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Shoot out at the Not-O.K. Corral or Privileged Client Communications - Lost and Found in Texas.

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SHOOT OUT AT THE NOT-O.K. CORRAL OR PRIVILEGED CLIENT COMMUNICATIONS— LOST AND FOUND IN TEXAS*

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I. INTRODUCTION

Although this Essay is quite critical of the Texas approach to inadvertently disclosed privileged material, there is, admittedly, no unanimity among the states or federal jurisdictions in dealing with the problem. The objective of this Essay is to demonstrate that the solutions propounded in Texas are unique to Texas, and unfortunately are unworkable to the point that they approach nonsense.

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* This Essay was presented at the *St. Mary's Law Journal* annual Symposium on Legal Malpractce and Professional Responsibility held on Friday, March 1, 2002. I wish to dedicate this Essay to Michael Tigar, who has proven to all who would observe that there is no inherent inconsistency between being a law professor and being a damned good lawyer.

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II. CONFIDENTIALITY AND VOLUNTARY WAIVER OF CONFIDENTIALITY

Confidentiality of client information is a bedrock of the legal profession.[1] Of course, like most rules of law, there are exceptions to confidentiality.[2] Likewise, because the purpose of confidentiality is to protect the client, that client may waive such confidentiality. Voluntary waiver is obvious and seldom problematic. Therefore, voluntary waiver attracts scant attention from the courts. Perhaps the best known of the few problematic instances of voluntary waiver arises when a client reveals confidential information while testifying during a deposition.[3]

Like all secrets, some confidential information will invariably leak out through one mechanism or another. When confidential information does leak, the fundamental question is: How much

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1. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 cmt. 1, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 2002) (TEX. STATE BAR R. art. X, § 9) (urging confidentiality as a function of the legal system). Comment 1 states:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidential information of one who has employed or sought to employ the lawyer. Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance.

Id.; *see also* RESTATEMENT (THIRD), THE LAW GOVERNING LAWYERS § 68 cmt. c (1998) (stating "the rationale for the privilege is that confidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services").

2. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 cmt. 3 (stating that confidentiality principles are also given effect by the attorney-client privilege). Comment 3 notes, in part:

> Several sound exceptions to confidentiality have been developed in the evidence law of privilege. Exceptions exist in evidence law where the services of the lawyer were sought or used by a client in planning or committing a crime or fraud as well as where issues have arisen as to breach of duty by the lawyer or by the client to the other.

Id. Rule 1.05(c) also provides a list of instances where a lawyer may reveal confidential information. *Id.*

3. *See* Sach v. Blondis, 412 F. Supp. 286, 288-89 (N.D. Ill. 1976) (holding the disclosure made during a deposition waived the attorney-client privilege with regard to the subject matter disclosed); *see also* United States v. El Paso Co., 682 F.2d 530, 539-41 (5th Cir. 1982) (finding a disclosure to outside auditors of internal tax analysis in which attorneys participated constituted waiver of privileges); *In re* John Doe Corp., 675 F.2d 482, 488-89 (2d Cir. 1982) (disclosure of internal report to outside auditors and underwriters constituted waiver of the privilege).

protection should we continue to afford that information? The fact of a leak, itself, has no particular legal significance. However, what is legally significant is whether the leak was voluntary or inadvertent.

A. *The Theft Analogy*

A very rudimentary, and perhaps crude, approach to the problem of leaks is to analogize inadvertently released confidential information to lost personal property. In other words, think of inadvertently released confidential information as a wallet that one inadvertently dropped to the ground. Now, assume that the wallet has been found, just as the confidential information has now been "found" by the lawyer who received it. In the case of the wallet, the finder is a thief if the intent to deprive the known owner of the wallet, and to appropriate it to the finder's own use, existed at the time the property was found and taken into possession.[4]

An even closer analogy may be crafted. For example, assume that the lost property is discovered in a trunk or bag (*e.g.*, a box of documents produced during discovery). In such a case, the person who possesses the trunk is a thief "'if the taking, though originally lawful, was obtained by any false pretext, or with intent to deprive the owner of the value thereof.'"[5] On the other hand, if the finder appropriates the property without knowledge of the true owner of the property, and returns the property immediately upon discovery of the identity to the true owner, there is no theft.[6]

Crude though it may be, the theft analogy sufficiently demonstrates that in our society the principle of "finders – keepers" does not rule in most situations. Instead, we follow the tenet that a known owner's right to his property (documents and information *are* property) trumps the good fortune of a finder. But, for some odd reason, if the property in question is inadvertently disclosed confidential material, the right of the owner does not necessarily prevail. The analysis applied to determine user rights to inadver-

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4. Williams v. State, 160 Tex. Crim. 330, 268 S.W.2d 670, 672 (1954); Forbes v. State, 95 Tex. Crim. 465, 254 S.W. 976, 977 (1923).

