



## Reacting to Inadvertent Disclosure

Having careless opposing counsel just isn't as much fun as it used to be. The current trend in the courts and the ethics rules seems to be to encourage the return of the elusive notion that a

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lawyer ought to treat opposing counsel the same way he or she would want to be treated if the situation were reversed. Imagine: The practice of law meets the Golden Rule.

A recent California case<sup>1</sup> points out how painful ignoring this trend can be. In that case, a lawyer acquired his opposing counsel's working notes on an expert witness' oral report. He did not tell his opposing counsel he had acquired the notes, and he then attempted to use the notes to impeach the expert. The court subsequently disqualified him from continuing to represent his client.

The working notes had been left in the defendants' lawyers case file laid on a desk during a break in a deposition. While the room was unoccupied, the plaintiff's lawyers and their experts entered to confer, and somehow the notes (a 12-page document) ended up in the plaintiff's lawyer's hands. During a subsequent deposition of the defendants' expert, it became apparent that the plaintiff's lawyers were using some document to frame their questions but refused to tell defendants' counsel what it was. When the document was finally revealed to defendants' lawyers, they demanded the return of all copies and moved to disqualify the offending lawyers.

What really seemed to impress California's Supreme Court was the fact that the plaintiff's lawyer had no logical explanation for how the document got in his file and admitted that he knew "within a minute or two" that it was a document he was not supposed to have. What really frosted the court was that instead of notifying defendants' counsel of what happened, the lawyer made copies of it, which he then sent to and discussed with his experts.

The court discussed the ethical considerations involved when a lawyer receives a document inadvertently sent, which exist as case law in California and which nearly approximate Arizona's ethical rule on the issue.<sup>2</sup> Finding that the actions of the plaintiff's lawyer were deliberate and less than forthcoming, the court held that disqualification of the plaintiff's lawyers and all the experts involved was appropriate.

There's a recent Arizona ethics opinion that indicates that

intellectual integrity is no longer taking a back seat to robust advocacy at any price.<sup>3</sup> The opinion, which takes a contrary view to another ABA Formal Ethics Opinion on the same subject,<sup>4</sup> holds that if a lawyer inadvertently sends another lawyer an electronic document that contains "metadata," such as track changes, comments and the like, it is unethical for the receiving lawyer to "mine" such information from the document.

It is important to note the opinion places the primary responsibility on the sending lawyer to make sure metadata and other confidential information are not disclosed to opposing counsel or others; a lawyer's duty to protect confidentiality is still alive and well in Arizona.<sup>5</sup> But failing that, the opinion tells us that two wrongs do not make a right, and that the duties of lawyers to others as set forth in ER 4.4(b) of our Rules of Professional Conduct will always require notification to the sending lawyer of the disclosure to allow that lawyer to take whatever action is deemed necessary.

So can you simply forward electronic documents to your client (who presumably is not a lawyer) and ask her to mine for metadata you as a lawyer are forbidden to see? Watch out for this one: ER 8.4(a) states that it is unethical to attempt to do through others that which you cannot ethically do yourself. And keep in mind the enormous price the lawyers in *Rico* had to pay for not paying attention. The cost of having to change lawyers in midstream, especially in a complex commercial case, can be devastating to the client and, ultimately, to the disqualified lawyer. **AD**

**Ethics Opinions and the Rules of Professional Conduct are available at [www.myazbar.org/Ethics](http://www.myazbar.org/Ethics)**



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### endnotes

1. *Rico v. Mitsubishi Motors Corp.*, 171 P.3d 1092 (Cal. 2007).
2. ER 4.4(b), Rule 42, ARIZ.R.S.CT.
3. Ariz. Ethics Op. 07-03 (Nov. 2007). See generally David Dodge, *Inadvertent Disclosure Revisited*, ARIZ. ATT'Y, Sept. 2006, at 8.
4. ABA Formal Op. 06-442 (Aug. 5, 2006).
5. ER 1.6, Rule 42, ARIZ.R.S.CT.