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## **Inadvertent Production: Where We've Been & Where We're Going**

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When inadvertent production issues surface in civil litigation, they generally fall into three categories. *First*, under the governing 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? There have been significant developments on all three fronts over the past three years. This column focuses on the American Bar Association's influential Model Rules of Professional Conduct on the first point, the Federal Rules of Civil Procedure on the second and the Federal Rules of Evidence and associated federal case law on the third.

### ***Ethical Duties***

Before 2002, there was not a specific ethics rule governing inadvertent production. Rather, ethical duties were largely set out in a series of ABA formal ethics opinions (along with corresponding ethics opinions issued by several state bar associations). 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 stop reading, notify the lawyer on the other side and generally follow the lawyer's instructions on the return or destruction of the documents unless privilege waiver was to be litigated. In the latter event, the lawyer on the receiving end could also tender the documents under seal to the court involved pending a decision on privilege waiver.

In 2002 and 2003, the ABA amended its Model Rules of Professional Conduct in many respects. That process produced a specific Model Rule, 4.4(b), and an accompanying comment, Comment 2, 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." Comment 2 leaves to procedural law whether any other actions are necessary and leaves to evidence law whether privilege has been waived. 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 Comment 2. The ABA also issued another ethics opinion, 06-442 (2006), applying these principles specifically to electronic "metadata" embedded within some electronic forms of documents. Model Rule 4.4(b), Comment 2 and the new ethics opinions are all available on the ABA Center for Professional Responsibility's web site at [www.abanet.org/cpr](http://www.abanet.org/cpr). Although not binding on states, the ethics rules in most jurisdictions (California

and New York are the most notable exceptions) are now based on the ABA Model Rules and over the past two years many states have updated their professional rules to mirror the ABA's new Model Rule 4.4(b).

***Procedural Framework***

The amendments to the Federal Rules of Civil Procedure that became effective in December 2006 contained a new section that specifically outlines the procedure for litigating possible privilege waiver through inadvertent production. F.R.C.P. 26(b)(5)(B) now provides:

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

New F.R.C.P. 26(f)(4) also encourages the use of so-called “claw back” agreements (either by informal agreement or stipulated order) under which

inadvertently produced confidential material can be “clawed back” by the producing party under specified conditions. The Advisory Committee Notes accompanying these changes emphasize that the intent is not to create a “free pass” for inadvertent production. They highlight, however, that inadvertent production is becoming more common as document production has increasingly evolved from paper correspondence to email and the cost of constructing privilege screens has increased in tandem. The Advisory Committee observed that the new rules are an attempt to provide an orderly framework for resolving inadvertent production issues. Both the new rules and the accompanying Advisory Committee Notes are available on the federal judiciary’s web site at [www.uscourts.gov/rules](http://www.uscourts.gov/rules).

A case from the U.S. District Court in Seattle, *Richards v. Jain*, 168 F. Supp.2d 1195 (W.D. Wash. 2001), illustrates another reason for asking the court: 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. Although *Richards* was decided before the ABA amended its Model Rules, subsequent cases have continued to rely on its logic to disqualify recipient counsel who did not bring asserted privilege waiver to the court and who "guessed wrong" in making their own determinations on privilege waiver. See, e.g., *Arnold v. Cargill, Inc.*, 2004 WL 2203410 (D. Minn. Sept. 24, 2004) (unpublished); *Maldonado v. New Jersey*, 225 F.R.D. 120 (D. N.J. 2004).

### ***Privilege Waiver***

Privilege waiver based on inadvertent production has also seen potentially far-reaching developments at the federal level over the past three years. The Advisory Committee on Evidence Rules has proposed a new federal rule of evidence addressing privilege waiver that would apply to both the attorney-client privilege and work product and would apply to all federal proceedings regardless of the basis for federal jurisdiction. Proposed F.R.E. 502(b) addresses

inadvertent production and as proposed by the Judicial Conference of the United States to Congress this past Fall read as follows:

“When made in a federal proceeding or to a federal office or agency, the disclosure [of a communication or information covered by the attorney-client privilege or work product protection] does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) and the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).”

Like the amendments to the Federal Rules of Civil Procedure in this regard, the Advisory Committee on Evidence Rules’ report generally reflects the same approach and concerns as expressed by the Advisory Committee on Federal Rules of Civil Procedure. Under 28 U.S.C. § 2074(b), Congress must approve any rule creating or affecting an evidentiary privilege and as I write this proposed F.R.E. 502 remains under review. If approved, it would take effect in December 2008. The proposed rule, the Advisory Committee’s report and current information on the proposal’s status and form are all available on the federal courts’ web site at [www.uscourts.gov/rules](http://www.uscourts.gov/rules).

The proposed new rule largely mirrors the factors that that federal courts have developed to assess whether inadvertent production constitutes a waiver.

Although the specific formulation varies somewhat from federal circuit to circuit, the factors typically include: (1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the “overriding issue of fairness.” See generally *U.S. ex rel Bagley v. TRW, Inc.*, 204 F.R.D. 170, 177-78 (C.D. Cal. 2001) (compiling cases); *Lawrence E. Jaffee Pension Plan v. Household Intern., Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006) (same); *In re Natural Gas Commodity Litigation*, 229 F.R.D. 82, 86 (S.D.N.Y. 2005) (same).

### ***Summing Up***

Inadvertent production is an area where both the duties imposed on lawyers and the rationale for those duties has shifted considerably over the past two decades. The last three years, however, have seen important developments that offer the prospect of a level of certainty and uniformity that this evolving area has not seen before.

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