5. Rhodes v. State, 11 Tex. Ct. App. 563, 569 (1882) (citing Reed v. State, 8 Tex. Ct. App. 40, 41 (1880)), *overruled in part on other grounds by* Nolen v. State, 14 Tex. App. 474 (1883).

6. Drummond v. State, 71 Tex. Crim. 260, 158 S.W. 549, 549 (1913).

tently disclosed confidential material is much more complex than for other forms of property. To some, the difference between a lost wallet and inadvertently disclosed confidential material may be very apparent. To this writer, it is not.

III. Typical Inadvertent Leaks of Confidential Information

Common patterns of inadvertent leaks of confidential information are: (1) privileged information inadvertently included with discovery documents; (2) privileged information contained in missent faxes; and (3) privileged information revealed by whistle blowers. One recurring thread exists in all three of these cases—the disclosure is inadvertent. As a result, the pertinent question is: "Does an inadvertent disclosure of admittedly confidential material waive its confidential nature?"

A. *Three Typical Solutions*

1. The Per Se Waiver Approach

There is a line of cases, although somewhat old, holding that inadvertently disclosed material per se loses its confidential nature without regard to what precautions were taken to avoid disclosure. As one court said, "one cannot 'unring' a bell."[7] Many of these cases involve bystanders who overhear confidential communications. An Illinois court notes that "even inadvertent communication to third parties, such as bystanders or eavesdroppers, destroys the privilege, at least where the eavesdropping is not surreptitious and the attorney and client have made little effort to insure that they are not overheard."[8]

Clark v. State[9] is a good Texas example of this per se approach.[10] In *Clark*, the Texas Court of Criminal Appeals held that a motel telephone operator could testify about conversations she overheard, between a motel guest and his lawyer while she was eavesdropping.[11]

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7. FDIC v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992).

8. Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 258 (N.D. Ill. 1981).

9. 261 S.W.2d 339 (Tex. Crim. App. 1953).

10. Clark v. State, 261 S.W.2d. 339 (Tex. Crim. App. 1953).

11. *Id.* at 341.

The per se approach harkens back to the day when confidentiality was seen more as a limitation on truth-seeking than as an essential aspect of maximizing the use of lawyers. Professor Wigmore championed the view that privilege should be very limited because it interfered with finding the truth. In his treatise he stated:

> Its benefits are all indirect and speculative; its obstruction is plain and concrete . . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.[12]

Seemingly, the per se approach is out of favor today, as it is seldom referred to in modern opinions.

2. The High-Road Approach Crafted by the ABA

The most common inadvertent discovery event occurs when a lawyer inadvertently includes privileged material in boxes of documents produced in response to a legitimate discovery request. The opposing lawyer finds the "hot documents" in the box, and the problems begin. What should the receiving lawyer do with the documents? Frequently mentioned answers are:

(a) avoid reading the documents, and return them to the producing lawyer;
(b) read the documents, call the producing lawyer, but do not give them back until ordered by a court;
(c) read the documents, say nothing, and spring them on the opposition at a tactically propitious time; or
(d) tender the documents in camera to a court, and seek a court ordered solution.[13]

The American Bar Association (ABA) is noted among lawyers for its leadership in the area of professional ethics. The ABA Model Rules of Professional Responsibility serve as a national benchmark of ethical guidelines. Ethics opinions emanating from the ABA are widely read and accepted as authority in the field. Therefore, the analysis of the problem of "hot documents" in a discovery box should begin with the solution provided by the ABA.

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12. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291 (John T. McNaughton ed., 1961).

13. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-382 (1994).

