Rules Governing
The Inadvertent Disclosure
Of Privileged Documents
In Maine

by Michael A. Nelson

You have just received a CD containing thousands of documents produced by opposing counsel in a large commercial case. As you begin the review, you realize that one group of documents appears to include communications between the president of the opposing party and his counsel, including extensive discussions of litigation and settlement strategy.

Your first thought might be: “Eureka, I have just hit the mother lode!” Then you realize that you actually may have a problem. What should you do?

This article will describe the history, development, and current status of the rules governing the conduct of lawyers who receive inadvertently disclosed privileged documents.

The Governing Rules
Common Law Rules

The attorney-client privilege protects confidential communications between a lawyer and a client for the purpose of giving or receiving legal advice. Voluntary disclosure of the communication to a third party waives the privilege.

The question of whether the inadvertent disclosure of a privileged document constituted the waiver of the privilege was first addressed in Maine by the federal court in FDIC v. Singh. In that case, the court observed that other courts had resolved the question of whether the inadvertent disclosure of a privileged document constituted the waiver of the privilege in one of three ways. One line of cases held that a truly inadvertent disclosure was not a voluntary disclosure and, therefore, could never constitute a waiver of the privilege. A second line held that it could constitute a waiver if the party asserting the privilege failed to take reasonable precautions to protect the privilege and prevent disclosure. A third line held that a disclosure, inadvertent or not, constituted a waiver of the privilege because privileged documents must be confidential and a disclosed document no longer was confidential. The federal court in Singh case opted for the third approach. Hence, as of 1990, the disclosure of a privileged document in Maine constituted a waiver of the privilege, allowing the receiving party to read and...
use the document for whatever advantage could be gained.

Two years later, the Professional Ethics Commission of the Maine Board of Overseers of the Bar addressed the issue of inadvertent disclosure from an ethical standpoint. The Commission concluded that the Maine Bar Rules did not prohibit a lawyer from retaining and using a clearly privileged document “voluntarily but mistakenly provided by opposing counsel.” The Commission indicated that the receiving lawyer should notify opposing counsel of the inadvertent disclosure of the document and provide counsel with a copy. However, it concluded that nothing in the Bar Rules in effect at that time prevented the receiving lawyer from disclosing and using the document.

The Law Court first addressed the issue five years later in Corey v. Norman Hanson & DeTroy. In that case, the Law Court rejected the federal court’s adoption of the third line of cases—that inadvertent disclosure always constitutes a waiver of the privilege—and adopted the opposite position that a truly inadvertent disclosure of a privileged document by a lawyer to opposing counsel does not constitute a waiver of the privilege. The Court reasoned that since only the client could waive the privilege, an inadvertent disclosure of a privileged document by a lawyer to opposing counsel does not constitute a waiver of the privilege. The Court further held that the receiving lawyer could not use or disclose the document and must return it to the producing party.

Hence, as of 1999, Maine had two diametrically opposed common law rules governing the inadvertent disclosure of privileged documents. For cases pending in federal court, the inadvertent disclosure of a privileged document constituted the waiver of the privilege allowing the receiving party to use and disclose the document. For cases pending in state court, inadvertent disclosure did not constitute a waiver of the privilege and lawyers receiving such documents were required to return them without using or disclosing them. Subsequent amendments to the Federal and Maine Rules of Civil Procedure, the Federal Rules of Evidence and the Maine Rules of Professional Conduct modified these common law rules.

Rule 26(b)(5)(B) of the Federal and Maine Rules of Civil Procedure

Rule 26(b) of the Federal Rules of Civil Procedure was amended in 2006 to establish procedures in the event of the inadvertent disclosure of privileged documents. The Maine Rules of Civil Procedure were amended in 2008 to incorporate the federal rule.

Under Rule 26(b)(5)(B), a party who believes that it has inadvertently disclosed privileged documents must notify the receiving party of its privilege claim with respect to those documents. Upon receipt of that notice, the receiving party must promptly return, sequester, or destroy the specified documents and any copies. The receiving party may not use or disclose the documents and must take reasonable steps to retrieve them if they have been disclosed or produced. If there is a dispute concerning the privilege claim, that dispute may be taken to the Court by either party for determination of the validity of the claim.

