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## Inadvertently Disclosed Information

# “Do I have to give it back?”

The almost universal use of fax machines, cellular phones, and e-mail have added another level of complexity to the responsibilities of attorneys in regard to the protection of confidential information received within the context of the attorney-client relationship. Inadvertent disclosure of this confidential client information is a breach of duty, which may lead to the loss of attorney-client or work product evidentiary privileges—as well as reveal information against the client’s wishes, or disclose strategies to the detriment of the client’s case. Moreover, it can lead to a malpractice suit or disciplinary complaint based on violations of the Rules of Professional Conduct.

Imagine yourself arriving at work one Monday morning, pouring your first cup of coffee, and leaning back in your desk chair to read Saturday’s mail. At first it seems like the usual assortment of motions, correspondence, records and bar association newsletters. As you take a moment to read through an opponent’s production response in a hotly contested case, you notice what appears to be a letter from opposing counsel to his/her client about your upcoming mediation. You scan the first few lines of the letter and realize the purpose of the letter is to provide opposing counsel’s client with a settlement evaluation. Being a principled individual and lawyer, you stop reading and put the letter on your desk, face down. Your blood pressure rises a bit, both out of excitement and concern. On the one hand, you are thinking of your duty to zealously represent your client and the tremendous advantage you could gain at mediation by reading the contents of this letter. On the other hand, you’re thinking of fairness, and how you might want opposing counsel to respond if you had made such a mistake. Your mind is full of questions. Do I have to tell opposing counsel that I have this letter? Can I read the rest of the letter? Do I have to give it back? What do the law and rules of ethics say about this?

Unfortunately, there is no single answer because the answers to these questions depend upon where you practice. This article focuses on three states—Indiana, Ohio and Michigan—and attempts to answer the initial question: *Do I have to give it back?*



**Inadvertent disclosure of confidential client information is a breach of duty which may lead to the loss of attorney-client or work product evidentiary privileges...**

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### Background and Overview on Inadvertent Disclosure

Federal Courts have taken three distinct approaches in cases of inadvertent disclosure of privileged communications.<sup>1</sup> Some courts have applied an objective test, holding that nearly any disclosure of a privileged communication results in waiver, plain and simple.<sup>2</sup> Courts taking this approach have theorized the judiciary should not be consumed with searching for the true intention of the disclosing party or with exercising hindsight by analyzing the adequacy of precautions taken by the disclosing party. While this approach provides a bright-line rule for the recipients of the privileged information, it creates a harsh result for counsel whose inadvertence leads to the attorney-client relationship being laid bare.

On the other end of the spectrum, some courts have held that unintentional disclosure cannot waive the privilege at issue, be it attorney-client, work product, or otherwise. These courts have adopted a subjective test, reasoning that a waiver of privilege must be intentional; thus, an inadvertent disclosure cannot waive the privilege.<sup>3</sup> While this is a protective and forgiving rule, it seems to do little to discourage negligent or reckless handling of important, privileged documents that professionalism should require an attorney to treat with care. Further, it “levels the playing field” by arguably preventing the better advocate—who presumably was careful with his or her privileged documents—from capitalizing

on an opponent’s mistake, and burdens the recipient with obligations resulting from opposing counsel’s error.

A third group of courts take a middle ground, using a balancing test to decide on a “case-by-case” basis whether the circumstances of the inadvertent disclosure warrant a finding the privilege has been waived.<sup>4</sup> Courts taking this middle ground—and applying a balancing test—generally consider five factors to be relevant to their analysis: (1) the reasonableness of the precautions taken by the party asserting privilege to prevent the disclosure; (2) the time taken to rectify the inadvertent error; (3) the scope and nature of the discovery proceedings; (4) the extent of the disclosure in relation to a role in discovery proceedings; and (5) the overriding issue of fairness.<sup>5</sup>

### The American Bar Association’s Position

On October 1, 2005, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association (ABA) issued Formal Opinion 05-437, significantly narrowing the scope of a lawyer’s duties to an opposing party where the lawyer receives a document inadvertently disclosed by the opposing party. In conjunction with this Opinion, the ABA also withdrew its earlier Formal Opinion 92-368, under which lawyers were obligated to: (1) refrain from examining inadvertently disclosed documents; (2) notify the sender of the receipt of the documents; and (3) follow the instructions of the sending lawyer with respect to the disposition of the documents. In contrast, under the ABA’s new position, a lawyer who inadvertently receives a privileged document from an opposing party or lawyer is under an ethical obligation only to “notify the sender” of the disclosure.

