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Clearing Up Inadvertent Disclosure

Lawyers may read only enough to determine a document is privileged and must notify opposing counsel

By WENDY PATRICK MAZZARELLA

You arrive back at your office after completing several days' worth of depositions. Before heading home, you stop to grab the "confidential" file to take with you in order to make some final notes while the facts are still fresh in your mind. When you locate the folder on your desk, to your horror, it is empty. In your mind you immediately visualize the disaster zone of the deposition room where you spent the last several days, with paperwork scattered everywhere. Oh no, you think, heart racing, is it possible you accidentally left it behind?

Inadvertent disclosure continues to be a significant issue on the front burner of ethics law. With modern cases involving volumes of paperwork and increased reliance on e-mail and other "quick" methods of transmitting information, both haste and human error create plenty of opportunities for inadvertent disclosure. Once the other side inadvertently receives a "nugget" from the opposing party, the battle is on. What is the ethical responsibility of the recipients? Do they notify their opponent? How much can they read? Do they have to return the document? Can they copy it first? And what in the world are they supposed to do with the information they have already seen, particularly if it could lead to a revamping of litigation strategy?

Inadvertent disclosure involves the competing interests of the duty of loyalty and diligent representation of a client against the broader duties of the attorney to opposing counsel, the court and the administration of justice. The long-awaited decision from the California Supreme Court in *Rico v. Mitsubishi Motors* has finally arrived. This article and the questions, answers and analysis that follow will discuss how the *Rico* case and other applicable law governs the way issues of inadvertent disclosure are approached, managed and solved.

Rico v. Mitsubishi Motors

The *Rico* ((2007) 42 Cal.4th 807) court considered what actions are ethically required of a lawyer who inadvertently receives privileged documents. The court adopted the rule expressed in *State Compensation Insurance Fund v. WPS Inc*. ((1999) 70 Cal.App.4th 644) (hereafter State Fund), that the attorney may only read as much as is necessary in order to determine the documents are privileged. Once that is determined, the attorney must notify opposing counsel immediately and make an effort to resolve the situation.

THE FACTS

In *Rico*, lawyers for Mitsubishi held a litigation strategy session at which one of the participants took notes about what was discussed at the meeting (*Rico*, supra, 42 Cal.4th at 810). One of Mitsubishi's lawyers, James Yukevich, printed out only one copy of the notes, which he kept to himself in order to help him defend the case. The notes were not labeled as either "work product" or "confidential." (*Id*. at 811)

Several weeks later, when Yukevich arrived early to depose a plaintiffs' witness at the office of plaintiffs' counsel, Raymond Johnson, he left his notes in the conference room to go to the restroom and returned to find plaintiffs' counsel and representatives in the conference room by themselves; he was permitted to get back into the room to retrieve his belongings after a short delay. (*Id*.) Somehow, Johnson came into possession of Yukevich's notes from the strategy session. He claimed that the court reporter gave them to him; the court reporter denied any memory of this issue whatsoever. (*Id*. at 812) It was subsequently ruled that Johnson had acquired the notes through "inadvertence," because defense counsel had failed to establish that plaintiffs' counsel had taken the notes from the case file. (*Id*.)

Nonetheless, Johnson made valuable use of the document. Recognizing it as a "powerful impeachment document" which he admitted he knew Yukevich had not intended to produce, he copied it for his experts and co-counsel and used the information a week later in the deposition of a defense expert. (*Id*.) Once the document came to light, defendants moved to disqualify plaintiffs' lawyers on grounds that they unethically utilized Yukevich's work product resulting in irreversible prejudice to the defendants. (*Id*. at 813) The trial court held the notes were privileged work product and that Johnson had acted unethically in his use of the notes. (*Id*.) Consequently, the court disqualified plaintiffs' attorneys and experts. (*Id*.) The Court of Appeal affirmed the trial court's order on work product grounds alone.

WORK PRODUCT

The California Supreme Court began its analysis by recognizing the document as protected attorney work product. (Id. at 814) The court cited various authorities defining attorney work product, including a definition protecting writings containing an "attorney's impressions, conclusions, opinions or legal research or theories." (Id. (citing California Code of Civil Procedure Section 2018.030(a); *Wellpoint Health Networks Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 120)) Yukevich's document contained a

summary of the experts' statements in addition to his own comments and personal impressions; the document was therefore protected work product. (*Id*. at 815)

The court pointed out that the protected nature of the document at issue precluded its use for any reason. (*Id*. at 820) This would include using it for impeachment, as Johnson attempted to do. And regarding plaintiffs' argument that the material in question should be discoverable under the crime or fraud exception, the court reiterated that under California Code of Civil Procedure (Cal. CCP) Section 2018.030(a), "[a] writing that reflects an attorney's impressions, conclusions, opinions or legal research or theories is not discoverable under any circumstances." It also noted that Cal. CCP Section 2018.050 does not apply, as it deals with official law enforcement investigations or actions brought by a public prosecutor if a lawyer's services were obtained in order to "enable or aid anyone to commit . . . a crime of fraud." (*Id*.) The material at issue in *Rico* thus remained privileged and protected.