Under Rule 26(b)(5)(B), the receiving party’s obligations to return, sequester, or destroy are not triggered until that party is notified by the producing party that privileged documents have been inadvertently produced. Even if the receiving party could reasonably discern that privileged documents had inadvertently been produced, the receiving party can and must disclose those documents until it receives notice of the privilege claim from the producing party. The burden is solely on the producing party to trigger the receiving party’s obligations to return, sequester, and destroy by giving notice of its privilege claim.

Rule 26(b)(5)(B) is intended to work in tandem with Rule 26(f), which directs the parties to discuss discovery plans, including methods for handling privilege or work product claims. Those discovery plans may include, among other things, an agreement by the parties to institute protocols to minimize the risk that the inadvertent disclosure of privileged documents would constitute a waiver of the privilege. The protocols may include “clawback” agreements under which the parties would agree that the inadvertent disclosure of privileged documents would not constitute a waiver of the privilege and that any such document be returned promptly to the producing party. In federal court, clawback agreements are enforceable by the parties against one another under the rules of evidence. Those agreements are enforceable against third parties as long as they are incorporated into a court order.

Federal Rule of Evidence 502(b)

In 2008, Congress added Rule 502(b) to the Federal Rules of Evidence, entitled “Attorney-Client Privilege and Work Product; Limitations on Waiver.” The rule was designed to address the rising costs associated with discovery in civil litigation, particularly the time and effort spent by counsel to protect privileged documents from inadvertent disclosure.

Like the Maine federal court in Singh, the drafters of Rule 502(b) recognized that courts had addressed the inadvertent disclosure issue in three different ways. One line of cases found that an inadvertent disclosure always constitutes a waiver. A second line held that an inadvertent disclosure only constitutes a waiver if the disclosing party acted carelessly in protecting or retrieving inadvertently disclosed privileged documents. And a third held that an inadvertent disclosure could never constitute a waiver. The third line was the one adopted by the Law Court in Corey. The first line had been adopted by the federal court in Singh. The drafters of Fed. R. Evid. 502(b) opted “for the middle ground.” According to Rule 502(b), the inadvertent disclosure of privileged documents does not constitute a waiver if (i) the holder of the privilege took reasonable steps to prevent disclosure and also took prompt and reasonable steps to rectify any inadvertent disclosure, or (ii) the privilege is not waived if:

(i) the disclosure is inadvertent;
(ii) 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 (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).¹⁵

Under Fed. R. Evid. 502(b), the burden is on the producing party to prove all three requisite elements to avoid waiver.¹⁶ The result will depend on the facts and circumstances in a given case. Among other things, the “reasonableness of the efforts by the producing party to protect the privilege would include the number of documents, the time constraints on production, the use of analytical software systems applications, and the appropriate document management system employed.”²⁷

For example, it has been held that the inadvertent disclosure did not waive the privilege when the scope of discovery was extensive, encompassing 6,952 pages of documents; the disclosed privileged documents encompassed only 357 pages; and the production error did not occur until after the law firm had provided the documents to a vendor providing document scanning services.¹⁸ It was not waived when four inadvertently produced privileged documents were included in a 1,600-document production¹⁹ or when 31 pages of privileged documents were included in a production of 540 documents.²⁰ The privilege was found to have been waived when the producing party failed to provide detailed evidence of its efforts and procedures to protect the privileged documents.²¹

Further, the producing party must prove that once it learned of an inadvertent disclosure of privileged documents, it acted promptly and reasonably to notify the opposing party and to retrieve those documents. The rule does not require the producing party to engage in a post-production review to ensure that no privileged document had been inadvertently produced. However, the producing party is expected to rectify any production problem as soon as it learns of the disclosure.²² It has been held that notice to the receiving party was timely if given within 24 hours, five days, and one day. Notice was untimely when the producing party waited weeks to notify the receiving party²³ or years to request court intervention once the receiving party refused to return the document.²⁴

Therefore, if a privileged document is produced inadvertently in a proceeding pending in federal court in Maine, the privilege may or may not be waived depending on the producing party’s ability to prove the requisite elements necessary to preserve the privilege set forth in Fed. R. Evid. 502(b). This is a substantive change from the earlier rule set forth by the Federal Court in Singh.

