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Inadvertent Production Revisited (Again): New Federal Evidence Rule

By Mark J. Fucile
Fucile & Reising LLP

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?

All three areas have seen significant developments over the past few years. On the ethical duty to notify, the ABA adopted a new ethics rule in 2002—Model Rule 4.4(b)—generally requiring counsel receiving what reasonably appears to be an inadvertently produced confidential document to notify the other side. Oregon followed in 2005 with RPC 4.4(b) paralleling its ABA Model Rule counterpart. Both the ABA in Formal Ethics Opinions 05-437 (2005), 06-440 (2006) and 06-442 (2006) and the OSB in Formal Ethics Opinion 2005-150 (2005) then adopted further guidance on the ethical duty to notify echoing and amplifying on the text of the new rules. On the procedural front, the federal rules were amended in 2006 to create a specific process under FRCP 26(b)(5)(B) generally prohibiting the recipient from using an inadvertently produced privileged

document until the court handling the case has ruled that privilege has been waived. In late September, Congress passed and the President signed legislation creating Federal Rule of Evidence 502 specifically addressing the evidentiary question of whether privilege has been waived through inadvertent production. The new rule, which had been proposed by the Federal Judicial Conference, became effective immediately.

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. FRE 502 outlines the criteria for waiver in federal proceedings *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 and controls regardless of the basis for federal jurisdiction. 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)."

Like the 2006 amendment to FRCP 26, FRE 502(e) encourages the parties to proactively agree in advance to procedures for handling inadvertently produced documents.

Both the Senate report accompanying the new rule (S.2450, available at www.senate.gov) and the Judicial Conference's report forwarding the proposal to Congress (available at www.uscourts.gov/rules) note that electronic communications—particularly email—have greatly expanded the scope of discovery across a wide spectrum of cases and that the cost of screening for privilege had increased in tandem. The theory of the new rule is to reduce the cost of discovery by limiting waiver through inadvertent production to situations where the party involved truly did not take reasonable steps to prevent disclosure. How that goal plays out in actual practice remains to be seen.

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 *Tinn v. EMM Labs, Inc.*, 556 F Supp2d 1191, 1198 (D Or 2008), citing *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or 336, 342-43, 838 P2d 1069 (1992) (diversity). Codification of a standard, however, in combination with the adoption of RPC 4.4(b) in 2005 and FRCP 26(b)(5)(B) in 2006, brings a level of uniformity to questions surrounding inadvertent production in federal civil litigation that this evolving area has not seen before.

Formalizing the rules in this area will also likely highlight a sometimes overlooked aspect of inadvertent production: disqualification risk to the recipient. Both existing federal (*see, e.g.*, *Richards v. Jain*, 168 F Supp2d 1195 (WD Wash 2001)), and Oregon (*see, e.g.*, OSB Formal Ethics Op. 2005-150) authority note that if a recipient of inadvertent production simply uses the documents involved without first getting a ruling that privilege has indeed been waived the recipient is at risk of being disqualified if that lawyer "guessed wrong" and a court later finds that privilege remained intact. In that event, the reasoning is that one side has used the other side's privileged material without permission and there is no other way to "unring the bell" to remedy that unauthorized knowledge other than disqualification.

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.