DISTINGUISHING PRECEDENT

The plaintiffs relied on *Aerojet-General Corp. v. Transport Indemnity Insurance* ((1993) 18 Cal.App.4th 996) to argue that because the document was received through inadvertence, Johnson had a duty to use the non-privileged portions of the document to the benefit of his client. (*Rico*, supra, 42 Cal.4th at 816) The court rejected this argument, finding there were no portions of the document at issue that were "unprivileged." (*Id*.) Having distinguished *Aerojet* on the privilege issue, the court turned to State Fund, where the inadvertently produced documents at issue were clearly identified as subject to the attorney-client privilege. (*Id*.) While Yukevich's document was not marked as privileged, as the material at issue was in State Fund, (the documents in State Fund were marked "Confidential," "Attorney-Client Communication/Attorney Work Product." *Id*. (citing *State Fund, supra*, 70 Cal.App.4th at 648)) the court noted the lack of such prominent markings makes them no less privileged. (*Id*. at 818 (citing the Court of Appeal's opinion) Note also that Johnson admitted he understood Yukevich did not intend to reveal the notes. (*Id*. at 819))

Accordingly, the *Rico* court adopted the State Fund standard: "When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified." (*Id*. at 817 (citing *State Fund, supra*, 70 Cal.App.4th at 656-657))

Given that this standard could conceivably be subject to abuse, who makes the determination of how much an attorney who inadvertently receives privileged material from opposing counsel can read? The *Rico* court noted that the State Fund standard is objective. Courts must consider if "reasonably competent counsel" under all of the facts

and circumstances present in any individual case would conclude the documents at issue were privileged, and what extent of review would have been necessary to reach that conclusion. (*Id*. at 818)

The *Rico* court recognized this rule as consistent with the state policy to preserve the rights of attorneys to thoroughly investigate all aspects of their case, and practical enough to address the modern reality of the often massive nature of document production. (*Id*. at 817-818) The court also recognized that "[a]n attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary and the administration of justice." (*Id*. at 818 (citing *Kirsch v. Duryea* (1978) 21 Cal.3d 303, 309)) The court further held disqualification of plaintiffs' legal team to be proper due to the irreversible prejudice caused by Johnson's unethical use of the notes. (*Id*. at 819)

While *Rico* appears to provide some answers to the initial question regarding what to do when you fear you are in receipt of inadvertently disclosed information, specifics as to what to do from that point on are left unanswered. For example, would disqualification still be an effective remedy if the lawyer had shared the document with his or her client? Can the lawyer comply with the notification requirement when a document "clearly appear[s]" to be privileged but then still challenge the privileged status of the document after notification? And what if a lawyer decides to change his or her trial strategy as a result of viewing what little of the document was necessary to detect its privileged status? Would such a change in tactics as a result be prohibited?

ABA rules and opinions

Although not binding in California, it is interesting to note that the ABA Model Rules of Professional Conduct do address inadvertent disclosure specifically. While the inadvertent disclosure issue is discussed in Model Rule 4.4, we still do get much guidance beyond the duty to "notify" the erring party.

INADVERTENT RECEIPT OF EVIDENCE: ABA RULE 4.4(b), RESPECT FOR RIGHTS OF THIRD PERSONS

Model Rule 4.4 subsection (b) provides that: "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] updates the scope of this rule by specifying that a "document" for purposes of this rule includes electronic communication such as e-mail that can be read or made into readable form. But the question remains, what is a lawyer to do beyond merely notifying the sender? Comment [2] explains that the point of notifying the sender is to allow the sender to take protective measures. The comment declines, however, to opine on whether such production is a waiver of the privileged status of the document and whether the lawyer is required to return the original document. In fact, Comment [3] states that this is a decision reserved to the lawyers' professional judgment.

What is the effect of the ABA Model Rules upon California lawyers? This point was discussed in State Fund and that discussion was reprinted in *Rico*. The trial court in State Fund relied on ABA Formal Ethics Opinion 92-368, which has since been withdrawn, to impose monetary sanctions on the lawyer who refused to return inadvertently disclosed documents. (*State Fund, supra*, 70 Cal.App.4th 644, 651) The Court of Appeal disagreed the ABA opinion should govern the lawyer's conduct because the ABA Model Rules "do not establish ethical standards in California, as they have not been adopted in California and have no legal force of their own." (*Id*. at 655-656 [citations omitted]) While an ABA formal opinion "does not establish an obligatory standard of conduct imposed on California lawyers," the ABA Model Rules may be considered as a "collateral source" where there is no direct ethical authority in California. (*Id*. at 656)

ABA ETHICS OPINIONS

ABA Formal Opinion 05-437, Inadvertent Disclosure of Confidential Materials, states that lawyers who receive a document from their opposition on a case that they either know or reasonably should know was inadvertently produced should "promptly notify the sender in order to permit the sender to take protective measures." This opinion explicitly provided that the ABA's previous ethics opinion on this subject, Formal Opinion 92-368, be withdrawn to the extent that it concluded otherwise, noting that it was enacted before the 2002 amendment to Rule 4.4.