Rule 4.4(b) of the Maine Rules of Professional Conduct

On August 1, 2009, the Maine Rules of Professional Responsibility were replaced by the Maine Rules of Professional Conduct, which are patterned after the ABA Model Rules of Professional Conduct. Rule 4.4 of the ABA Model Rules directly address the ethical obligations of lawyers who received inadvertently disclosed privileged documents as follows:

“(b) 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.”

Under the ABA Model Rules, the sole obligation of the lawyer receiving an inadvertently disclosed privileged document is to notify the party producing the document. There is no obligation under the ABA Model Rule to refrain from disclosing or using that document or to return it, at least until notice is received that the producing party is asserting a privilege claim with respect to it.

The Maine Ethics 2000 Task Force, which drafted the Maine Rules of Professional Conduct, recommended a version of Rule 4.4(b) that differs from the ABA Model Rule by imposing more specific and extensive ethical obligations on the lawyer receiving an inadvertently produced document that is apparently privileged. The Maine Supreme Judicial Court adopted the Task Force’s recommendation. Under Maine’s version of Rule 4.4(b), a lawyer receiving an inadvertently produced privileged document not only must notify the sender (as required by the ABA Model Rules) but also must refrain from reading the document; must promptly return, sequester, or destroy the document and all copies; and may not use or disclose any information on the document.²⁵

This Rule governs the conduct of all Maine lawyers, whether they are litigating cases in state or federal court, or engaging in a transactional representation.²⁶

Application of the Governing Rules

In light of the governing rules concerning the treatment of inadvertently disclosed privileged documents, what should lawyers do when they receive such documents? The answer may depend on (i) whether the document was received in connection with a judicial proceeding or in the context of a transactional representation; (ii) whether the proceeding is pending in state court or federal court; and (iii) whether the lawyer received the document directly from the opposing side or indirectly, through his or her own client.

Disclosure in a Judicial Proceeding or During a Transactional Representation

The common law rule set forth by the Law Court in Corey, as well as the procedural and evidentiary rules set forth in Federal and Maine Rules of Civil Procedure 26(b)(5)(B) and Federal Rule of Evidence 502(b) govern the inadvertent disclosure of privileged documents during litigation. They do not appear to apply to transactional lawyers where the inadvertent disclosure occurs outside of litigation. That leaves Rule 4.4(b) of the Maine Rules of Professional Conduct as the only rule providing governing transactional lawyers who receive such
documents. Rule 4.4(b) requires all lawyers, including those involved in transactions, who receive an inadvertently produced privileged document to stop reading that document; to notify the sender of the inadvertent disclosure; and to return, destroy or sequester the document. However, since transactional lawyers operate outside of litigation, they do not have an available forum to challenge the validity of the privilege claim or to enforce any right to compel the return of the document. The only available recourse for transactional lawyers who believe that Rule 4.4(b) has been violated would be a complaint to the Board of Bar Overseers.27

Federal or State Judicial Proceedings

In FDIC v. Singh and Corey, the Federal Court and the Law Court staked out opposing positions on whether the inadvertent disclosure of a privilege document constituted a waiver of the privilege. The Federal Court's position on waiver was modified by Fed. R. Evid. 502(b) which adopted the so-called “middle ground” line of cases, providing that the privilege may or may not be waived by an inadvertent disclosure depending upon whether the producing party took reasonable precautions to protect the privileged document and to retrieve it once it was inadvertently produced. The Law Court, on the other hand, has not backed away from the rule adopted in Corey that an inadvertent disclosure does not, under any circumstances, constitute a waiver of the privilege.

A lawyer practicing in federal or state court who receives an apparently privileged document must, in the first instance, comply with the ethical requirements of Rule 4.4(b) of the Maine Rules of Professional conduct and stop reading the document, notify the other side and return, destroy or sequester it. However, if the privilege claim subsequently is litigated, the existence of the privilege and whether it has been inadvertently waived will be governed by different rules in state and federal court. In state court the waiver issue will be governed by Corey, which held that an inadvertent disclosure does not constitute a waiver of the privilege. However, in federal court the issue will be governed by Fed. R. Evid. 502(b), which requires that the party asserting the privilege prove that the disclosure was truly inadvertent, and that it took reasonable efforts to prevent disclosure and to retrieve the document once it was disclosed.