In 1994, the ABA issued Formal Opinion 94-382.[14] That opinion concluded that a receiving lawyer should, upon recognizing the privileged nature of the documents, return the documents to the producing lawyer or seek a court resolution on the issue of whether or not the privilege has been waived by reason of the production. This solution can be characterized as the "high road approach."

The ABA high road approach is based upon "general considerations of common sense, reciprocity[,] and professional courtesy."[15] As a matter of professional policy, the ABA decided that the receiving lawyer's obligation to zealously represent her client was not adequate to justify taking advantage of the inadvertent disclosure by the opposing lawyer.[16] Consistent with its philosophy of "common sense" and "professional courtesy," the ABA is currently considering an amendment to Model Rule 4.4: Respect For Rights Of Third Persons. The amendment would add paragraph (b) as follows: "(b) A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."[17]

3. The Reasonable Precautions Test

A second approach to the dilemma of "hot documents" in a discovery box, the reasonable precautions test, arises from the courts. A leading case is *Alldread v. City of Grenada.*[18] In that case, the Grenada city officials demanded the return of audio tapes of city council executive sessions that were inadvertently produced in a discovery production.[19] A five-part test was applied by the Fifth Circuit to determine if the privilege had been waived by reason of this inadvertent production. The court considered: (1) the reasonableness of precautions taken to prevent disclosure; (2) laches in seeking return of the information; (3) the scope of discovery that produced the information; (4) the extent of inadvertent disclosure; and (5) the overriding issue of fairness.[20] A similar approach has

14. *Id.*
15. *Id.*
16. *Id.*
17. MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (Proposed Rule 2001).
18. 988 F.2d 1425 (5th Cir. 1993).
19. Alldread v. City of Grenada, 988 F.2d 1425, 1433 (5th Cir. 1993).
20. *Id.*; *see also* Transamerica Computer Co. v. Int'l Bus. Mach. Corp., 573 F.2d 646, 651 (9th Cir. 1978) (finding no waiver of privilege to certain documents accidentally deliv-

been used where the leak occurred in a fax wrongly sent to the opposing lawyer.[21]

It is important to note that this test does not address what the receiving lawyer is to do with the material in the interim. However, the Restatement of the Law Governing Lawyers does provide an answer to that issue. The Restatement holds that:

> If the person whose information was disclosed is entitled to have it suppressed or excluded [(*e.g.*, a non-negligent inadvertent disclosure)], the receiving lawyer must either return the information or hold it for disposition after appropriate notification to the opposing person or that person's counsel. A court may suppress material after an inadvertent disclosure that did not amount to a waiver of the attorney-client privilege . . . . Similarly, if the receiving lawyer is aware that disclosure is being made in breach of trust by a lawyer or other agent of the opposing person, the receiving lawyer must not accept the information.[22]

IV. THE TEXAS SHOOT-OUT AT THE NOT-O.K. CORRAL

Texas got off to a good and reasonable start on inadvertently sent "hot documents" with the decision in *Granada Corp. v. First Court of Appeals.*[23] Granada (the party who inadvertently disclosed information) argued that inadvertent disclosure of privileged information is necessarily involuntary; therefore, a waiver is legally impossible.[24] The Texas Supreme Court disagreed, and adopted what amounts to the reasonable precautions test.[25] In the language of the court:

> Disclosure is involuntary only if efforts reasonably calculated to prevent the disclosure were unavailing. Thus, although disclosure does not necessarily waive privileges, a party claiming involuntary disclosure has the burden of showing, with specificity, that the circumstances confirm the involuntariness of the disclosure. In addition to

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ered in discovery when discovery included seventeen million pages of documentation). Although never directly overruled, many courts have declined to follow the *Transamerica* holding. *E.g.*, Genentech, Inc. v. United States Int'l Trade Comm'n, 122 F.3d 1409 (Fed. Cir. 1997).

21. GPL Treatment Ltd. v. Louisiana-Pacific Corp., 894 P.2d 470, 473 (Or. Ct. App. 1995); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).

22. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. m (1998).

23. 844 S.W.2d 223 (Tex. 1992).

