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## Inadvertent Document Productions and the Threat of Attorney Disqualification

by Etan Mark

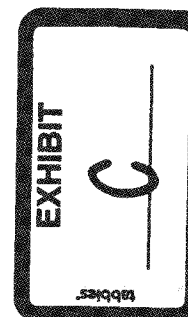
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*Before you embark on the journey of revenge, dig two graves. --Proverb*

Imagine a scenario in which a particularly obnoxious opposing counsel dumps 10,000 pages of documents on your doorstep three weeks late and the day before a hearing on a motion to compel. Seven hours later, frustrated and bleary-eyed from mind-numbing review, you stumble across an e-mail from opposing counsel to his client, with the subject line "case strategy." While thoughts of waiver may begin dancing excitedly in your head, you must tread carefully; you have unwittingly begun a potentially self-destructive journey into uncharted waters. If you attempt to gain any advantage from counsel's "mistaken" disclosure of this document, you face the strong possibility of disqualification.

The specter of inadvertent disclosure of privileged documents looms large over the psyche of an attorney engaged in a high-volume document production. The sheer quantity of discovery is capable of quickly overwhelming any lawyer or paralegal, and unfortunately, inadvertent disclosure of privileged documents is becoming more common. Whether such an inadvertent disclosure constitutes a waiver has already been thoroughly examined by a host of law review articles, journals, and periodicals, and will not be addressed any further here.<sup>1</sup> This article examines how an attorney who *receives* a privileged production is expected to mitigate the damage to the adversary, and the potentially dire consequences if the attorney fails to do so.

Courts in Florida have high expectations from their attorneys; those expectations are not lessened for an attorney who receives inadvertently produced privileged documents. Indeed, attorneys who inadvertently *produce* the documents are capable of turning their inadvertence into a formidable weapon in the form of a motion to disqualify. Throughout the U.S., courts routinely express a reluctance to consider motions to disqualify. Choosing your attorney has been called "one of the most important associational freedoms that a person may have" — therefore, "a court must be sensitive to the competing interests of requiring an attorney's professional conduct and preserving client confidences and, on the other hand, permitting a



party to hire the counsel of choice."<sup>2</sup> The Second Circuit Court of Appeals in *Government of India v. Cook Industries, Inc.*, 569 F.2d 727, 739 (2d Cir. 1978), has noted that "there is a particularly trenchant reason for requiring a high standard of proof on the part of one who seeks to disqualify his or her former counsel, for in disqualification matters we must be solicitous of a client's right freely to choose counsel — a right which, of course, must be balanced against the need to maintain the highest standards of the profession."<sup>3</sup> The Sixth Circuit Court of Appeals in *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 224 (6th Cir. 1988), made a similar observation: "the ability to deny one's opponent the services of capable counsel, is a potent weapon."<sup>4</sup> Nonetheless, as discussed in more detail below, courts in Florida will not hesitate to disqualify an attorney who capitalizes on an adversary's mistakes and gains an "informational advantage" as a result of an inadvertent document production.

### **The Ethical and Regulatory Framework**

In February 1994, The Florida Bar issued an ethics opinion stating that in the event of an inadvertent disclosure of documents (electronic or otherwise), "an attorney, upon realizing or reasonably believing that he or she has received a document or documents that were inadvertently misdelivered, is ethically obligated to promptly notify the sender of the attorney's receipt of the documents. It is then up to the sender to take any further action."<sup>5</sup> In 2006, the Rules Regulating The Florida Bar were amended to include a provision that codifies this ethics opinion.<sup>6</sup> The body of that rule, entitled "Respect for Rights of Third Persons," states:

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.<sup>7</sup>

The comment to Rule 4-4.4 cautions that zealousness in representation "does not imply that a lawyer may disregard the rights of third persons."<sup>8</sup> Moreover, "[i]f a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures."<sup>9</sup>

The Federal Rules of Civil Procedure provide a bit more guidance:

[T]he party making the claim must notify any party that received the information of the claim and the basis for it. *After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim of privilege is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.*<sup>10</sup>

The advisory committee notes further state:

[N]o receiving party may use or disclose the information pending resolution of the privilege claim.... In presenting the question [of whether the information is privileged], the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.<sup>11</sup>

With this framework in mind, it is time to turn to cases where attorneys receiving inadvertently produced documents did not act "promptly." While the results in these cases are somewhat inconsistent, it is clear that the attorneys who received the privileged documents subjected themselves to the very real possibility of disqualification.