The ABA’s new ethics opinion was issued in order to provide consistency with ABA Model Rule of Professional Conduct 4.4(b), as revised as part of the ABA’s “Ethics 2000”

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<sup>1</sup> For a detailed discussion of these approaches, see the excellent discussion in *Draus v. HealthTrust, Inc.*, 172 F.R.D. 384 (S.D.Ind.1997).

<sup>2</sup> See *In re Sealed Case*, 877 F.2d 976, 980 (D.C.Cir. 1989); *F.D.I.C. v. Singh*, 140 F.R.D. 252, 253 (D.Me. 1992); *Int’l Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 449 (D.Mass. 1988).

<sup>3</sup> See *Helman v. Murry’s Steaks, Inc.*, 728 F.Supp. 1099, 1104 (D.Del. 1990); *Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12, 21 (D.Neb. 1983); *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F.Supp. 936, 938-39 (S.D.Fla. 1991); *Mendenhall v. Barber-Greene Co.*, 531 F.Supp. 951, 954 (N.D.Ill. 1982).

<sup>4</sup> See *Allread v. City of Grenada*, 988 F.2d 1425, 1334 (5th Cir. 1993); *Bud Antle, Inc. v. Grow-Tech, Inc.*, 131 F.R.D. 179, 183 (N.D.Cal. 1990); *Hartford Fire Ins. Co. v. Garve*, 109 F.R.D. 323, 332 (N.D.Cal.1985).

<sup>5</sup> *Miles-McClellan Constr. Co., Inc. v. The Board of Education Westerville*, 10th Dist. No. 05AP-1112, 2006-Ohio-3439.

comprehensive revisions to the Model Rules, and now provides, simply, 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.*

The comments to revised Rule 4.4(b) provide that “[w]hether the lawyer is required to take additional steps, such as returning the original document, is a matter of [substantive] law beyond the scope of these Rules as is the question of whether the privileged status of a document has been waived.” Thus, under the new ABA approach, lawyers must look to the courts for resolution of the questions of waiver, return, and use of the inadvertently disclosed information.

### **Inadvertent Disclosure in Indiana and Ohio**

Indiana and Ohio are similar in their approach to dealing with inadvertently disclosed information. Both states have recently adopted the new version of ABA Model Rule 4.4(b).<sup>6</sup> While the language of this rule is the same in both states, the comments to the rule differ slightly. If you practice in these states, you must pay close attention to cases that will be coming down in the future and analyze the latest changes. While your ethical obligation to opposing counsel is discharged by “promptly notifying the sender,” resolution of the remaining critical issues regarding the evidentiary use of this information—if the parties cannot agree after notification is made—will be decided by the courts.

With regard to resolution of the waiver of privilege through inadvertent disclosure, both Indiana and Ohio courts have historically adopted the middle ground “case-by-case” approach and apply the balancing test to resolve these issues.

For example, in addressing the issue of inadvertent disclosure of allegedly privileged documents through discovery, the Ohio Court of Appeals has held the trial court must hold a hearing considering the “five factors” discussed above before determining to what extent—if any—waiver has occurred.<sup>7</sup>

However, most recently since adopting the new Model Rule 4.4(b), the Ohio Court of Appeals qualified this rule, noting on May 19, 2008, “we find that the trial court *may* consider the five (5) factors listed above, but is not required to do so.”<sup>8</sup> Thus, while the court in *Guider* did utilize the “middle ground” five (5) factor test, Ohio practitioners would be wise to continue to watch for new developments in this area of evidentiary and privilege law.

Indiana applies the same test for considering contested materials that have been inadvertently disclosed.<sup>9</sup> Courts applying the balancing test have looked broadly at the reasonableness of the disclosing party’s actions to protect information prior to the inadvertent disclosure, and the extent of their efforts to take action to prevent use of the information after it has been disclosed. Of note, while there is a duty in Indiana to inform the sender of the inadvertent disclosure, the duty to send the materials back to the sender is not so clear. Given the recent adoption of the ABA’s new approach, courts applying Indiana law have recommended (but not required) the return of inadvertently disclosed documents upon receipt.<sup>10</sup>

Thus, while the Rules of Professional Conduct do not speak to this issue, and the courts of Indiana and Ohio have not expressly created this duty, consideration of the return of this information seems to be the better practice.