24. Granada Corp. v. First Court of Appeals, 844 S.W.2d 223, 226 (Tex. 1992).

25. *Id.*

> precautionary measures, other factors to be examined in determining involuntariness include the delay in rectifying the error, the extent of any inadvertent disclosure, and the scope of discovery.[26]

Granada seemed to work well, in large part because the notion that lawyers are responsible for protecting clients' confidences is commonplace. The cornerstone of the *Granada* holding is the involuntary nature of the production of the privileged documents, indicated and supported by the fact that efforts made to prevent inadvertent production failed.[27]

However, *Granada* appears to be of no use if confidence is breached *purposely*, such as by the theft of privileged documents by an employee. This was the fact situation presented to the Texas Supreme Court in *In re Meador.*[28] In *Meador,* a disgruntled employee provided material, which belonged to her employer, that was obviously protected by attorney-client privilege. The material was presented to the lawyer representing her former co-worker in a suit against the employer.[29] The receiving lawyer was aware that the material was privileged and that the material was effectively stolen.[30] Not only did the receiving lawyer fail to advise the employer that he had copies of the privileged documents, but he also refused to return the copies after lawyers for the employer discovered what had occurred and demanded return of the privileged documents.[31]

The trial court in *Meador* ruled that the receiving lawyer must return the privileged documents and that he could not use them at trial.[32] That portion of the ruling was not challenged on appeal, and thus that issue was not before the supreme court. The only issue before the court was whether or not the trial court abused its discretion in refusing to disqualify the receiving lawyer.[33] *Meador*

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26. *Id.*

27. *See, e.g., In re* Univ. of Tex. Health Ctr., 33 S.W.3d 822, 827 (Tex. 2000); *In re* Bank of Am., 45 S.W.3d 238, 242 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

28. *See In re* Meador, 968 S.W.2d 346, 348 (Tex. 1998) (alleging that an attorney used privileged documents obtained from the defendant's office by a client in another lawsuit).

29. *See id.* at 348-49 (relating the sequence of events a former employee followed in copying some of her former employer's files, then subsequently turning over these privileged documents to her attorney).

30. *Id.* at 352.

31. *Id.* at 349.

32. *Id.*

33. *In re* Meador, 968 S.W.2d at 350. As the court stated:

must be read carefully, because much of its language is dicta. Nevertheless, the court set forth some very specific postulates about the use of inadvertently revealed confidential information. Unfortunately, the court's opinion is a wandering dialogue of seemingly conflicting statements. For instance, the court first recognized that ABA Opinion 94-382, discussed above, "represents the standard to which attorneys should aspire."[34] While recognizing this lofty goal, the court also belittled the ABA opinion-writing process.[35]

Then, after signaling that it would not adhere to the ABA high road approach, the court held that the promptness with which the attorney notifies the opposing side that he or she has received its privileged information is only *one factor* to consider, at least concerning the issue of whether or not the attorney should be disquali-

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Although the trial court refused to disqualify Masterson, it ruled that he must return all copies of the documents and that he could not use them in the *Meador* litigation. Meador has not challenged this portion of the trial court's ruling. The only issue before us, therefore, is whether the trial court abused its discretion in refusing to disqualify Masterson.

Id. at 349. Note that the touchstone regarding whether an attorney should be disqualified upon receiving his opponent's privileged information appears to turn on whether the attorney, not a third party, directly participated in effecting the misappropriation:

A different case is presented where an attorney is directly involved in improperly obtaining the other side's confidential information. However, for the reasons already discussed, we disapprove of the court of appeals' decision in *Contico* to the extent that it holds that an attorney must be disqualified when, through no wrongdoing on the attorney's part, he or she gains possession of an opponent's confidential information, without regard to the significance of the information or the other circumstances surrounding the disclosure.

Id. at 354.

34. *See id.* at 351.

[W]e nonetheless agree with the court of appeals that ABA Formal Opinion 94-382 represents the standard to which attorneys should aspire in dealing with an opponent's privileged information. The ABA's approach reflects the importance of the discovery privileges, and ensures that the harm resulting from an unauthorized disclosure of privileged information will be held to a minimum.

Id.

35. *In re* Meador, 968 S.W.2d at 349 n.1.

This ten-person standing committee of the American Bar Association is charged with "interpreting the professional standards of the Association and recommending appropriate amendments and clarifications . . . . ABA opinions are binding upon no one. ABA opinions represent the views of a small committee of a private association, and they construe that private association's Model Rules and Model Code."

