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Electronically Stored Information – Pitfalls and Ways to Avoid Mistakes and Inadvertent Disclosure

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Mistakes sometimes happen. One of the most serious mistakes attorneys can make is to inadvertently disclose privileged or otherwise protected information during discovery. This may sound easy, but in the electronic era, where electronic documents with metadata are the norm, this creates special difficulties.

When lawyers realize their opponents have made the mistake of inadvertently producing protected information, they have an obligation to address the issue promptly. Under Model Rule of Professional Conduct 4.4 (a) "lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender." In the modern practice of law, electronically stored information ("ESI"), which can range from emails or any other type of data that can be digitally retrieved, could contain information that if not properly handled, lead to inadvertent disclosure of sensitive information through metadata. *See* 1:2 Handbook of Federal Civil Discovery and Disclosure. Unlike paper, ESI contains metadata, which is "information about the document or file recorded by the computer to assist the computer, and often the user, in storing and retrieving the document or file at a later date." *See* 2:3 Handbook of Federal Civil Discovery and Disclosure, Metadata. When handling sensitive documents, especially documents that have redactions, it is important that lawyers make sure that metadata is carefully scrubbed for any redacted text to avoid an inadvertent disclosure.

This unfortunate situation came up in *Hur v. Lloyd & Williams*, where an attorney who produced documents failed to scrub the metadata from a document that had been partially redacted because it was privileged information. While the opposing firm discovered the mistake, they did not take corrective action under Rule 4.4 and attempted to use the metadata as exhibits in the trial. While the court did not apply sanctions on either attorney (for, on one hand, not scrubbing data correctly, or, on the other hand, not following Rule 4.4), it ordered for the opposing firm to not mention the privileged information. The court explained that the "rules require a recipient of inadvertently disclosed information subject to a claim of privilege to notify the sender and either return, sequester, or destroy the materials." This means that "the attorney can share the materials with the court *in camera* if privilege is disputed. But until the issue of privilege is resolved, the attorney should not disclose the materials to others, including the public by way of a nonconfidential court filing."

As a practical matter to avoid discovery disputes and the possibility of sanctions, attorneys should (1) follow Rule 4.4 if there is any question of privilege regarding a document or metadata, and (2) always use a discovery tool during production of documents to scrub metadata of partially or fully redacted documents.

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