### **Disqualification of Counsel and Inadvertent Document Production**

The floodgates of disqualification following an inadvertent disclosure were first opened by the Fourth District Court of Appeal in *General Acceptance Insurance Company v. Borg-Warner Acceptance Corp.*, 483 So. 2d 505 (Fla. 4th DCA 1986). In *Borg-Warner*, the court inadvertently forwarded the defendant insurance company's claim file to plaintiff's counsel — rather than defendant's counsel — following an in camera inspection during which the court ascertained that the claim file was privileged.<sup>12</sup> Plaintiff's counsel received the file from the court, and not realizing that the file was sent to him inadvertently, reviewed it.<sup>13</sup> The defendant insurance company moved to disqualify plaintiff's counsel "on the grounds that they had acquired an unfair advantage by virtue of the inadvertent disclosure of [g]eneral [a]ccident's claim file and certain privileged documents."<sup>14</sup> The trial court denied the motion, but the Fourth District Court of Appeal reversed, stating:

Like so many other ethical considerations in the practice of law, perceptions are of the utmost importance. Thus, how much of an advantage, if any, one party may gain over another we cannot measure. However, the possibility that such an advantage did accrue warrants resort to this drastic remedy for the sake of the appearance of justice, if not justice itself, and the public's interest in the integrity of the judicial process.

Seizing on this language, the Third District Court of Appeal in *Abamar Housing & Development v. Lisa Daly Lady Décor, Inc.*, 698 So. 2d 276 (Fla. 3d DCA 1997), considered whether the inadvertent production of 23 attorney-client privileged documents as part of a voluminous document production resulted in a waiver of the attorney-client privilege by the producing attorney.<sup>15</sup> In a letter responding to the producing attorney's mediation proposal, the attorney who received the inadvertently produced documents attached a copy of a letter from the producing attorney to his client containing a preliminary analysis of the litigation.<sup>16</sup> Upon receipt of the letter and alerted "that a possible inadvertent disclosure of privileged documents had occurred," the producing party re-reviewed the produced documents and discovered a handful of additional documents that were also privileged.<sup>17</sup> He requested that the documents be returned, but opposing counsel refused and subsequently introduced these documents in a deposition.<sup>18</sup> The court determined that the attorney-client privilege was not waived as a result of the accidental disclosure, and took issue with the tactics employed by the receiving attorney in his attempts to gain a strategic advantage in the case as a result of the producing attorneys' inadvertent production.<sup>19</sup> In a parting shot to counsel who received the documents, the court sought to "remind counsel of the well-justified dictate that "[a]n attorney who receives confidential documents of an adversary as a result of an inadvertent release is ethically obligated to promptly notify the sender of the attorney's receipt of the documents."<sup>20</sup>

Accepting the court's invitation to seek disqualification of his adversary, the producing party subsequently sought disqualification of opposing counsel, which the court granted.<sup>21</sup> By separate order, the court held that "[t]he receipt of privileged documents is grounds for disqualification of the attorney receiving the documents based on the unfair tactical advantage such disclosure provides. Moreover . . . a movant is not required to demonstrate specific prejudice in order to justify disqualification."<sup>22</sup> The court further stated:

While recognizing that disqualification of a party's chosen counsel is an extraordinary remedy and should be resorted to sparingly, we believe the prudent course in this case is to disqualify counsel. Like so many other ethical considerations in the practice of law, perceptions are of the utmost importance. Thus, how much of an advantage, if any, one party may gain over another we cannot measure. However, *the possibility that such an advantage did accrue warrants resort to this drastic remedy for the sake of the appearance of justice, if not justice itself, and the public's interest in the integrity of the judicial process.* *General Accident Ins. Co.*, 483 So. 2d at 506. Defendants' motion adequately set forth the requirements for disqualification. This case demonstrates the effects of the inadvertent disclosure, the plaintiffs' recalcitrance in rectifying the

disclosure, and the unfair tactical advantage gained from such disclosure. There was no requirement to demonstrate prejudice.<sup>23</sup>

Perhaps sensing that it was suggesting an "automatic disqualification rule," the court equivocated in a footnote, noting that "an attorney who follows the dictates of the ethics opinion, and complies with the obligation to *promptly notify* and to *return immediately* the inadvertently produced documents without exercising any *unfair* advantage (such as photocopying the 'confidential documents' prior to returning them), will not be subject to disqualification."<sup>24</sup> Thus, although the court specifically held that "[t]here was no requirement to demonstrate prejudice" to warrant disqualification, the court focused on 1) the effects of the inadvertent disclosure; 2) the plaintiffs' recalcitrance; and 3) the "unfair tactical advantage gained from such disclosure."<sup>25</sup> Based on these criteria, the court determined that "the trial court shall enter an order granting the motion to disqualify."<sup>26</sup>

Despite the court's contention that it was not embracing an automatic disqualification rule, relying on its decision in *Abamar*, the Third District Court of Appeal recently reached an identical result under similar circumstances. In *Atlas Air Inc. v. Greenberg Traurig, P.A.*, 997 So. 2d 1117, 1119 (Fla. 3d DCA 2008), the Third District Court of Appeal disqualified Kenny Nachwalter, P.A., after the firm received inadvertently disclosed documents and refused to provide information at a deposition regarding who else saw the documents and whether the contents of the documents were discussed to others within the firm.<sup>27</sup> Therefore, it was impossible for the court to determine "the extent of the tactical advantage Kenny Nachwalter may have obtained by viewing the privileged documents, and whether another remedy, short of disqualifying the firm, was available."<sup>28</sup> Importantly, the trial court had already determined that the individual attorney who had reviewed the documents should be disqualified.<sup>29</sup> The court cited with approval to *Abamar*, and further noted that the court "must look to the actions taken by the receiving lawyer or law firm in determining whether the drastic remedy of disqualification is warranted."<sup>30</sup>

Certainly this rule seems impossibly harsh. Taking the courts' application of the ethical guidelines to its extreme, imagine a scenario where opposing counsel "inadvertently" forwards a memorandum on his entire case strategy to you. You open the e-mail and attachment, and quickly skim it before realizing what its contents actually contain. But before you fully appreciate that the e-mail is privileged, you read "will settle for \$1 million" — a morsel that will no doubt be emblazoned in your mind for the remainder of the litigation. Surely you have now obtained a significant tactical advantage — no less than that gained by counsel in *Borg-Warner Acceptance Corp.* Must you now be disqualified due to your opponent's carelessness? The answer is not clear. In fact, many courts have been more reluctant to tread on the "important associational freedom" of choosing one's own counsel, focusing on the conduct of the receiving attorney rather than the possibility of an iota of advantage.

In cases where courts have determined that the opposing counsel did not exhibit "recalcitrance," but rather was acting to protect "his clients' interests where the question of privilege was not a simple one,"<sup>31</sup> courts have been much more hesitant to disqualify counsel — despite the fact that the Third District Court of Appeal has already opined that "perceptions are of the utmost importance."<sup>32</sup> In April 2009, the U.S. District Court for the Southern District of Florida refused to disqualify counsel following its use of an inadvertently produced e-mail in a motion for sanctions.<sup>33</sup> In *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 2009 WL

