

February 2006 *Multnomah Lawyer Ethics Focus*

## **Inadvertent Production *Revisited***

**By Mark J. Fucile  
Fucile & Reising LLP**

Two years ago this month, I wrote a column on inadvertent production. I noted at the time that for a variety of reasons the pendulum had swung from one that essentially rewarded the recipient of inadvertently produced confidential material to one that posed a disqualification risk to the recipient if the material involved wasn't returned and potential privilege waiver wasn't litigated promptly. With the new Oregon Rules of Professional Conduct that were adopted last year, there has been a slight swing back in the pendulum—but disqualification risk still remains if inadvertently produced material isn't handled with care.

When inadvertent production occurs, four key questions usually follow for the recipient: (1) do I need to notify my opponent? (2) do I need to return the document involved? (3) has privilege been waived? and (4) if I don't litigate privilege waiver before I use the document, will bad things happen to me?

*Notice.* Before the RPCs were adopted last year, the principal guidance in Oregon on these questions was Oregon State Bar Formal Ethics Opinion 1998-150. That opinion, in turn, drew heavily from an ABA ethics opinion on the same subject—Formal Opinion 92-368. 1998-150 counseled that a recipient of inadvertently produced confidential material had to both notify his or her opponent *and* follow the opponent's instructions pending a decision by the court on whether privilege had been waived.

This past year saw the adoption of a new Oregon rule specifically addressing inadvertent production, a new accompanying Oregon ethics opinion and the withdrawal of ABA Formal Opinion 92-368. Oregon RPC 4.4(b) creates a duty to notify an opponent: “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.”

*Return.* At the same time, RPC 4.4(b) does not create a *rule of ethics* on whether a recipient must return inadvertently produced confidential information. Rather, the new ethics opinion, 2005-150, casts that decision as turning on the substantive *law of evidence*: “By its express terms, Oregon RPC 4.4(b) does not require the recipient of the document to return the original nor does it prohibit the recipient from openly claiming and litigating the right to retain the document if there is a nonfrivolous basis on which to do so. The purpose of the rule is to permit the sender to take protective measures; whether the recipient lawyer is required to return the documents or take other measures is a matter of law beyond the scope of the Oregon RPC, as is the question of whether the privileged status of such documents has been waived.”

*Waiver.* On the question of privilege waiver, *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.

*Recipient Risk.* 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.” Formal Ethics Opinion 2005-150 cites a federal case from Seattle that 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* drives home the risk of what can happen if a recipient of inadvertently produced confidential information uses the material involved without first litigating privilege waiver and obtaining a ruling from the court.

## **ABOUT THE AUTHOR**

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 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 (Portland) 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, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.