

HIGH TECH ETHICS

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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 and a current member 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 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 and the Idaho State Bar Advocate. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He received his B.S. from Lewis & Clark College and his J.D. from UCLA.

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November 2008 Multnomah Lawyer Ethics Focus Column

Multnomah Lawyer Ethics Focus columns are on the web at www.mbabar.org. The columns included for today's course materials, together with Mark's other articles on legal ethics, the attorney-client privilege and law firm risk management are also available in the Resources Section of Fucile & Reising LLP's web site at www.frllp.com.

February 2007 *Multnomah Lawyer Ethics Focus*

**High Tech Ethics:
New ABA Opinion on Metadata**

**By Mark J. Fucile
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Imagine this scenario: You are negotiating a major contract for a client. Relations with your counterpart on the other side are polite and professional. Nonetheless, whenever you seem to be on the verge of agreeing on particular points, the other side injects new issues that are prolonging the negotiations. You know that your counterpart is answering to a team of executives but you and your client are not sure who it is on the other side that may be calling the shots. You receive a new version of the draft contract from your counterpart in Word via email. Your teenager has told you that there's something called "metadata" "embedded" in electronic documents coming in the original word processing format that includes information about both when and who made changes to documents. Can you look at the metadata to determine who on the other side is directing the nettlesome changes?

There is no direct guidance here in the form of an Oregon State Bar ethics rule or opinion. Other states that have examined the issue have come to varying conclusions. The American Bar Association's Standing Committee on Ethics and Professional Responsibility, however, recently issued an ethics opinion on the review and use of metadata. Although the ABA's ethics opinions are not controlling, the opinion, 06-442, offers a useful summary of both the law and the

issues in this area. It is available on the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr and looks at the issues from the perspective of both the sender and the recipient.

From the Sender's Perspective. 06-442 draws a distinction between documents produced in the course of formal discovery and those simply exchanged during negotiations.

On the former, it notes that a producing party may have a duty to produce metadata if relevant and requested or to assert any appropriate privilege because ABA Model Rule 3.4(a) (like its Oregon equivalent) prohibits lawyers from obstructing another's access to evidence or unlawfully altering or concealing documents. The new federal electronic discovery rules that went into effect this past December sharpen that point in federal litigation.

On the latter, it notes that a lawyer's duty of competent representation generally includes an obligation to protect a client's confidential information under Model Rules 1.1 (competence) and 1.6 (confidentiality) (which are also similar to their Oregon equivalents). Although 06-442 carefully sidesteps the issue of whether a lawyer who allows confidential information to slip through to the other side in the form of metadata has violated the standard of care in either a liability or a regulatory sense, it counsels sending documents that might otherwise contain such information in an "imaged" or "hard copy" format (such as fax, "pdf" or simply paper), "scrubbing" such information (using software designed for this function) from the document before sharing it with the other side or executing a "claw back" agreement with the other side (allowing each party to "claw back"

privileged documents that were inadvertently produced). Beyond confidential information, 06-442 notes that virtually all electronic documents that are in their original word processing format (such as Word or WordPerfect) contain a variety of metadata that is not confidential and, therefore, may be shared with the other side.

From the Receiver's Perspective. 06-442 predicates its comments on the receiver's end with the assumption that the lawyer recipient has obtained the document lawfully and, therefore, is not in breach of Model Rule 4.4(a) (which prohibits gathering evidence in a way that violates the rights of a third party and which is similar to its Oregon equivalent).

In either a discovery or negotiating context, 06-442 counsels that a lawyer on the receiving end is not prohibited in the first instance from looking at metadata in a document that the lawyer receives from the other side. If, however, the metadata contains what appears to be inadvertently produced privileged information, then Model Rule 4.4(b) (which is substantively identical in both the ABA and Oregon versions) directs that the lawyer notify his or her counterpart on the other side of the receipt of the information involved. At that point, both the ABA and Oregon versions of RPC 4.4(b) characterize whether privilege has been waived as question of substantive evidence law rather than a matter of professional ethics. Oregon State Bar Formal Ethics Opinion 2005-150 discusses inadvertent production of privileged materials from the ethics perspective and *Goldsborough v. Eagle Crest Partners*, 314 Or 336, 838 P2d 1069 (1992), and *In re Sause Brothers Ocean Towing*, 144 FRD 111 (D Or

1991), are the leading cases in Oregon's state and federal courts on privilege waiver from an evidentiary perspective. OSB Formal Ethics Opinion 2005-150 also discusses the potential disqualification risk for a recipient of simply using an opponent's privileged information without first obtaining a court's ruling that privilege has been waived. OSB Formal Ethics Opinion 2005-150 is available on the OSB's website at www.osbar.org.

Summing Up. ABA Formal Opinion 06-442 is neither the only nor even the last word on the use of metadata. As we move further into an era when documents of all types are increasingly shared in electronic formats, however, it offers both a useful summary of where the law is and where it may be headed in the years ahead.

November 2008 *Multnomah Lawyer Ethics Focus*

Inadvertent Production Revisited (Again): New Federal Evidence Rule

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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?

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.