### **Inadvertent Disclosure in Michigan**

Michigan has not explicitly adopted ABA Model Rule 4.4(b); however, this has not left Michigan without guidance on inadvertent disclosure. Case law has created a duty to notify the opposition when it is apparent to an attorney that there has been an inadvertent disclosure.<sup>11</sup>

In *Resolution Trust. v. First of America Bank*, defense counsel inadvertently sent a document, marked “PRIVILEGED AND CONFIDENTIAL” to plaintiff’s counsel. The document laid out the facts of the case and the strategy of the defense. Plaintiff’s counsel notified defense counsel the letter had been received, and defense counsel requested it be returned and that plaintiff’s local counsel—who received the letter—be disqualified. In analyzing the case, the court stressed a high sensitivity to ethics and to the importance of attorney-client confidentiality. In reaching its decision, the court relied on the ABA Model Rules and the earlier ABA Opinions 92-368. Thus, while not expressly adopted by the Michigan, the older version of Model Rule 4.4(b) was utilized in reaching this decision.

At present, a Michigan lawyer receiving materials under circumstances where it is clear material was not intended for the receiving lawyer—where the documents appear on their face to be confidential or subject to attorney-client privilege—must refrain from examining the materials, notify the sending lawyer that the materials were received, and do either of the following: (1) follow the sending lawyer’s directions about the disposition of the confidential materials or (2) refrain from using the materials until a definitive resolution to the inadvertently disclosed documents is obtained from a court.<sup>12</sup> As explained by the court, “[w]hile lawyers have an obligation to vigorously advocate the positions of their clients, this does not include the obligation to take advantage of a clerical mistake in opposing counsel’s office where something so important as the attorney-client privilege is involved.”<sup>13</sup>

In sum, Michigan courts analyze whether waiver has occurred, applying the subjective test requiring there must be a “true waiver” by an intentional, voluntary act. In Michigan, a waiver cannot arise by implication.<sup>14</sup>

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<sup>6</sup> Indiana adopted ABA Model Rule 4.4(b) effective January 1, 2005. Ohio adopted the revised Model Rule effective February 1, 2007.

<sup>7</sup> *Miles-McClellan Constr. Co.*, *supra*, at 5.

<sup>8</sup> *Guider v. Am. Heritage Homes Corp.*, WL 2080 686 (Ohio App. 3 Dist., May 19, 2008).

<sup>9</sup> *P.T. Buntin, M.D., P.C. v. Becker*, 727 N.E.2d 734, 741 (Ind. App. 2000); *JWP Zack, Inc. v. Hoosier Energy Rural Elec. Co-op, Inc.*, 709 N.E.2d 336, 342 (Ind.App. 1999).

<sup>10</sup> *Allen v. Int’l Truck and Engine*, 2006 WL 2578896, 12 (S.D.Ind. 2006).

<sup>11</sup> *Resolution Trust Corp. v. First of Am. Bank*, 868 F.Supp. 217, 220 (W.D.Mich., 1994).

<sup>12</sup> *Resolution Trust Corp. v. First of Am. Bank*, *supra*, 868 F.Supp. at 219.

<sup>13</sup> *Resolution Trust Corp. v. First of Am. Bank*, *supra*, 868 F.Supp. at 220.

<sup>14</sup> *Holland v. Gordy Co.*, 2003 WL 1985800 (Mich.App.).

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### Conclusion and Observation

At present, all three states discussed in this article require the recipient of privileged information notify opposing counsel of their mistake. In Indiana and Ohio there is no duty to return the privileged document, although in Indiana, at least one court implies this would be the appropriate action. While Indiana and Ohio apply the balancing test to determining whether the inadvertent disclosure of the material constitutes a waiver of the attorney-client privilege, Michigan utilizes the subjective test to determine the disclosing party's intent. Keep in mind since the ABA's recent revision of the Model Rules of Professional Conduct, the answer to the question “do I have to give it back?” has changed and will likely continue to be in flux with upcoming court opinions.

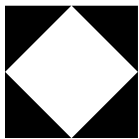
Although attorneys must follow substantive law and the rules of ethics on their march through frequently contentious litigation, they also have the ability to do more than the law requires. Professional courtesy is an important unwritten rule of engagement in litigation. While conducting an aggressive defense is important, each lawyer must decide for themselves the best course to follow when privileged communications are inadvertently disclosed. Returning the inadvertently disclosed information—regardless of the rules—may be the best, and most professional, practice.

**The answer to the question “do I have to give it back?” has changed and will likely continue to be in flux in upcoming court opinions.**

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