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Inadvertent Production Revisited (Yet Again)

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Few areas in the law of lawyering have seen as near constant evolution over the past 20 years as inadvertent production. Ironically, the principal reason is the equally constant evolution of technology during that same period. When paper reigned supreme, courts were much less forgiving of lawyers who inadvertently produced confidential communications that were labeled plainly with law firm or general counsel letterhead. As communications between lawyers and their clients moved increasingly to electronic form, however, it both increased the volume of documents needing to be screened for privilege and made the screening process more difficult and expensive. That technological change, in turn, has affected the development of the law of inadvertent production on ethical duties, procedural rules and evidentiary privilege.

Over the past several years we have tracked the developments in the law of lawyering on inadvertent production. Because significant changes have again occurred since we last visited this area, it merits another look.

Ethical Duties

Before the Rules of Professional Conduct were amended in 2006, there was no specific ethics rule governing inadvertent production. Instead, ethical duties were largely defined by 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 two accompanying comments, Comment 2 and 3, 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. Comment 3, in turn, commits the voluntary return of inadvertently produced material to the receiving lawyer's discretion (again subject to procedural and evidentiary law). 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 its comments.

Washington has seen a similar evolution in the duty to notify. When our RPCs were amended in 2006, they included a new RPC 4.4(b) and new accompanying comments that are identical to their ABA counterparts. RPC 4.4(b) applies both to 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.

Although RPC 4.4(b) is limited to notification, it offers the advantage of rule-based clarity. The initial ABA ethics opinions, by contrast, were cobbled together from a variety of analogous legal precepts—including the law of bailment (a rarely cited concept in ethics opinions). Further, when combined with the more recent procedural and evidentiary amendments discussed next, lawyers in both Washington's federal and state courts now have a set of "bright line" rules to guide them through the matrix of issues raised by inadvertent production.

Procedural Rules

The amendments to the Federal Rules of Civil Procedure adopted in 2006 and the amendments to the Washington Civil Rules adopted in 2010 address the procedural mechanism for litigating possible privilege waiver through inadvertent production.

FRCP 26(b)(5)(B) now provides:

> "If information produced in discovery 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; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved."

Amended CR 26(b)(6) closely follows its federal counterpart:

"If information produced in discovery 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; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified. Either party may promptly present the information in camera to the court for a determination of the claim. The producing party must preserve the information until the claim is resolved."

FRCP 45(d)(2)(B) and CR 45(d)(2)(B) contain similar language in the context of subpoenas directed to third parties.

The emphasis on the courts—rather than the litigants—determining privilege waiver echoes earlier case law, including *In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996) (unauthorized contact with opposing party's expert), and *Richards v. Jain*, 168 F. Supp.2d 1195 (W.D. 2001) (unauthorized use of privileged communications taken by client when he left adverse party). *Firestorm* and *Richards* also suggest the penalty for lawyers who use an opponent's privileged material without first getting a ruling from a court that privilege has been waived: potential disqualification. The rationale for disqualification as a remedy is that simply returning the documents involved once they have been thoroughly analyzed and used isn't enough. As *Richards* in particular emphasizes, the only way to "unring the bell" may be to remove the lawyers involved from the case altogether.

Evidentiary Privilege

Privilege waiver based on inadvertent production has also seen significant recent developments both nationally and in Washington.

Nationally, in September 2008 Federal Rule of Evidence 502 became law and creates specific criteria for waiver through inadvertent production. FRE 502 applies to all federal proceedings regardless of the basis for federal jurisdiction and binds state courts as well if a ruling in a federal case comes first. It applies to both the attorney-client privilege and the work product rule. FRE 502(b) is framed in the negative and finds that no waiver occurs if: "(1) the disclosure is

inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following . . . [FRCP] 26(b)(5)(B)."

This past September, Washington adopted ER 502, which mirrors its federal counterpart and includes the same three factors for assessing waiver.

The federal (FRE 502(e)) and the state (ER 502(e)) versions of the rule also encourage the use of so-called "claw back" agreements under which parties stipulate (either by direct agreement or through a stipulated court order) in advance to return inadvertently produced material.

The criteria for assessing waiver incorporated into the respective federal and state rules generally reflect the standards that a majority of courts had established through judicial decisions (*see generally Banks v. United States*, No. C03-5533RJB, 2005 WL 974723 (W.D. Wash. 2005) (unpublished) (compiling cases); *Sitterson v. Evergreen School Dist. No. 114*, 147 Wn. App. 576, 196 P.3d 735 (2008) (Division 2) (applying majority position)).

Summing Up

Collectively, the evolving ethics, procedural and evidence rules offer a much more cohesive approach to inadvertent production issues than in years past. Although any given case will continue to turn on its individual facts, the movement to a rule-based approach should provide relatively straightforward

guidance as lawyers confront these issues with increasing frequency in an era where electronic communications now reign supreme.

ABOUT THE AUTHOR

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