

## THROUGH NO FAULT OF YOUR OWN

### How to Handle the Inadvertent Receipt of Privileged Documents

By Michele K. Trausch

You're sitting at your desk, trying to decide whether to have sushi or salad for lunch. Suddenly a fax arrives from opposing counsel in that big contentious matter you're handling for your major client. "Oh, no," you think, "not another meet-and-confer letter about those special interrogatories."

But, wait, it turns out that what has been sent does not seem to be directed to you. Rather, it looks like opposing counsel's status report to his client, outlining his strategy for winning his case and annihilating yours! What do you do?

Fortunately, guidance is at hand in the recent appellate court decision, *State Compensation Insurance Fund v. WPS, Inc.*, 70 Cal. App. 4th 644 ("*State Fund*"), decided by the Second District on March 4, 1999. The answer may not be intuitive. First, a little background.

#### **State Fund Facts**

In this bad faith case, the attorney for WPS demanded production of documents and received some 7,000 pages in response. Of those, 273 were

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"Attorney-Client Communication/Attorney Work Product" and "Do Not Circulate or Duplicate." The case involving WPS proceeded to trial, where State Fund prevailed. Later, in an unrelated bad faith case, the attorneys for State Fund received a demand for documents in which the insured requested production of the claims summaries. It turned out that the WPS lawyer had given his expert the claims summary forms; that same expert had been hired in the unrelated case and had provided the documents to counsel for the insured.

State Fund demanded return of the documents from WPS even though the first case was over. The WPS attorney refused. After an evidentiary hearing, the court concluded that the documents were privileged, were inadvertently produced, that the privilege had not been waived, that WPS's attorney had violated his ethical obligations in failing to return the documents, and that sanctions were appropriate. WPS appealed from that order.

#### **State Fund Holding**

The *State Fund* court found that the waiver had been completely inadvertent on the part of the lawyers; that the client considered the claims summaries to be highly confidential, not available through discovery, and protected by the attorney-client privilege; and that the disclosure had been prejudicial to State Fund.

Referencing Evidence Code section 912, the Court held that "'waiver' does not include accidental, inadvertent disclosure of privileged information by the attorney."

What do you do if you are the unintended recipient of privileged documents which shouldn't have been sent to you? The answer is as follows: "... the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged." What happens next depends on the lawyers involved; either they can agree as to the disposition of the documents or "resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified."

#### **ABA Opinion 92-368: Inadvertent Waiver**

In reaching its decision, the *State Fund* court basically adopted the rationale of ABA Opinion 92-368, a formal opinion on inadvertent disclosure of confidential materials. Issued November 1992, the opinion analyzes the conflicting dynamics confronting a lawyer who has received documents containing privileged material which are clearly intended for someone else. "Virtually all difficult ethical problems arise from the conflict

between a lawyer's responsibility to clients, to the legal system and to the lawyer's interest in remaining an upright person while earning a satisfactory living." The dilemma arises due to the conflict between a lawyer's duty of loyalty to his or her client to be a "zealous advocate" and to place his or her client's interest foremost, and the opposing obligation to act fairly and not take advantage of another's obvious error.

After a discussion of the importance, if not sanctity, of keeping client confidences, the ABA Committee concluded that mere inadvertence in sending documents to the wrong party should not be considered a waiver, particularly when it was the lawyer, not the client, who inadvertently produced the confidential documents.

Consider the situation so many of us have experienced: you return to a deposition early from lunch and find opposing counsel has left his or her briefcase and notes open in the room. Most of us would resist the urge to look at those notes, although there may be an excellent chance that by doing so, we would better our own client's position in the litigation. Similarly, the Committee concluded, we should not take advantage of a clerical blunder by opposing counsel in misdirecting confidential documents meant for his or her client.

The ABA Opinion found the ethical thing to do is "to avoid reviewing the materials, notify sending counsel if sending counsel remains ignorant of the problem and abide by sending counsel's direction as to how to treat the disposition of the confidential materials."

### **Aerojet-General: Distinguished**

The ABA Opinion may have seemed appropriately high-minded, but the First District Court of Appeal to

dismissed it out of hand in *Aerojet-General Corporation v. Transport Indemnity Insurance*, 18 Cal. App. 4th 996 (1993). Prior to *State Fund*, *Aerojet* had provided the only authority to California attorneys on this issue. In *Aerojet*, the attorney received a packet of materials clearly not intended for him. Among other things, the materials identified a witness previously unknown to him whose deposition he then noticed. Opposing counsel was curious as to how the attorney had learned of the witness and eventually became aware of the inadvertent disclosure. The trial court was outraged at the deposing attorney's behavior, finding it to be "unethical and in bad faith" and sanctioned his firm.

On appeal, the court held that the attorney had not violated "any laws, statutory or decisional, or any rules of court or rules of professional conduct in the manner by which he obtained" the documents -- he received them by accident. The *Aerojet* court was influenced by the fact that the identity of the witness was not privileged and necessarily would have been disclosed in discovery. The court concluded that "(o)nce (the attorney) had acquired the information in a manner that was not due to his own fault or wrongdoing, he cannot purge it from his mind. Indeed, his professional obligation demands that he utilize his knowledge about the case on his client's behalf."

While the non-privileged nature of the *Aerojet* information certainly differs from the sensitive and clearly privileged documents in *State Fund*, the latter decision goes even further in providing direction to California attorneys, reminding us of our responsibility to "protect the integrity of judicial proceedings."

### **Conclusion**

In this day of electronic mail and the increasing use of facsimiles, inadvertent disclosures are bound to

happen on a much more frequent basis. Noting that "there is no established California law" governing a lawyer's obligations in this type of situation, the *State Fund* decision "provides a standard" for lawyers confronted with a predicament comparable to the one presented in that case. Now that this standard has been set forth, failure to abide by the *State Fund* directions when inadvertently receiving privileged documents could possibly subject a practitioner to sanctions.

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