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Inadvertent Production: New Rules for Electronic Times

**By Mark J. Fucile
Fucile & Reising LLP**

Few areas of the law of lawyering have seen greater change over the past 20 years than the standards governing inadvertent production of confidential information. In *Richmark Corp. v. Timber Falling Consultants, Inc.*, 126 FRD 58 (D Or 1989), our federal court refused to order the return of a letter on law firm letterhead that had been mistakenly included in a small supplemental production in a commercial case. No ethics rules were cited and the decision turned largely on whether the law firm that inadvertently produced the letter was negligent. *Richmark* was by no means a landmark case. But, it is a good illustration of the prevailing approach to inadvertent production a generation ago: “finders keepers, losers weepers.”

Since *Richmark*, there has been a sea change in the standards governing inadvertent production. The principal driver of that change has been technological. As communication with clients moved from paper to electronic forms, the volume and complexity of screening for privilege increased significantly—as did the attendant cost. To address the more frequent risk of inadvertent production in the electronic context, there have been major developments in three related areas: (1) the ethical duty to notify opposing counsel upon receipt of what appears to be inadvertently produced privileged

materials; (2) how privilege waiver is litigated; and (3) the standards governing waiver through inadvertent production. In this column, we'll look at all three.

Ethical Duty to Notify

In the early 1990s, the ABA issued two seminal ethics opinions on inadvertent production, Formal Ethics Opinions 92-368 and 94-382. The opinions are unusual because, lacking an ABA Model Rule, they relied instead on such disparate ingredients as the attorney-client privilege and the law of bailment to create a duty to notify opposing counsel of the receipt of what reasonably appears to be inadvertently produced privileged material. Oregon followed in 1998 with Formal Ethics Opinion 1998-150 that drew on its counterpart opinions from the ABA.

When the ABA amended its influential Model Rules in 2002, it included a new rule on inadvertent production—4.4(b)—that codified the duty to notify. In light of the express rule, the ABA withdrew 92-368 and 94-382 and replaced them with two new opinions, 05-437 and 06-440, that tracked new Model Rule 4.4(b). Oregon likewise adopted the new rule—RPC 4.4(b)—when we moved to the ABA Model Rules in 2005 and issued a new ethics opinion, 2005-150, reflecting the new rule.

Litigating Privilege Waiver

Comment 3 to ABA Model Rule 4.4 leaves to a lawyer's discretion whether to simply return an inadvertently produced document or to litigate privilege

waiver. If the latter, the federal procedural rules were amended in 2006 to create a new provision—FRCP 26(b)(5)(B)—that controls litigating privilege waiver through inadvertent production. Under the federal rule, the receiving party must not use the material until waiver has been resolved. The federal rule also encourages the use of so-called “claw back” agreements by which parties can agree in advance to return inadvertently produced documents under specified circumstances.

Although Oregon does not yet have a comparable rule, the Oregon ethics opinion cites a Washington federal case (*Richards v. Jain*, 168 F Supp2d 1195 (WD Wash 2001)) that provides a powerful incentive to seek the court’s guidance before using inadvertent production: potential disqualification if the receiving lawyer uses the material without first seeking judicial review and is later found to have “guessed wrong.”

Privilege Waiver

The standards for assessing privilege waiver through inadvertent production have also seen significant developments. In 2008, the federal evidence rules were amended to create a new rule—FRE 502—that specifically codifies criteria for assessing waiver through inadvertent production. The federal standards look primarily to the reasonableness of the steps taken to screen for privilege in the context of the production involved. They are framed in the

negative and generally find that privilege is not waived if reasonable screening occurred.

Again although Oregon does not yet (as I write this) have a comparable rule, the Supreme Court in *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or 336, 838 P2d 1069 (1992), adopted a functionally similar set of factors.

Summing-Up

The developments over the past decade afford a much more straightforward approach to analyzing inadvertent production issues that arise with increasing frequency in an era of electronic communication. Although the law has become more “forgiving” of inadvertent production than when *Richmark* was decided in 1989, it is important to remember that “more forgiving” doesn’t necessarily mean “all is forgiven.” In *Relion, Inc. v. Hydra Fuel Cell Corp.*, No. CV06-607-HU, 2008 WL 5122828 (D Or Dec. 4, 2008) (unpublished), for example, our federal court concluded that a producing law firm had not taken reasonable steps to screen for privilege and found waiver through inadvertent production under FRE 502.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal

departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.