counterparts. This new rule applies to both Washington state court proceedings and under, respectively, Western District General Rule 2(e) and Eastern District Local Rule

83.3(a), federal courts here as well. Washington RPC 4.4(b) and Comment 2 are available on the WSBA's web site at www.wsba.org.

Procedural Framework

The amendments to the Federal Rules of Civil Procedure that became effective this past December contained a new section that specifically outlines the procedure for litigating possible privilege waiver through inadvertent production. FRCP 26(b)(5)(B) now provides:

> "If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved."

New FRCP 26(f)(4) also encourages the use of so-called "claw back" agreements (either by informal agreement or stipulated order) under which inadvertently produced confidential material can be "clawed back" by the

producing party under specified conditions. The Advisory Committee Notes accompanying these changes emphasize that the intent is not to create a "free pass" for inadvertent production. They highlight, however, that inadvertent production is becoming more common as document production has increasingly evolved from paper correspondence to email and the cost of constructing privilege screens has increased in tandem. The Advisory Committee observed that the new rules are an attempt to provide an orderly framework for resolving inadvertent production issues. Both the new rules and the accompanying Advisory Committee Notes are available on the federal judiciary's web site at www.uscourts.gov/rules.

Although the Washington Civil Rules have not been amended in a similar fashion, Washington case law gets to much the same end. In 1996, the Washington Supreme Court in *In re Firestorm 1991*, 129 Wn.2d 130, 138-39, 916 P.2d 411 (1996), held that lawyers who are confronted with issues about whether privilege applies to information received from the other side or has been waived should seek the court's guidance rather than making those decisions unilaterally. *Firestorm 1991* was not an inadvertent production case. It dealt instead with information received through an *ex parte* contact with an opposing party's expert. Nonetheless, *Firestorm 1991* suggests the mechanism for a recipient to test whether privilege has been waived through inadvertent production: ask the court.

A later case from the U.S. District Court in Seattle that relied on *Firestorm 1991*, *Richards v. Jain*, 168 F. Supp.2d 1195 (W.D. Wash. 2001), illustrates another reason for asking the court: disqualification risk *to the recipient*. *Richards* was not an inadvertent production case either. In *Richards*, the plaintiff was a former high level executive of a high tech company who sued his employer over stock options when he left the company. On his way out, Richards downloaded the entire contents of his hard drive onto a disk and gave it to his lawyers. The disk included 972 privileged communications between the company and both outside and inside counsel. The lawyers did not notify the company or its counsel. Instead, the lawyers used the communications in formulating their complaint and related case strategy without first litigating the issue of whether privilege had been waived. When the documents surfaced during the plaintiff's deposition, the defendant moved for both the return of the documents and for the disqualification of the plaintiff's lawyers. The court found that the documents were privileged and that privilege had not been waived. It then ordered the documents returned. More significantly, however, the court also disqualified the plaintiff's lawyers on the theory that there was no other way to "unring the bell" in terms of their knowledge of the defendant's privileged communications.

Privilege Waiver

Privilege waiver based on inadvertent production has also seen potentially far-reaching developments at the federal level over the past year. The Advisory Committee on Evidence Rules has proposed a new federal rule of evidence addressing privilege waiver that would apply to both the attorney-client privilege and work product and would apply to all federal proceedings regardless of the basis for federal jurisdiction. Proposed FRE 502(b) addresses inadvertent production and as I write this reads:

> "A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B)."

Like the amendments to the FRCP in this regard, the Advisory Committee on Evidence Rules' report generally reflects the same approach and concerns as expressed by the Advisory Committee on Federal Rules of Civil Procedure. Under 28 USC § 2074(b), Congress must approve any rule creating or affecting

an evidentiary privilege and as I write this proposed FRE 502 remains under review. If approved, it would take effect in December 2008. The proposed rule, the Advisory Committee's report and current information on the proposal's status and form are all available on the federal courts' web site at www.uscourts.gov/rules.

Although the Washington evidence rules have not been amended in a similar way, Washington case law again arrives at much the same end. Whether privilege has been waived through inadvertent production turns on very similar case-specific factors, including: "'(1) the reasonableness of the precautions taken by the producing party to prevent inadvertent disclosure of privileged documents; (2) the volume of discovery versus the extent of the specific disclosure at issue; (3) the length of time taken by the producing party to rectify the disclosure; and (4) the overarching issue of fairness.'" *Harris v. Drake*, 152 Wn.2d 480, 495-96, 99 P.3d 872 (2004) (Alexander, C.J., dissenting) (citation omitted).

Summing Up

Inadvertent production is an area where both the duties imposed on lawyers and the rationale for those duties has shifted considerably over the past two decades. The last year, however, has seen important developments that bring a level of certainty and uniformity that this evolving area has not seen before.

ABOUT THE AUTHOR

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