May 2005 WSBA *Bar News Ethics & the Law* Column

Inadvertent Production: Gold Nugget or Rotten Egg?

By Mark J. Fucile
Fucile & Reising LLP

Imagine this scenario: You just received five boxes of documents from opposing counsel in response to a production request. You and your paralegal dig into the boxes and you run across some e-mail print-outs. You notice that one of the e-mails contains damaging admissions by your opponent and you are envisioning it as a billboard-size trial exhibit. You then realize that this gold nugget is from in-house counsel to the president of the opposing party and, therefore, was privileged at the time it was written. You received a privilege log with the production, but this e-mail wasn't included. Given its content though, you conclude that opposing counsel likely produced it inadvertently.

What do you do? Do you need to tell opposing counsel? Has the privilege been waived? And, if you simply use the document without telling the other side, are there risks *to you* that might turn your gold nugget into a rotten egg?

In an age when privileged communications increasingly travel in electronic instead of paper form under distinctive law firm or general counsel letterhead, it is also becoming more common for at least some privileged documents to slip through even the most diligent review. When that happens, there are typically three sets of issues: (1) ethics issues on notification; (2) privilege issues on

waiver; and (3) practical issues in handling the documents to minimize the recipient's risk of unpleasant consequences.

Notification. Over the past 12 years, the pendulum has swung from "finders keepers, losers weepers" to a proposed rule requiring notification and related procedures for determining whether privilege has been waived.

In 1993, the WSBA's Rules of Professional Conduct Committee issued an informal ethics opinion—1544—finding that a lawyer who comes into possession of an opponent's inadvertently produced privileged material could simply use that material.

Since the early 1990s, four important developments occurred—two nationally and two in Washington—that moved the pendulum away from "finders keepers, losers weepers."

First, in 1992 and 1994, the ABA addressed inadvertent production and the related circumstance of unsolicited receipt of an opponent's privileged material in, respectively, Formal Ethics Opinions 92-368 and 94-382. Both opinions counseled that a lawyer who receives such materials should: (a) stop reading once it becomes apparent that they are privileged; (b) notify the lawyer on the other side; and (c) follow the other lawyer's instructions on what to do with the documents. In 1997, the RPC Committee cited ABA Formal Opinion 94-382 as guidance in responding to an "unsolicited receipt" question in WSBA Informal Ethics Opinion 1779.

Second, 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 should seek the court's guidance rather than making those decisions unilaterally. *Firestorm 1991* was not an inadvertent production case. It dealt 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.

Third, in 2001, the U.S. District Court in Seattle in *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001), disqualified a law firm for using an opponent's privileged information. *Richards* was not an inadvertent production case either. The lawyers in *Richards* received the documents at issue from their client, the plaintiff, who had taken them with him when he left his job with the defendant. But, *Richards* looked to ABA Formal Opinion 94-382 in outlining a lawyer's duties: "An attorney who receives privileged documents has an ethical duty upon notice of the privileged nature of the documents to cease review of the documents, notify the privilege holder, and return the documents." 168 F. Supp. 2d at 1200-01.

Fourth, in 2002, the ABA revised Model Rule 4.4 to include an explicit requirement to notify the other side of the receipt of what reasonably appears to

be inadvertently produced privileged material: "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." The comment to ABA Model Rule 4.4(b) leaves open what additional steps should be taken. The WSBA has proposed revising RPC 4.4 in the same fashion and including a similar comment. Those proposed changes are currently before the Supreme Court for review.

In sum, Washington may soon have a rule requiring notification. As we'll discuss further, *Richards* counsels that there is an important tactical reason for also returning the privileged documents and, as *Firestorm 1991* suggests, litigating privilege waiver before using the documents involved.

Waiver. The comment to ABA Model Rule 4.4(b) and the proposed comment here in Washington both note that the issue of whether privilege has been waived through inadvertent production is governed by substantive law, not the RPCs. In general, whether privilege has been waived through inadvertent production turns on 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).

Minimizing Recipient Risk. Are there risks if you conclude on your own that privilege has been waived and use the documents without first litigating privilege waiver? The short answer is "yes"—and that's where the "rotten egg" potential comes in. *Richards* illustrates that potential. As noted earlier, *Richards* was not a true inadvertent production case because the plaintiff's law firm received the privileged documents directly from its client when he left the defendant employer. Rather than notify its opponent, return the documents and then litigate the privilege issue up front, the law firm simply used the documents in formulating its case strategy. When the defense found out, it moved to disqualify the plaintiff's law firm. The court agreed—holding that privilege had not been waived and because there was no other way to "unring the bell" to erase the law firm's knowledge of the confidential information, disqualification was an appropriate sanction.

The Supreme Court in *Firestorm 1991* held that no privileged information was involved in the unauthorized contact at issue and, therefore, disqualification was not warranted on its facts. The Supreme Court cautioned, however, that "[o]ne situation requiring the drastic remedy of disqualification arises when counsel has access to privileged information of an opposing party." 129 Wn.2d at 140. Knitting *Richards* together with *Firestorm 1991* suggests that if you

decide for yourself that privilege has been waived and guess wrong you may have your own "inadvertence" problem: you may have inadvertently disqualified yourself. In short, your gold nugget might turn into a rotten egg if you don't handle it with care.

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.