In ABA Formal Opinion 06-440, Unsolicited Receipt of Privileged or Confidential Materials, the committee withdrew Formal Opinion 94-382 in its entirety, which had dealt with a lawyer receiving confidential material from one not authorized to provide it, or materials that the lawyer knew or could tell were protected by the attorney-client privilege or were covered by Rule 1.6, Confidentiality of Information. That opinion advised lawyers in this situation not only to notify their opponent they had received the material, but also to refrain from viewing the material any further than necessary to see what it was, and to follow their opponent's instructions on how to proceed.

The committee noted that Rule 4.4(b) did not include these extra requirements beyond notification when material was inadvertently sent. And further, the committee pointed out in Formal Opinion 06-440 that if the material in question was intentionally sent but without authorization, Rule 4.4(b) did not apply because the transmission was not inadvertent. Lawyers in that position were not even required under the Model Rules to notify their opponents that they had received the information. They stated that the lawyer's responsibilities in this situation were beyond the scope of Rule 4.4(b), but did observe in a footnote that if the sender of confidential or privileged material has committed a crime or tortuous conduct by sending the information, a lawyer who receives and makes use of such information may be subject to court sanctions. (ABA Formal Op. 06-440, citing *Maldonado v. New Jersey* (D.N.J. 2004) 225 F.R.D. 120)

Conclusion

Inadvertent disclosure continues to present the difficult balancing of interests between a lawyer's duty of loyalty to his or her client and the duty as an officer of the court. Awareness of the rules and principles cited above will permit attorneys faced with this dilemma to evaluate their options in light of applicable ethical rules in order to make an appropriate decision. Stay tuned for more developments in this cutting-edge area of legal ethics.

This article does not constitute legal advice. Please shepardize all case law before using.

■ *Wendy Patrick Mazzarella is a San Diego County Deputy District Attorney, chair of the San Diego County Bar Association Ethics Committee and a member of the California State Bar Committee on Professional Responsibility and Conduct (COPRAC).*

Test — Legal Ethics
1 Hour MCLE Credit

This test will earn one hour of MCLE credit in Legal Ethics.

1. Before the *Rico* case, an attorney's duty upon receiving inadvertently disclosed material was governed by an applicable California Rule of Professional Conduct.

2. When California does not have an ethical rule governing a specific issue, courts may look to the ABA for guidance, although they may not consider ABA rules and opinions as binding authority.

3. In order to argue that an inadvertently produced document is privileged, the attorney must have adequately labeled the document as such.

4. Failing to notify opposing counsel or the court about the receipt of an inadvertently produced privileged document will not prejudice an attorney's handling of the case, even though it might be morally objectionable.

5. A document can be protected as attorney work product even if the entire thing was not written or prepared by an attorney.

6. Disqualification is a proper remedy for unethical use of inadvertently produced information when its misuse results in irreversible prejudice.

7. An attorney's duty to engage in aggressive impeachment trumps his or her duty as an officer of the court to notify all parties upon accidental receipt of inadvertently produced information.

8. ABA Model Rule 4.4(b) requires a lawyer who inadvertently receives a document to promptly return the document to the sender.

9. *Rico* is the first California case to address the situation presented by accidental disclosure of privileged information.

10. Unethical use of inadvertently received information may lead to disqualification not only of the attorney handling the case, but also of other members of his or her legal team with whom the attorney shared the document.

11. According to *Rico*, the initial determination of whether or not an inadvertently received document is privileged must be made by the court.

12. In determining what to do with an inadvertently disclosed document, it does not make a difference what the document is, only that it has been accidentally obtained from the other side.

13. Under *Rico*, a court is required to conduct its own determination of how much examination of a document would have been required to ascertain its privileged status.

14. Regarding different modes of transmitting information, the ABA Rules do not cover inadvertently received e-mails.

15. After *Rico*, when a California lawyer inadvertently receives a document that is obviously privileged, he or she has a duty to immediately return the document to the sender.

16. Under the ABA Model Rules, whether or not a lawyer returns an inadvertently received document is a decision that is left to his or her professional judgment.

17. When opposing counsel intentionally sends a privileged document, the rule in *Rico* still applies.

18. In explaining its holding, the *Rico* court considered the reality of large scale document production involved in modern cases.

19. California lawyers are now specifically prohibited from considering anything they happen to read in an inadvertently produced document.

20. A court is required to consider whether reasonably competent counsel would have concluded a document at issue was privileged, even if the attorney who received the document explains that he did not reach that conclusion.

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