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## The Shifting Sands of Inadvertent Production

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Many areas of litigation ethics haven't changed all that much since the ABA adopted the first set of national professional rules in 1908. Inadvertent production, however, isn't one of them. For a variety of reasons, ironically many of them related to advances in technology, the rules governing inadvertent production have shifted almost as much as the sands on the Oregon coast over the past 20 years. In fact, the past decade alone has seen major changes in the way the professional, procedural and evidence rules approach inadvertent production. This article will look at the development of all three facets of inadvertent production chronologically over the last 20 years for perspective on where the rules are today and where they may be moving tomorrow.

### ***"Finders Keepers, Losers Weepers"***

Twenty years ago our federal district court discussed inadvertent production in *Richmark Corp. v. Timber Falling Consultants, Inc.*, 126 F.R.D. 58 (D. Or. 1989). *Richmark* was not a landmark case. Instead, *Richmark* was just the opposite. It was a very typical example of the way inadvertent production was often addressed in the days when paper reigned supreme: "finders keepers, losers weepers." In *Richmark*, one side produced two inches of documents during a supplemental production that inadvertently included a letter on law firm letterhead discussing litigation strategy from outside counsel for one of the

parties to its client. The Court found that the firm producing the letter should have taken better screening precautions and denied its motion seeking the letter's return. *Richmark* was also typical in not citing any professional rule. There was none at the time. Rather, inadvertent production analysis turned largely on the evidentiary issue of whether privilege had been waived by the producing lawyer's negligence.

### ***Two Influential ABA Opinions***

The “finders keepers, losers weepers” approach to inadvertent production began to change in the early 1990s with the publication of two influential ABA formal ethics opinions, 92-368 in 1992 and 94-382 in 1994. The former dealt with inadvertent production and the latter with the related circumstance of unsolicited receipt. Both noted that as communications had begun to move increasingly to electronic forms inadvertent production was happening more often. They identified the beginnings of two technological trends that were only to accelerate as “electronic communications” moved from faxes to email. First, many privileged electronic communications were not as readily identifiable as paper with familiar law firm or “office of general counsel” letterhead. Second, electronic communications also had the effect of increasing the volume of documents produced in a typical case. Both trends challenged even well-designed privilege screens and conscientious lawyers and staff.

At the same time, the ABA opinions frankly acknowledged that there was no professional rule that specifically addressed inadvertent production. Looking to a variety of sources ranging from the attorney-client privilege to the law of bailment, the ABA opinions cobbled together a three-step professional standard when a lawyer received what on its face was the other side's confidential material under circumstances that did not reasonably appear to be intended: (1) stop reading; (2) notify the sender; and (3) follow the sender's instructions on return or destruction. This new approach neither prevented the recipient from arguing that privilege was waived through inadvertence nor did it release the sender from the duty of competent representation by taking reasonable steps to prevent inadvertent production in the first place. It did, however, represent a significant shift in focus from the sender to the recipient. In short, the era of "finders keepers, losers weepers" was over.

The two ABA ethics opinions proved to be very influential as many state and local bar associations around the country—including Oregon—followed. The Oregon State Bar in Formal Opinion 1998-150 adopted the same three-step professional standard. The new approach was equally influential with courts. In one widely discussed decision from here in the Northwest, for example, the U.S. District Court in Seattle in *Richards v. Jain*, 168 F. Supp.2d 1195 (W.D. Wash. 2001), disqualified the lawyers on the receiving end of an opponent's confidential material using analysis drawn from the ABA opinions and concluding that there

was no way other than disqualification to effectively “unring the bell” in terms of the lawyers’ knowledge of the other side’s confidential information. Although *Richards* was not a true inadvertent production case because the lawyers’ client had taken the documents involved when he left his employer, the remedy of disqualifying the recipient lawyers illustrated how far the tide had shifted from “finders keepers, losers weepers.”

***ABA Model Rule 4.4(b)***

The approach articulated in the ABA opinions was not without critics, who focused on the fact that it was not based squarely in a professional rule. See *Legislative History: The Development of the ABA Model Rules of Professional Conduct 1982-2005* (2006) at 556. When the ABA updated its Model Rules of Professional Conduct in 2002, it added a specific rule—ABA Model Rule 4.4(b)—addressing inadvertent production. The ABA also added Comments 2 and 3 to that rule at the same time. Although finally finding a home in the professional rules, this still newer approach included an ironic twist: the new rule and the comments significantly *reduced* the scope of inadvertent production *as a matter of ethics*. Model Rule 4.4(b) limited its focus solely to the duty to notify: “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 comments left to procedural law the appropriate means to litigate privilege waiver and left to evidence law the

question of whether privilege had been waived. The new rule and comments also eliminated the “no peeking” requirement and left to the discretion of the receiving lawyer whether a document should be returned. The ABA then followed by formally withdrawing Ethics Opinions 92-368 and 94-382 and replacing them with two others—05-437 and 06-440—that essentially tracked Model Rule 4.4(b) and its comments. With Model Rule 4.4(b), the focus essentially shifted back to the sender in the sense that, once notified, the practical burden was then on the sender to seek the return of the document and to argue that privilege remained intact.

Again, Oregon followed. When we replaced the former DRs with the RPCs in 2005, our new rules contained a provision identical to its ABA counterpart: RPC 4.4(b). Although Oregon did not adopt comments when we made the switch to a system based on the ABA Model Rules, the Oregon State Bar withdrew Formal Ethics Opinion 1998-150 and replaced it with a new opinion, 2005-150, that, also like its ABA counterparts, largely tracked the new rule.

***FRCP 26(b)(5)(B)***

When the Federal Rules of Civil Procedure were amended in 2006 to address discovery of electronic evidence, they included a new section, FRCP 26(b)(5)(B), directed specifically to inadvertent production. The Advisory Committee report accompanying the new changes echoed the ABA ethics

opinions of the early 1990s in noting the continuing expansion of electronic communications and the corresponding difficulty and expense of creating increasingly sophisticated privilege screens to avoid inadvertent production. The new rule primarily addressed the procedural mechanism for litigating privilege waiver once notification had taken place: “[A] party must promptly return, sequester, and destroy the specified information or any copies it has . . . [and] must not use or disclose the information until the claim [of privilege] is resolved[.]” If a recipient wishes to use the information, it must first go to the court (and may file the document in question under seal) to litigate privilege waiver. The use of so-called “claw back” agreements was also encouraged by amended FRCP 26(f)(3)(D) under which parties agree in advance that inadvertent production will be returned.

***FRE 502***

This past Fall, 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).” Like the 2006 amendments to FRCP 26, FRE 502(e) encourages parties to proactively agree in advance to procedures for handling inadvertently produced documents. Both the Advisory Committee and Congressional reports on FRE 502 echo the reasoning of the corresponding amendments to FRCP 26.

***Where Next?***

In many respects, the recent federal procedural and evidence amendments return the overall analysis of inadvertent production issues in federal court to a standard surprisingly close to the three-step process articulated by the ABA opinions of the early 1990s. To date, Oregon has not amended either the ORCP or the OEC along the lines of the new federal rules. On the former, however, OSB Formal Ethics Opinion 2005-150 cites *Richards* and the author is aware of one state trial court decision applying 2005-150 and *Richards* to disqualify counsel who used an opponent’s confidential materials without first litigating whether privilege had been waived. On the latter, the prevailing standard on waiver through inadvertence in state court under *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or. 336, 838 P.2d 1069 (1992), is functionally very similar to new FRE 502. The one sure bet is that the most recent developments are not the last in the shifting sands of inadvertent production.

## **ABOUT THE AUTHOR**

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