

CHAPTER 4/B

**THE LEGAL ETHICS DESKBOOK *LIVE*:
NEW RULES, NEW RESOURCES**

**Discovery Ethics:
New Rules Governing Inadvertent Production**

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This chapter and the accompanying presentation focus on one facet of discovery ethics, the new rules governing inadvertent production. This chapter is drawn from the 2009 Supplement to Chapter 9 in the WSBA Legal Ethics Deskbook and a forthcoming Ethics & the Law column for the WSBA Bar News.

***Discovery Ethics:
New Rules Governing Inadvertent Production***

I. Introduction

Few areas in the law of lawyering have seen as near constant evolution over the past 20 years as inadvertent production. Ironically, the principal reason is the equally constant evolution in technology during that same period. When paper reigned supreme, courts were much less forgiving of lawyers who inadvertently produced confidential communications that were labeled plainly with law firm or general counsel letterhead. As communications between lawyers and their clients moved increasingly to electronic form, however, it both increased the volume of documents needing to be screened for privilege and made the screening process more difficult. That technological change, in turn, has affected the development of the law of inadvertent production on ethical duties, procedural rules and evidentiary privilege. In fact, the past three years alone have seen major developments in all three aspects of inadvertent production.

II. Ethical Duties

Before the Rules of Professional Conduct were amended in 2006, there was not a specific ethics rule governing inadvertent production. Instead, ethical duties were largely defined by 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 two accompanying comments, Comment 2 and 3, 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.”¹ Comment 2 leaves to procedural law whether any other actions are necessary and leaves to evidence law whether privilege has been waived. Comment 3, in turn, commits the voluntary return of inadvertently produced material to the receiving lawyer’s discretion (again subject to procedural and evidentiary law). 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 its comments.²

Washington has seen a similar evolution in the duty to notify. When our RPCs were amended in 2006, they included a new RPC 4.4(b) and new accompanying comments that are identical to their ABA counterparts.³ The new rule applies both to Washington state court proceedings and under, respectively, Western District General Rule 2(e) and Eastern District Local Rule 83(a), federal courts here as well.

¹ For the legislative history of these changes, see *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005* at 553-58 (2006).

² ABA Formal Ethics Opinion 06-442 (2006) addresses electronic “metadata” and touches on some aspects of inadvertent production in this context.

³ For the legislative history of these changes, see *Reporter’s Explanatory Memorandum to the Ethics 2003 Committee’s Proposed Rules of Professional Conduct* at 53-54 (2004), available on the WSBA’s web site at www.wsba.org.

III. Procedural Rules

The amendments to the Federal Rules of Civil Procedure adopted in 2006⁴ and the proposed amendments to the Washington Civil Rules currently under review as I write this⁵ both address the procedural mechanism for litigating possible privilege waiver through inadvertent production.

FRCP 26(b)(5)(B) now provides:

“If information produced in discovery 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; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.”⁶

Proposed CR 26(b)(6), in turn, closely follows its federal counterpart:

“If information produced in discovery 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; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified. Either party may promptly present the information in camera to the court for a determination of the claim. The producing party must preserve the information until the claim is resolved.”

FRCP 45(d)(2)(B) and proposed CR 45(d)(2)(B) contain similar language in the context of subpoenas directed to third parties.

⁴ The legislative history of the rule amendments is available on the federal courts web site at www.uscourts.gov/rules.

⁵ As a write this, the public comment period closes April 30, 2009. The proposed rules are available on the Washington courts web site at www.courts.wa.gov.

⁶ For an example of the application of FRCP 26(b)(5)(B), see *U.S. ex rel. Parikh v. Premera Blue Cross*, No. C01-0476MJP, 2007 WL 162726 (W.D. Wash. Jan. 17, 2007) (unpublished) (applying the new rule and concluding that no waiver of privilege had occurred through the inadvertent production of one page of a privileged communication).

An earlier case from the U.S. District Court in Seattle, *Richards v. Jain*, 168 F. Supp.2d 1195 (W.D. Wash. 2001), illustrates a primary reason for seeking a court ruling on privilege waiver rather than simply using the information involved: disqualification risk *to the recipient*. *Richards* was not an inadvertent production case. 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. In doing so, *Richards* relied in part on *In re Firestorm 1991*, 129 Wn.2d 130, 138-39, 916 P.2d 411 (1996), where the Supreme Court 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.

IV. Evidentiary Privilege

Privilege waiver based on inadvertent production has also seen significant recent developments both nationally and in Washington.

Nationally, last year 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).”

In Washington, there is as yet no comparable amendment to the Evidence Rules.⁷ At the same time, Washington case law arrives at much the same end. Last Fall, Division 2 of the Court of Appeals in *Sitterson v. Evergreen School Dist. No. 114*, 147 Wn. App. 576, 196 P.3d 735 (2008), cited FRE 502 and surveyed case law from other jurisdictions in adopting a balancing test very similar to the new federal rule. The five factors outlined in *Sitterson* include: “(1) the reasonableness of precautions taken to prevent disclosure, (2) the amount of time taken to remedy the error, (3) the scope of discovery, (4) the extent of the disclosure, and (5) the overriding issue of fairness.” 147 Wn. App. at 588.⁸

V. Conclusion

Collectively, the recent amendments to the ethics, procedural and evidence rules bring a much more cohesive approach to inadvertent production issues than in years past. Although any given case will continue to turn on its individual facts, the new unified rule-based approach

⁷ See ER 501(a) (attorney-client privilege); RCW 5.60.060(2)(a) (same).

⁸ For a similar set of factors, albeit discussed in dissent, see *Harris v. Drake*, 152 Wn.2d 480, 494-97, 99 P.3d 872 (2004) (Alexander, C.J., dissenting).

should provide relatively straightforward guidance as lawyers confront these issues with increasing frequency in an era where electronic communications reign supreme.