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Court of Appeals Addresses Receipt of Inadvertently Produced Privileged Documents

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

Division III of the Washington Court of Appeals in Spokane recently surveyed the duties under both the Rules of Professional Conduct and the Superior Court Civil Rules when a lawyer receives what reasonably appears to be a litigation opponent's inadvertently produced privileged documents.

Hur v. Lloyd & Williams, LLC, __ Wn. App.2d __, 2023 WL 1129735 (Wn. App. Jan. 31, 2023), involved a contract dispute. In responding to the defendant's document production request, the plaintiff produced over 1,000 pages of emails electronically. The plaintiff's counsel redacted privileged information from the documents produced and provided a notice regarding the grounds for the redactions with the production rather than a privilege log. The plaintiff's attorney did not realize when producing the documents that although the portions redacted were "blacked out" when viewed, the underlying terms could still be retrieved through an electronic word search. The defendant's lawyer ran a keyword search through the production and the results included portions of the emails that had been redacted. Instead of notifying the plaintiff's attorney, the defendant's lawyer used the email fragments that had been revealed in a motion for summary judgment. When the plaintiff's attorney saw the documents in the summary judgment motion, the plaintiff moved to disqualify

defense counsel on the theory that the defendant's lawyer was improperly privy to the plaintiff's confidential information.

The trial court denied the motion to disqualify and instead ordered that the defendant destroy the files involved, declined to consider the emails in ruling on the motion and prohibited their further use. Arguing those remedies were insufficient, the plaintiff sought discretionary review. Although the Court of Appeals accepted review, it found that the trial acted within its discretion in ordering the lesser sanctions.

In its decision, the Court of Appeals included a succinct summary of the duties of a lawyer who receives what reasonably appears to be an opponent's inadvertently produced privileged information. The Court of Appeals noted that RPC 4.4(b) directs a lawyer-recipient to "promptly notify the sender." The Court of Appeals also found that CR 26(b)(6) requires the lawyer-recipient to either promptly return the documents involved or to sequester them pending *in camera* review by the court concerned to determine whether privilege had been waived through inadvertent production (or whether privilege applied in the first place).

Although the Court of Appeals agreed that the defendant's lawyer had not complied with either rule, it concluded that the trial court acted within its discretion in ordering the lesser sanctions. In doing so, the Court of Appeals

noted that the plaintiff had conceded that the email fragments involved were relatively insignificant and were consistent with the plaintiff's litigation position. The Court of Appeals, citing WSBA Advisory Opinion 2216 (2012) on metadata, also cautioned that the result might have been different had the defendant's lawyer used a software tool expressly intended to defeat appropriate redactions.

Hur merits careful review by litigators involved in electronic discovery.

Although disqualification did not result on the particular facts before it, the Court of Appeals in *Hur* did not categorically rule it out either if the intrusion into privilege was more significant in light of the standards outlined in RPC 4.4(b) and CR 26(b)(6).

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author and the editor-in-chief for the WSBA *Legal Ethics Deskbook* and is a contributing author and principal editor for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is

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admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.