

January 2025 Multnomah Lawyer Ethics Focus

What Was Old Is New: Inadvertent Production in an Age of Artificial Intelligence

Mark J. Fucile
Fucile & Reising LLP

Last year, the ABA issued a comprehensive ethics opinion addressing the use of artificial intelligence tools in law practice. Although the opinion drew examples from many practice settings, it led with one: discovery tools that analyze documents for relevance and screen for privilege. Given that production today in even “routine” cases often involves thousands of electronic documents, AI-enabled tools offer the promise of helping lawyers sift through both outbound and inbound production with greater efficiency.

At the same time, even good AI tools are not necessarily foolproof and ultimately the lawyers using those tools remain responsible for the result. This dichotomy puts a new spin on an old issue: inadvertent production of privileged documents. In this column, we’ll first briefly touch on lawyer responsibility for competently using AI tools to assist with document production. We’ll then survey the ethical, procedural, and evidentiary issues involved when privileged documents are produced inadvertently. We’ll conclude with the practical risks involved to both the producing and receiving lawyers when privileged documents are inadvertently produced.

Use and Responsibility

ABA Formal Opinion 512 makes two basic points when discussing AI tools to assist with document production.

First, lawyers using AI tools in this context have a duty to understand them—and their associated risks. This flows from ABA Model Rule 1.1, which governs competence:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.

Oregon RPC 1.1 is identical to the ABA Model Rule. Although RPC 1.1 is a regulatory rule, it echoes the civil standard of care reflected in Oregon Uniform Civil Jury Instruction 45.04 for legal malpractice:

An attorney has the duty to use that degree of care, skill, and diligence ordinarily used by attorneys practicing in the same or similar circumstances in the same or similar community.

Second, lawyers using AI tools to assist with discovery remain responsible for the outcome—including inadvertent production. Formal Opinion 512 puts it this way (at 4): “[R]egardless of the level of review the lawyer selects, the lawyer is fully responsible for the work on behalf of the client.” In other words, if a problem occurs, a lawyer can’t simply blame the AI tool involved.

Formal Opinion 512 counsels that the level of review before using a particular AI tool will vary with the circumstances. If the tool is either new altogether or at least new to the law firm, the lawyer-users will be expected to review it sufficiently to ensure that they use it competently. By contrast, if the lawyer is using a familiar tool that has been enhanced through AI, Formal Opinion 512 suggests (at 4) that it “may require less independent verification or review, particularly where a lawyer’s prior experience with the . . . [AI] . . . tool provides a reasonable basis for relying on its results.” Again, however, when using a tool to screen for privilege, the margin for error is thin and the lawyer—not the tool—is ultimately responsible for the result.

Standards

Inadvertent production typically triggers a blend of ethical, procedural, and evidentiary issues.

Under RPC 4.4(b) and OSB Formal Opinion 2005-150 (rev. 2015), a lawyer receiving what reasonably appears to be inadvertently produced privileged documents has an ethical duty to notify the producing lawyer. The receiving lawyer is also vested with the professional discretion to simply return or destroy the documents involved.

If the receiving lawyer wishes to argue that privilege has been waived through inadvertent production, Oregon law is silent on the precise procedure to follow but analogous federal law suggests a prudent approach. Under Federal Rule of Civil Procedure 26(b)(5)(B), a party arguing that privilege has been waived is required to go to the court concerned before using the documents involved.

In assessing whether privilege has been waived through inadvertent production, Oregon uses a set of factors drawn from *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or. 336, 838 P.2d 1069 (1992), while Federal Rule of Evidence 502(b) controls in federal court. The factors are similar with both and focus on the overall volume of documents involved compared to the privileged documents inadvertently produced, the steps the producing party took to screen for privilege, and actions the producing party took after discovering the error.

Risks

The risks surrounding inadvertent production differ depending on whether the law firm was the producer or the receiver.

For the producer, if privilege is deemed waived through inadvertence and significant client harm results, the specter of a malpractice claim may loom depending on the circumstances. Firms can lessen this risk by incorporating

“clawback” agreements into stipulated protective orders so that inadvertently produced documents will be returned without waiving privilege. The Oregon federal district court has a sample form on its website.

For the receiver, if the procedures for safely litigating waiver are not followed and the receiver simply uses the documents involved without first going to the court concerned, the law firm may face an order barring their use or even disqualification if the court later determines that privilege was not waived.

Wickersham v. Eastside Distilling, Inc., 713 F. Supp.3d 1013 (D. Or. 2024), while not involving inadvertent production, discusses both of these potential remedies for improper invasion of privilege.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar’s *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland

Page 6

campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.860.2163 and Mark@frllp.com.