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Inadvertent Production: New Federal Rules

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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? In federal civil litigation here, the Oregon RPCs supply the controlling rule on the first point but there have recently been significant changes adopted by the U.S. Supreme Court on the second and proposed to Congress on the third.

Ethical Duties. In either Oregon state or federal court (where the Oregon RPCs are adopted by Local Rule 83.7(a)), Oregon RPC 4.4(b) and Oregon State Bar Formal Ethics Opinion 2005-150 (available on the OSB's web site at www.osbar.org) counsel that "[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."

Similar guidance comes nationally from ABA Model Rule of Professional Conduct 4.4(b) and ABA Formal Ethics Opinions 05-437 and 06-440 (available

on the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr).

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.

Privilege Waiver. The professional rules, both in Oregon under RPC 4.4(b) and nationally under ABA Model Rule 4.4(b), make plain that whether privilege has been waived is a question of applicable evidence law rather than ethics. Here, too, there are potentially far-reaching developments at the federal level. 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 also 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 also available on the federal courts' web site.

For lawyers in Oregon's federal court, the practical substance of the new standard is not far from the current court-made one articulated by such leading cases as *In re Sause Brothers Ocean Towing*, 144 FRD 111, 113-15 (D Or 1991) (federal question) and *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or 336, 342-43, 838 P2d 1069 (1992) (diversity). Codification of a standard, however, would, in combination with the adoption of RPC 4.4(b) in 2005 and FRCP 26(b)(5)(B) in 2006, bring a level of uniformity to questions surrounding

inadvertent production in federal civil litigation that this evolving area has not seen before.

ABOUT THE AUTHOR

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