Id. (quoting *Preface to* MODEL RULES OF PROF'L CONDUCT, at viii (1996) and Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 326 (1997)).

fied for his conduct.[36] Then, as if to add fuel to the fire, the court invoked *Granada*, gratuitously noting that: "If a lawyer receives privileged materials because the opponent inadvertently produced them *in discovery*, the lawyer ordinarily has *no duty* to notify the opponent or voluntarily return the materials. Rather, the producing party bears the burden of recovering the documents by establishing that the production was involuntary."[37] Accordingly, the court created a distinction between cases where confidential material is inadvertently produced outside of formal discovery (*e.g.*, stolen documents, mis-sent faxes), and cases where the material is produced during formal discovery (*e.g.*, documents mistakenly placed in a discovery box).

V. RULE 193—HEARING FROM ANOTHER GUN . . .

Rule 193.3(d) of the Texas Rules of Civil Procedure became effective January 1, 1999. As amended, Rule 193.3(d) states that a party inadvertently producing privileged documents during discovery may "re-claim" the privilege within ten days *of discovering the production* (or such shorter period of time ordered by the court) if he amends his discovery responses and asserts the privilege. Then the party who received the documents must return them, pending a ruling by the court on the claimed privilege.[38]

According to the committee comment, the amended rule overturns *Granada*: "A party who fails to diligently screen documents before producing them does not waive a claim of privilege. This

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36. *Id.* at 351-52. Texas is not the only state with cases rejecting ABA suggestions about ethics. *See* State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 807 (Cal. App. 2 Dist. 1999) (stating that the ABA opinion has no legal force of its own); *In re* Marketing Investors Corp., No. 05-98-00535, 1998 WL 909895 (Tex. App.—Dallas 1998, no pet.).

37. *In re* Meador, 968 S.W.2d at 352 (emphasis added).

38. TEX. R. CIV. P. 193.3(d). The text of the rule states:

> (d) *Privilege Not Waived by Production.* A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if—within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

Id.

rule is thus broader than Tex. R. of Evid. 511 and overturns *Granada Corp. v. First Court of Appeals*,[39] to the extent the two conflict."[40] One cannot help but wonder what was wrong with the reasonable precautions test established in *Granada*. That test had seemingly served this state well in the past,[41] and continues to serve other jurisdictions well, including the United States Court of Appeals for the Fifth Circuit.[42]

By fiat, the committee that drafted new Rule 193.3(d) declared that "[a] party who fails to diligently screen documents before producing them does not waive a claim of privilege."[43] If we take the committee at its word, a lawyer can respond to a document discovery request without *any* effort to avoid producing privileged documents, including confidential material; then re-claim that material after discovering that his or her own negligent conduct (but not intentional conduct) revealed privileged documents. But the new rule does even more. It at least partially overrules the dicta (albeit important dicta) in *Meador* that: "If a lawyer receives privileged materials because the opponent inadvertently produced them in discovery, the lawyer ordinarily has no duty to notify the opponent or voluntarily return the materials."[44] Rule 193.3 clearly states that the receiving lawyer must "promptly return" the allegedly privileged material *when the motion is merely filed*—not when the motion is heard and sustained by a court.[45]

The most interesting question raised by Rule 193 is: How does one seek the return of that which was inadvertently produced, when one does not know that he produced it? This Essay does not propose an answer to that question. However, it is likely that a lawyer who inadvertently produces privileged material to the opponent and never realizes that fact will learn of it for the first time when that material is introduced by the receiving party at trial as a "gotcha."[46]

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39. 844 S.W.2d 223 (Tex. 1992).

40. TEX. R. CIV. P. 193.3(d) cmt. 4.

41. *In re* Univ. of Tex. Health Ctr., 33 S.W.3d 822, 827 (Tex. 2000).

42. Alldread v. City of Grenada, 988 F.2d 1425, 1433 (5th Cir. 1993).

43. *Id.*

44. *In re* Meador, 968 S.W.2d at 352.

