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Inadvertent Production in Electronic Times

By Mark J. Fucile
Fucile & Reising LLP

Few areas of the law of lawyering have seen such constant change over the past 20 years as inadvertent production. Ironically, the principal reason is the equally constant evolution of technology over 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 office of general counsel letterhead. As communications between lawyers and their clients moved increasingly to electronic form, however, it both increased the volume of documents requiring screening for privilege and made the screening process more difficult. That technological change, in turn, has significantly affected the development of the law of inadvertent production on ethical duties, procedural rules and evidentiary privilege.

Ethical Duties

Before the Rules of Professional Conduct were amended in 2004, there was not a specific ethics rule governing inadvertent production. Instead, ethical duties were largely defined by two American Bar Association formal ethics opinions, 92-368 (1992) and 94-382 (1994). These opinions, which in many respects were cobbled together from the law of bailment and other legal precepts similarly removed from the professional rules, 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 opposing counsel and follow the directions of opposing counsel on returning or destroying the documents involved. If the recipient believed that privilege had been waived through inadvertent production, the ABA opinions also counseled that the final determination of privilege waiver was for the court in which the case was pending.

The explicit link between technological change and inadvertent production in the ABA opinions is best reflected in the introduction to 94-382, commenting on 92-368:

> "We recognized that, in this advanced technological age with its frequent use of facsimile machines and electronic mail, such inadvertent disclosures frequently occur, and that today's beneficiary of such disclosures may likely become tomorrow's victim." 94-382 at 1.

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, Comments 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." 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 (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 tract Model Rule 4.4(b) and its comments.[1]

When the Idaho RPCs were amended in 2004 to reflect the changes to the ABA Model Rules, they included new RPC 4.4(b) and new accompanying comments—Comments 4 and 5 in our formulation—that are identical to their ABA counterparts. The new rule applies to both Idaho state court proceedings and, under U.S. District Court Local Civil Rule 83.5(a), Idaho federal court.

Although RPC 4.4(b) only addresses notification, the duty to return or sequester pending court resolution of privilege waiver formerly found in ABA Formal Ethics Opinions 92-368 and 94-382 has now shifted to the state and federal procedural rules discussed in the next section.

Procedural Rules

The amendments adopted in 2006 to both the Idaho and Federal Rules of Civil Procedure address the procedural mechanism for litigating possible privilege waiver through inadvertent production. Both sets of amendments were developed in response to the increasingly central role of electronically stored information in discovery.[2] The Advisory Committee Report for the federal amendments observed on this point:

> "Ever since the Committee began its intensive examination of discovery in 1996, a frequent complaint has been the expense and delay that accompany privilege review. . . The Committee's more recent focus on electronic discovery revealed that the problems of privilege review are

> often more acute in that setting than with conventional discovery. The volume of electronically stored information responsive to discovery and the varying ways such information is stored and displayed make it more difficult to review for privilege than paper. The production of privileged material is a substantial risk and the costs and delay caused by privilege review are increasingly problematic. The proposed amendment . . . addresses these problems by setting up a procedure to assert privilege and work-product protection claims after production." *Id*. at 45.

Although the respective state and federal rules are similar, they are not identical.

Idaho's rule, IRCP 26(b)(5)(B), which was adopted effective July 1, 2006, reads:

> "When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) [addressing privileged information generally] with regard to the information and preserve it pending a ruling by the court."

The federal rule, FRCP 26(b)(5)(B), which was adopted effective December 1, 2006, 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."[3]

A related amendment, FRCP 26(f)(3)(D), also encourages parties to enter into so-called "claw back" agreements under which they stipulate in advance to return inadvertently produced material. *See, e.g., Adams v. United States*, No. CV-03-0049-E-BLW, 2008 WL 126629 (D. Idaho Jan. 10, 2008) (unpublished), *on reconsideration*, 2009 WL 1117392 (D. Idaho April 23, 2009) (unpublished) (enforcing such an agreement).

A recipient who does not follow the appropriate rule could be subject to discovery sanctions. Further, a 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* itself was not an inadvertent production case. The plaintiff in *Richards* was a former senior executive of a high tech company who sued his former 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 with 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 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, the court relied on inadvertent production principles, including the ABA ethics opinions discussed earlier.

Evidentiary Privilege

Privilege waiver based on inadvertent production has also seen significant recent developments.

In September 2008, Federal Rule of Evidence 502 became law and created 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 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)." Once the document involved is found to be privileged, FRE 502 now controls the analysis of waiver through inadvertent production. *See, e.g.*, *Multiquip, Inc. v. Water Management*

Systems LLC, No. CV 08-403-S-EJL-REB, 2009 WL 4261214 (D. Idaho Nov. 23, 2009) (unpublished) (holding that an email was privileged and then applying FRE 502 to conclude that privilege had not been waived through inadvertent production).[4]

Again, the principal driver for the new federal evidence rule was the increasing use of electronic communications and the attendant cost of screening that material for privilege. The Report on Senate Bill 2450, which became FRE 502[5], noted in this regard:

> "The increased use of email and other electronic media in today's business environment have exacerbated the problems with the current doctrine on waiver. Electronic information is even more voluminous and dispersed than traditional record-keeping methods, greatly increasing the time needed to review and separate privileged from non-privileged material. As the time spent reviewing documents has increased, so too has the amount of money litigants on all sides must spend to protect against the potential waiver of privilege." (Senate Report 110-264 at 2.)

Idaho does not currently have a comparable amendment to either the general rule of privilege, IRE 502, or the rule governing waiver through voluntary disclosure, IRE 510. Similarly, the precise standards for waiver through inadvertent production have not been directly addressed by appellate court decision. Especially in light of IRCP 26(b)(5)(B), however, there is nothing to suggest that Idaho's state courts would take a markedly different approach to this issue than federal court. *See generally Farr v. Mischler*, 129 Idaho 201, 207, 923 P.2d 446 (1996) (noting without applying the general approach developed

nationally on waiver through inadvertent production now recognized expressly in FRE 502).

Summing Up

Collectively, the evolving ethics, procedural and evidence rules offer an increasingly cohesive approach to inadvertent production analysis in an era when electronic communications and data storage have made inadvertent production a much more common occurrence than in the days when paper reigned supreme.

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.

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[1] ABA Formal Ethics Opinion 06-442 (2006) addresses the related issue of "metadata" embedded within electronically transmitted documents. The ABA opinions noted are available on the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr.

[2] *See* Idaho Supreme Court Order Amending Rules, signed March 17, 2006 (available on the Idaho Courts' web site at: http://www.isc.idaho.gov/rules/Discovery_rule306.pdf); Report of the Civil Rules Advisory Committee, dated May 27, 2005 (available on the U.S. Courts' web site at: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/Excerpt_CV_Report.pdf).

[3] The federal rules contain a specific provision addressing subpoenas similarly, FRCP 45(d)(2)(B). The corresponding Idaho rule, IRCP 45(d), does not, but would likely reach the same result because it permits a person served with a subpoena to challenge it on the basis of privilege or analogous protection from discovery.

[4] *Truckstop.net, L.L.C. v. Sprint Communications Co., L.P.*, Nos. CV-04-561-S-BLW, CV-05-0138-S-BLW, 2006 WL 3894914 (D. Idaho Jan. 8. 2006) (unpublished), *appeal dismissed*, 547 F.3d 1065 (9th Cir. 2008), provides an illustration of the predicate question of whether the document involved is privileged in the first place.

[5] Under 28 U.S.C. § 2074(b), Congress must approve any rule creating or affecting an evidentiary privilege.