

*Inadvertent production of privileged documents: What every Georgia lawyer needs to know;  
IN PRACTICE The Daily Report (Fulton County GA) April 29, 2014 Tuesday*

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**BODY:**

CONSIDER THE FOLLOWING scenario: in reviewing materials provided in discovery by your adversary in civil litigation, you discover that opposing counsel inadvertently produced privileged documents. Are you required to notify opposing counsel of this error? Are you allowed to read the documents? Do you have to return the documents or can you use them in the litigation?

The answers to these questions are not as straightforward as you might think. Part of the confusion stems from the fact that Georgia has not adopted the provision of the Model Rules of Professional Conduct that specifically addresses this issue. Likewise, the Georgia Civil Practice Act and Georgia Evidence Code omit relevant provisions of the Federal Rules of Evidence and Civil Procedure that also address inadvertent disclosure.

However, as discussed below, there is some guidance found in Georgia case law that can assist a Georgia lawyer in addressing the issues that arise from inadvertent disclosure.

The Model Rules of Professional Conduct

Under Rule 4.4(b) of the American Bar Association's Model Rules of Professional Conduct, "a lawyer who receives a document related to the representation of the lawyer's client, and knows or reasonably knows that the document was inadvertently sent, shall promptly notify the sender."

This rule, which applies to both litigation and non-litigation matters, was enacted in 2002. The vast majority of states have adopted this rule or something substantially similar to it, but Georgia has not. Nevertheless, Georgia lawyers who appear pro hac vice in other jurisdictions should be aware that this rule exists because lawyers practicing in other states generally are required to comply with the forum state's ethics rules.

## Federal jurisprudence

Georgia lawyers who practice in federal court (in Georgia and elsewhere) should be aware of two provisions of the Federal Rules that apply to inadvertent disclosure. First, [Fed. R. Civ. P. 26\(b\)\(5\)\(B\)](#) provides that a party who inadvertently produces a privileged document can notify the receiving party of a claim of privilege. Thereafter, the party being so notified must return or sequester the document (and may not use it) until the claim of privilege is resolved.

This rule is more protective than Model Rule 4.4(b) in some respects, but less protective in others. For example, unlike [Rule 4.4\(b\)](#), [FRCP 26](#) does not require a party receiving potentially privileged information to notify the producing party of the inadvertent disclosure. Moreover, [FRCP 26](#) only applies in civil litigation, while Model Rule 4.4(b) applies in any legal context-i.e., civil litigation, criminal litigation, corporate transactions, etc.

On the other hand, once a receiving party has been notified of the claim of privilege, [FRCP 26](#) requires the receiving party to sequester and not use the allegedly privileged document until the claim of privilege is resolved. Model Rule 4.4(b) imposes no such requirement.

The second relevant federal provision is [Federal Rule of Evidence 502\(b\)\(2\)](#). That rule provides that the disclosure of information subject to the attorney-client privilege or work product doctrine shall not constitute a waiver if: the disclosure was inadvertent; the producing party took reasonable steps to prevent disclosure; and the producing party promptly notifies the receiving party upon discovery of the error. In applying that rule, federal courts generally place the burden on the party asserting the privilege to prove that production was inadvertent and that reasonable steps were taken to prevent disclosure.<sup>n1</sup>

Where the proponent of the privilege fails to demonstrate that it took adequate steps to insure that privileged materials were not produced in discovery, courts have found a waiver. For instance, one court found that the privilege was waived where the attorney mistakenly filed privileged documents under seal (with a copy sent to opposing counsel) instead of filing them for an in camera inspection by the court.<sup>n2</sup> Another court held that reasonable steps were not taken to protect the privilege where the author of privileged documents failed to label the documents as privileged or identify the author of the documents as an attorney.<sup>n3</sup>

## Georgia practice

As noted above, the Georgia Rules of Professional Conduct do not include Model Rule 4.4(b). The Georgia Civil Practice Act and the recently amended Georgia Evidence Code do not include provisions analogous to [FRCP 26\(b\)\(5\)\(b\)](#) and [FRE 502\(b\)\(2\)](#) discussed above. Moreover, there are no Georgia ethics opinions on this topic.<sup>n4</sup>

Notwithstanding the lack of any controlling ethics rules, advisory opinions or statutes, Georgia courts have nevertheless protected privileged documents that have been inadvertently disclosed. In one recent instance, the Georgia Court of Appeals affirmed a trial court's decision ordering the return of inadvertently produced documents.<sup>n5</sup> In so ruling, the Court of Appeals noted that the trial court had broad discretion in such discovery-related matters. The Court of Appeals also declined to apply the Federal Rules discussed above, relying instead on the general protection of privilege set forth under Georgia law.<sup>n6</sup>

The Court of Appeals also appeared to place the burden on the party seeking disclosure to demonstrate that the privilege was waived. Thus, while the legal basis for the return of

inadvertently produced materials is less settled under Georgia law than it is under federal law, Georgia courts do seem inclined to allow the clawback of privilege materials.

## Conclusions

Georgia lawyers should be aware that, when practicing in other jurisdictions which have adopted Model Rule 4.4(b), they may have an ethical obligation to notify opposing counsel of inadvertently disclosed materials. Moreover, when litigating in federal courts, there are specific statutory guidelines addressing inadvertent disclosures. While there are no corollary provisions under Georgia ethical, procedural or evidence rules, Georgia courts have nevertheless been willing to protect the privilege in the event of an inadvertent disclosure.

However, to avoid any doubt, lawyers should consider entering into a clawback agreement with opposing counsel prior to the commencement of discovery. This provides both parties with an added measure of protection.

## Footnotes

- [\[note 1\]](#) See e.g., [Callan v. Christian Audiger Inc.](#), 263 F.R.D. 564, 566 (C.D. Cal. 2009); [Peterson v. Bernardi](#), 262 F.R.D. 424, 427-428 (D.N.J. 2009). But see [Woodard v. Victory Records](#), 2013 WL 4501455 (N.D. Ill. 2013) (party that receives a notice of inadvertent disclosure under [FRCP 26\(b\)\(5\)\(B\)](#) has the burden to challenge the claim of privilege).
- [\[note 2\]](#) [First American Corelogic Inc. v. Fiserv Inc.](#), 2010 WL 4975566 (E.D. Tex. 2010).
- [\[note 3\]](#) [Carlson v. Carmichael](#), 2013 WL 3778356 (E. D. Pa 2013)
- [\[note 4\]](#) Prior to the enactment of Model Rule 4.4(b), there was an ABA Formal Advisory Opinion regarding inadvertent disclosure (No. 92-386), but that opinion has been subsequently withdrawn. (See ABA Formal Opinion No. 05-437.) Moreover, that prior opinion was criticized by other sources and several courts, including a federal district court in Georgia that expressly rejected it. See [In re: Polypropylene Carpet Antitrust Lit.](#), 181 F.R.D. 680, 697 (N.D. Ga. 1998).
- [\[note 5\]](#) [Alston & Bird v. Mellon Ventures II L.P.](#), 706 S.E.2d 652 (2011).
- [\[note 6\]](#) See former [O.C.G.A. § 24-9-21](#) (now [O.C.G.A. § 24-9-501](#)).