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Inadvertent Production: Gold Nugget or Rotten Egg?

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Imagine this scenario: You just received five boxes of documents from opposing counsel in response to a production request. You and your paralegal dig into the boxes and you run across some e-mail print-outs. You notice that one of the e-mails contains a damaging admission by your opponent and you are envisioning it as a billboard-size trial exhibit. You then realize that your gold nugget is from in-house counsel to the president of the opposing party and, therefore, was privileged at the time it was written. You got a privilege log with the production, but the e-mail wasn't listed. Given its content, though, you conclude that your opposite number likely produced it inadvertently.

What do you do? Do you need to tell opposing counsel? Has the privilege been waived? If you don't tell the other side and instead simply use an inadvertently produced document, is there a risk *to you* that might turn your gold nugget into a rotten egg?

In an age when privileged communications increasingly travel electronically instead of paper form under law firm or office of general counsel letterhead, it is also becoming more common for at least some privileged documents to slip through even a well-designed review. When that happens, there are typically three sets of issues: (1) ethics issues on notification; (2)

privilege issues on waiver; and (3) practical issues in handling the documents to minimize the recipient's risk.

The Oregon State Bar in Legal Ethics Opinion 1998-150 crisply summarizes the ethical duties of the recipient: (1) stop reading when you determine that the material is privileged; (2) promptly notify opposing counsel; (3) follow opposing counsel's instructions on return—or file the documents under seal with the court if you believe privilege has been waived and the documents might be destroyed if you return them; and (4) seek the court's early determination of any privilege-waiver questions.

Ethics Opinion 1998-150 is careful to note that a lawyer complying with these ethical obligations *does not* forgo the right to argue that privilege has been waived through inadvertent production. Privilege waiver is controlled by substantive law. *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. Although the state and federal formulations vary somewhat, they generally look at the following case-specific factors to determine whether privilege has been waived through inadvertence: the reasonableness of the precautions taken against disclosure; the time taken to raise the error; the overall scope of discovery; the extent of the inadvertent production; and fairness to both sides.

Are there risks if you conclude on your own that privilege has been waived and use the documents without either telling your opponent or first litigating privilege waiver? The short answer is "yes"—and that's where the "rotten egg" potential comes in. A recent federal case from Seattle illustrates the risk. *Richards v. Jain*, 168 F Supp 2d 1195 (WD Wash 2001), was not a true "inadvertent" production case because the plaintiffs' law firm received the privileged documents directly from its client who had secretly taken them with him when he left his job with the defendants. Rather than notify their opponents and litigate the waiver issue up front, the law firm simply used the documents in formulating its case strategy. When the defendants found out, they moved to disqualify the plaintiffs' firm. The court agreed—holding that because there was no other way to "unring the bell" to erase the law firm's knowledge of the confidential information, disqualification was an appropriate sanction. Although disqualification is only one possible remedy, *Richards* shows how your gold nugget might turn into a rotten egg if you don't handle it with care.

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