45. TEX. R. CIV. P. 193.3(d).

46. *Id.* at cmt. 4. The committee, in its comments to the Rule, made this odd reference to the "chicken or the egg" problem the rule seems to create: "To avoid complications at trial, a party may identify prior to trial the documents intended to be offered,

Rule 193 is impractical, unjust, and confusing. For example, the rule is self-limited to material produced by "a party."[47] Thus, it does not cover material produced by a non-party. Remember *Meador*? And what about *a non-party witness* to whom a discovery request has been issued? Also, the rule is expressly limited to production in response to a *formal* discovery request.[48] What rule governs inadvertent production that is not the result of a formal discovery request to a party, like mis-sent faxes or material taken by a disgruntled employee? Do cases like *Granada* and *Meador* continue to control those situations? If this is the correct answer, then we have the odd condition in Texas that two quite different sets of rules govern essentially the same problem.

The Restatement got it right. It states:

> Waiver does not result if the client or other disclosing person took precautions reasonable in the circumstances to guard against such disclosure. What is reasonable depends on circumstances . . . . Once the client knows or reasonably should know that the communication has been disclosed, the client must take prompt and reasonable steps to recover the communication, to reestablish its confidential nature, and to reassert the privilege.[49]

Regarding the duty to notify that presumptively confidential material has been disclosed, the Restatement states:

> If the person whose information was disclosed is entitled to have it suppressed or excluded (see § 79, Comment c), the receiving lawyer must either return the information or hold it for disposition after appropriate notification to the opposing person or that person's counsel. A court may suppress material after an inadvertent disclosure that did not amount to a waiver of the attorney-client privilege (see § 79, Comment h).

Where deceitful or illegal means were used to obtain the information, the receiving lawyer and that lawyer's client may be liable,

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thereby triggering the obligation to assert any overlooked privilege under this rule." *Id.* This rather idealistic suggestion from the committee assumes that a lawyer who has received the opponent's confidential information in discovery will politely identify the information with a pretrial filing. It would have been simple for the committee to have required the filing.

47. TEX. R. CIV. P. 193.3(d).

48. *Id.* at 193.3.

49. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79 cmt. h (1998 Main Vol.).

among other remedies, for damages for harm caused or for injunctive relief against use or disclosure. The receiving lawyer must take steps to return such confidential client information and to keep it confidential from the lawyer's own client in the interim.[50]

VI. Entering the O.K. Corral with a Bullet-Proof Vest

If both parties to litigation are sufficiently concerned, there may be a way to bullet-proof the inadvertence problem with an agreement made at the outset of a case.[51] The agreement would more or less track the language of the Restatement.[52] It is probably naive to assume that *both* parties to litigation would be willing to enter such an agreement, but it may be offered as an idea that could have appeal if *both* sides will be engaged in large volume discovery. The agreement would offer protection to both sets of lawyers; not only from one another, but from what could prove to be a very unhappy client who has just learned that a privileged "smoking gun" document has been furnished, inadvertently, to the other side.

VII. Conclusion

By nature and by training most lawyers are rule-bound, an ideology that shapes their thinking about professional ethics. Lawyers view their job as being a manipulation of rules for the benefit of a client. For these lawyers, the nature of the profession does not afford them the opportunity or luxury of thinking about right and wrong abstractly. As a consequence, ethics is perceived as just another set of rules to be manipulated along the way. In the words of one noted litigator: "[T]he law of ethics in its narrow sense dictates only what a bad person would be required to do in order to avoid punishment. This is the function of the formal rules."[53] Lawyers either cannot or will not accept ethics as a springboard to an abstractly just result; an abstractly just result is a foreign thought.

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50. *Id.* § 60 cmt. m.

51. *See* Tex. R. Civ. P. 191.1 (providing that "[e]xcept where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties").

52. Such an agreement has been approved by at least one court. *See* Prescient Partners Legal Profession v. Fieldcrest Cannon, Inc., 1997 WL 736726, at *1 (S.D.N.Y. 1997) (discussing the parties' agreement and a subsequent Protective Order).

53. Michael Tigar, *Litigators' Ethics*, 67 Tenn. L. Rev. 409, 416 (2000) (paraphrasing The Essential Holmes 161-63 (Richard Posner ed. 1992)).

Consequently it behooves the courts and the rules-writing committees to get it right. In the case of inadvertently released confidential information, Texas has a long way to go before getting it right.