

AVOIDING A COLLISION AT THE INTERSECTION OF ETHICS STREET AND MALPRACTICE AVENUE

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TABLE OF CONTENTS

Mark J. Fucile

**I. Discussion Hypothetical:
Inadvertent Production: Gold Nugget or Rotten Egg?**

**II. Background Article:
“Inadvertent Production: Where We’ve Been & Where We’re Going”**

*Reprinted from Mark Fucile’s June 2007 WSBA Bar News Ethics & the Law column
Available on the WSBA’s web site at www.wsba.org*

III. New Federal Evidence Rule 502

*Effective September 19, 2008
Available on the U.S. Courts’ web site at www.uscourts.gov/rules*

Note: The Washington RPCs as amended in 2006 (and later), the accompanying official comments and the report of the WSBA special committee that recommended the rule changes are all available on the WSBA’s web site at www.wsba.org. Relevant ABA ethics opinions cited are available on the ABA Center for Professional Responsibility’s web site at www.abanet.org/cpr. For a discussion of proposed changes to CR 26 dealing with methods of handling inadvertent production that are similar to FRCP 26, see the WSBA Litigation Section’s page on the WSBA’s web site. New Federal Evidence Rule 502 and accompanying judicial and legislative reports are available on the U.S. Courts’ web site at www.uscourts.gov/rules.

**I. Discussion Hypothetical:
Inadvertent Production: Gold Nugget or Rotten Egg?**

Note: This is based on a true story....

Imagine this scenario:

You are a young associate working closely with a partner representing the plaintiff in a large commercial case. You are nearing trial. Many documents have been exchanged by both sides. The partner decides to take the depositions of the defendant's senior executives, principally regarding a new affirmative defense that was added by an amended answer. The partner asks you to serve a short supplemental document request on the other side focusing on any personal files these executives have on the new issue. You dutifully send out the document request.

You receive the defendant's response. It is a thin envelope. The cover letter is from the lead defense counsel and simply says "Enclosed please find the documents you requested." You flip over the cover letter to see a fax cover sheet from the lead defense counsel to the defendant's CEO enclosing a copy of the amended answer with a note to the CEO scrawled in the lead defense counsel's handwriting:

"_____ [CEO], Here's our amended answer with the new defense. Although there are nominally facts to support it, we think it's a loser. We only raised it to make life difficult for the plaintiff in hopes that we'll increase the prospects of settlement. _____ [Lead Defense Counsel]."

The document has a production number on it.

You begin imagining the note projected like a billboard on the wall of the courtroom and go running down the hall to show it to the partner you're working with. As you bolt down the hall, you ask yourself....

- ▶ Do we have to notify the other side?
- ▶ How do we litigate privilege waiver?
- ▶ Has privilege been waived?
- ▶ Are there any risks to *our side* if we simply use it?

II. Background Article: “Inadvertent Production: Where We’ve Been & Where We’re Going”

*Reprinted from Mark Fucile’s June 2007 WSBA Bar News Ethics & the Law column
Available in electronic form on the WSBA’s web site at www.wsba.org*

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? There have been significant developments on all three fronts over the past year.

Ethical Duties

Before the Rules of Professional Conduct were amended last September, there was not a specific ethics rule governing inadvertent production. Rather, ethical duties were largely set out in 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 an accompanying comment, Comment 2, 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. 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 Comment 2. Model Rule 4.4(b), Comment 2 and the new ethics opinions are all available on the ABA Center for Professional Responsibility’s web site at www.abanet.org/cpr.

Washington has seen a similar evolution in the duty to notify. When our RPCs were amended in September 2006, they included a new rule, RPC 4.4(b), and a new comment, Comment 2, that are identical to their ABA counterparts. This new rule applies to both 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. Washington RPC 4.4(b) and Comment 2 are available on the WSBA’s web site at www.wsba.org.

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.

Although the Washington Civil Rules have not been amended in a similar fashion, Washington case law gets to much the same end. 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 or has been waived should seek the court’s guidance rather than making those decisions unilaterally. *Firestorm 1991* was not an inadvertent production case. It dealt instead 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.

A later case from the U.S. District Court in Seattle that relied on *Firestorm 1991*, *Richards v. Jain*, 168 F. Supp.2d 1195 (W.D. Wash. 2001), illustrates another reason for asking the court: disqualification risk *to the recipient*. *Richards* was not an inadvertent production case either. In *Richards*, the plaintiff was a former high level executive of a high tech company who sued his employer over stock options when he left the company. On his way out, Richards downloaded the entire contents of his hard drive onto a disk and gave it to his lawyers. The disk included 972 privileged communications between the company and both outside and inside

counsel. The lawyers did not notify the company or its counsel. Instead, the lawyers used the communications in formulating their complaint and related case strategy without first litigating the issue of whether privilege had been waived. When the documents surfaced during the plaintiff's deposition, the defendant moved for both the return of the documents and for the disqualification of the plaintiff's lawyers. The court found that the documents were privileged and that privilege had not been waived. It then ordered the documents returned. More significantly, however, the court also disqualified the plaintiff's lawyers on the theory that there was no other way to "unring the bell" in terms of their knowledge of the defendant's privileged communications.

Privilege Waiver

Privilege waiver based on inadvertent production has also seen potentially far-reaching developments at the federal level over the past year. 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 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 all available on the federal courts' web site at www.uscourts.gov/rules.

Although the Washington evidence rules have not been amended in a similar way, Washington case law again arrives at much the same end. Whether privilege has been waived through inadvertent production turns on very similar 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).

Summing Up

Inadvertent production is an area where both the duties imposed on lawyers and the rationale for those duties has shifted considerably over the past two decades. The last year, however, has seen important developments that bring a level of certainty and uniformity that this evolving area has not seen before.

III. Federal Rule of Evidence 502

Effective September 19, 2008

Available on the U.S. Courts' web site at www.uscourts.gov/rules

Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver.--When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

(b) Inadvertent disclosure.--When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding 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 Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure made in a State proceeding.--When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

- (1) would not be a waiver under this rule if it had been made in a Federal proceeding; or
- (2) is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling effect of a court order.--A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) Controlling effect of a party agreement.--An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling effect of this rule.--Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions.--In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.