The Party Who Provided the Document to the Lawyer

Let us assume that a party inadvertently discloses an apparently privileged document not to a lawyer, but to another party. That receiving party then provides the document to his lawyer.

Does receipt of that apparently privileged document by the lawyer from his own client trigger the lawyer's ethical obligations under Rule 4.4(b)? Must that lawyer avoid reading the document, disclose his receipt of that document to the opposing lawyer, and return or sequester it? Or, under those circumstances, would those Rule 4.4(b) obligations be trumped by the confidentiality requirements of Rule 1.6(a) of the Rules of Professional Conduct, which would prohibit that lawyer from revealing any communications between him and his client, including his receipt of the document from that client?

Not surprisingly, the answer to that question depends on whom you listen to. The ABA Standing Committee on Ethics and Professional Responsibility takes the position28 that Rule 4.4(b) does not require a lawyer to notify opposing counsel of the receipt of an apparently privileged document from his own client because the lawyer has not received that document “inadvertently.” His own client intentionally gave him the document. The fact that the lawyer received the document from his client and not directly from an opposing party or lawyer does not trigger the lawyer's obligations under Rule 4.4(b). Further, under the lawyer's confidentiality obligations pursuant to Rule 1.6(a), the lawyer would be prohibited from notifying opposing counsel of his receipt of the document because that would constitute the disclosure of a confidential communication between the lawyer and his client. He can make that disclosure to the opposing counsel only if his client waives the lawyer's confidentiality obligation under Rule 1.6(a).

The New Jersey Supreme Court has expressed the opposite view.29 In that case, a client found apparently privileged e-mails on his employee's computer and gave those e-mails to his lawyer. The Court held that the lawyer's receipt of those e-mails from his own client triggered the lawyer's obligations under Rule 4.4(b) to notify opposing counsel of his receipt of those e-mails. Even though the lawyer did not receive the e-mails directly from an opposing party or opposing attorney, but received them from his own client, he was still obliged to treat them as inadvertently produced privileged documents under Rule 4.4(b). The Court did not attempt to reconcile the lawyer's apparently conflicting obligations under Rule 4.4(b) to disclose his receipt of those e-mails from his client to opposing counsel, and the lawyer's obligation under Rule 1.6(a) to keep his communications with his client confidential.

It remains to be seen whether the Law Court will adopt the position of the ABA Standing Committee or the New Jersey Supreme Court on that issue.

The amendments to the Federal and Maine Rules of Civil Procedure, the Federal Rules of Evidence, and the Maine Rules of Professional Conduct have provided lawyers with guidance as to their ethical and procedural obligations when they receive inadvertently disclosed privileged documents. However, differences still remain between federal and state courts in Maine as to when an inadvertent disclosure constitutes a waiver of the privilege. There also is uncertainty as to the apparently conflicting ethical obligations of a lawyer who receives an apparently privileged document that had been inadvertently disclosed to his own client.
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1. M.R. Evid. 501(a); 8J Wigmore, Evidence § 2292 (McNaughton Rev. 1961).
8. 1999 ME 196, 742 A.2d 933.
12. Pursuant to the Rules Enabling Act, 28 U.S.C. § 2074(b), rules "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by an Act of Congress."
14. Fed. R. Evid. 502(b) advisory committee's note.
15. There is no comparable rule in the Maine Rules of Evidence.
17. Fed. R. Evid. 502(b) advisory committee's note.
22. Fed. R. Evid. 502(b) advisory committee's note.
25. The rule reads as follows:
(b) A lawyer who receives a writing and has reasonable cause to believe the writing may have been inadvertently disclosed and contain confidential information or be subject to a claim of privilege or of protection as trial preparation material.

(i) shall not read the writing or, if he or she has begun to do so, shall stop reading the writing;
2) shall notify the sender of the receipt of the writing; and
3) shall promptly return, destroy or sequester the specified information and any copies.

The recipient may not use or disclose the information in the writing until the claim is resolved, formally or informally. The sending or receiving lawyer may promptly present the writing to a tribunal under seal for a determination of the claim.

M.R. Prof. Conduct 4.4(b).
26. D. Me. Local R. 83.3.

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