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Lessons From *Alex Jones*: The Rules Governing Inadvertently Produced Documents

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For those of you who live in a cave, Alex Jones is a talk show host/podcaster who has promoted various conspiracy theories. One tragic conspiracy he promoted is that the Sandy Hook shooting massacre was a hoax. As you are likely aware, a Texas jury recently awarded nearly $50 million to the parents of one of the Sandy Hook victims who sued Jones and his cohorts for defamation, and a Connecticut jury awarded nearly $1 billion. As of this writing other cases against Jones are pending.

One of the Perry Mason moments of the Texas trial was when the plaintiff's lawyer surprised Jones by cross-examining him about text messages from his cell phone that he did not know had been produced. You can watch some of the drama here, *see* The Age & Sydney Morning Herald, *Memorable Moments from the Alex Jones Trial*, YouTube (Aug. 4, 2022), https://www.youtube.com/watch?v=OFHTEd0RlAI, in which the following exchange occurred:

> Q [by Mark Bankston, plaintiff's lawyer]: Did you know that twelve days ago, … your attorneys messed up and sent me an entire digital copy of your entire cell phone, with every text message you've sent for the past two years, and when informed, did not take any steps to identify it as privileged or protected in any way, and as of two days ago, it fell free and clear into my possession, and that is how I know you lied to me when you said you didn't have text messages about Sandy Hook, did you know that?
>
> A [by Mr. Jones]: I … see, I told you the truth. This is your Perry Mason moment. I gave them my phone, and [interruption by the Court].

See id. at 1:07.

I'm sure you do not want to be like Mr. Jones' defense counsel in that video, so let's review the Utah rules regarding inadvertent disclosure of documents.

Utah Rule of Civil Procedure 26

The analysis in Utah starts with Utah Rule of Civil Procedure 26(b)(9)(B), which states:

> If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

This language is clear. Once notified by the producing party that privileged material has been produced, the receiving party may not use the material until the claim of privilege is resolved. Either party may seek appropriate relief from the court.

The federal rule is similar. *See* Fed. R. Civ. P. 26(b)(5)(B).

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Ethical Rules

Let's begin the ethics part of this discussion with Utah Rule of Professional Conduct 1.1, Competence. I have harped on this rule before when writing about electronic discovery issues, but it bears repeating: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation . . . ." Utah R. Prof. Cond. 1.1.

Comment [8] to Rule 1.1 makes it clear that competence may include knowledge of electronics: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. . . ." Utah R. Prof. Cond. 1.1, cmt. [8]. If computers and electronics are not your strong suit, engage in some meaningful CLE and get help.

Rule 4.4(b) directly addresses the inadvertent disclosure of privileged information: "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." Utah R. Prof. Cond. 4.4(b).

A comment to Rule 4.4 clarifies that the duty to notify a sender regarding inadvertently produced information applies to an electronic document's metadata. Utah R. Prof. Cond. 4.4, cmt. [2]. For example, suppose your adversary electronically produced a set of documents that redacted privileged information, but the redacted material is still visible in the metadata. Under Rule 4.4, you would have an obligation to notify your adversary that his or her redactions were not completely effective.

The comments also suggest that the lawyer's *ethical* duties stop after the lawyer has notified the sender. Whether the lawyer is ethically required to take additional steps (such as those required by Utah Rule of Civil Procedure 26) is beyond the scope of the ethical rules. *Id*. In other words, the drafters of Rule 4.4 did not try to resolve questions of privilege or waiver. They left that for the parties and, if necessary, the court to decide. From an ethical rules perspective, the decision to voluntarily return or delete an inadvertently produced document "is a matter of professional judgment ordinarily reserved to the lawyer." *Id*., cmt. [3].

The supreme court adopted current Rule 4.4(b) in 2005. Prior to that, when Rule 4.4(b) did not exist, the Bar's Ethics Advisory Opinion Committee (EAOC) addressed a similar issue under Rule 8.4(d), which addresses conduct prejudicial to the administration of justice. Even without the benefit of our current Rule 4.4(b), the EAOC determined that "an attorney in possession of an opposing party's attorney-client communications for which the attorney-client privilege has not been intentionally waived should advise opposing counsel of the fact of its disclosure." Utah State Bar Ethics Op. No. 99-01, 1999 WL 48784, *2 (Jan. 29, 1999). In that case, the attorney had come into possession of an adverse party's materials through his *client*, not through the opposing attorney. *See id*. at *1.

What Utah's rules do not explicitly address is whether a lawyer is obligated to stop reading the materials once she realizes they may be privileged. The rules may be purposely vague on this issue. Some argue for limiting the scope of a lawyer's ethical duties in this context because lawyers who receive such communications should not be subject to professional discipline in situations not of their own making. *See* Anthony E. Davis, *Inadvertent Disclosure – Regrettable Confusion*, New York Law J. (Nov. 7, 2011), https://www.law.com/newyorklawjournal/almID/1202524676226/. If you do proceed to read such materials, however, be aware of the risk that you are subjecting yourself to potential disqualification from the case or other civil sanctions. *See* Keith A. Call, *Fragile Contents: Dropping the Box Can Waive Privileges; Opening the Box Can Get You Sanctioned*, 30 Utah B.J. 42, 42–43 (July/Aug. 2017).

Summary

In summary, when an attorney in Utah comes into possession of information that he or she has reason to know was inadvertently sent, the lawyer has an *ethical obligation* to notify the sender. Under our current rules, that is where the ethical duty stops.

Once notified, the sending party has the right to assert privilege. If privilege is asserted, the lawyer has a duty under the civil discovery rules to destroy or sequester the information and not use it until the issue of privilege is resolved by the parties or the court.

Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the author.