982456 (S.D. Fla. Apr. 10, 2009), defendant Humana, Inc., discovered 10,000 pages of documents that were otherwise responsive to a document request, approximately one month after the close of discovery, some of which were withheld or redacted on the basis of attorney-client privilege.<sup>34</sup> In the interim, Humana provided plaintiff Preferred Care Partners (PCP) with a privilege log.<sup>35</sup> Approximately two weeks after the document production and submission of the privilege log, Humana requested the return of two e-mails (the first batch) that it claimed it had inadvertently produced.<sup>36</sup> PCP's counsel advised Humana that it "segregated those documents from Humana's production and placed them in a safe location," but it intended "to submit the documents to the [c]ourt for in camera review."<sup>37</sup> Prior to filing its motion for in camera review, PCP filed a motion for sanctions, and attached to its motion the first batch and two additional arguably attorney-client privileged communications (the second batch), but with potential attorney-client communications redacted.<sup>38</sup> Humana then requested the return of the second batch, which it claimed were attorney-client privileged documents.<sup>39</sup> PCP refused, and Humana moved to disqualify counsel for PCP.

The court first analyzed whether PCP complied with Fed. R. Civ. P. 26(b), requiring a party notified of an inadvertently produced document to "promptly return, sequester or destroy the specified information and any copies it has."<sup>40</sup> Because Humana only notified PCP that it was asserting a privilege with respect to the first batch, the court noted that the "legal standards governing the propriety of PCP's use of arguably privileged materials differ depending on whether Humana notified PCP of the disclosure . . . or whether Humana failed to notify PCP of the disclosure . . . ."<sup>41</sup> Presumably, although the court did not elaborate, Fed. R. Civ. P. 26(b) (5)(B) requiring a party notified that it is a recipient of a mistakenly produced document to "promptly return, sequester or destroy the specified information," would correspond to the first batch, while Florida Rule of Professional Conduct 4-4.4(b), requiring a lawyer who "receives a document . . . and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender," would correspond to the second batch. Assuming each of these rules is applied in equal force, an attorney notified of the privilege before independent discovery of it must "promptly return, sequester or destroy" the information," while the attorney who is not notified, but independently discovers the privilege must merely "promptly notify the sender." Despite the Third District Court of Appeal's heavy reliance on the "appearance of justice" or the "possibility" of an advantage, such considerations are notably absent from the Southern District of Florida's analysis. After discussing whether Humana waived the attorney-client privilege, the court concluded that

Humana's request to disqualify PCP's counsel based on his receipt of documents that were inadvertently disclosed to him based on Humana's own discovery oversights, omissions and errors is not well taken. PCP's counsel acted reasonably under the circumstances and has gained no 'informational advantage' that could possibly be used in a manner prejudicial to Humana.<sup>42</sup>

Certain Florida state courts have also attempted to buck the disqualification trend set by the Third District Court of Appeal, and have argued that "[t]he mere possibility of a tactical advantage could not result in the drastic remedy of disqualification."<sup>43</sup> In *Kusch v. Ballard*, 645 So. 2d 1035 (Fla. 4th DCA 1994), the Fourth District Court of Appeal vacated the disqualification of counsel, and in no uncertain terms expressed its disagreement with the course the law of disqualification of counsel was taking. In a concurrence, Judge Farmer noted:

I should first admit straightaway to a certain distaste for the practice of judges disqualifying lawyers for parties in civil cases. There has never been a persuasive theoretical basis demonstrated to my satisfaction for such an extraordinary remedy. Nothing in any constitutional provision, statute or rule of practice or procedure purports to repose such a power in civil trial

judges. Moreover, the remedy strikes at the heart of one of the most important associational freedoms that a person may have the right to choose one's own lawyer. Even if the basis for disqualification lies in a violation of the lawyer's ethical code, I do not understand why the disciplinary process of The Florida Bar is not exclusively authorized to grant such relief.<sup>44</sup>

Echoing a sentiment expressed by a number of judges throughout Florida, in *Kusch* the court noted that "if we permit the receiving lawyer's disqualification, an unethical lawyer could intentionally fax a privileged communication to a formidable opponent, claim inadvertence, and successfully have the lawyer disqualified."<sup>45</sup> The concurrence further opined that "we should understand that we would be handing those without scruple a powerful and tempting tool, allowing them to block the opposing lawyer out of the game."<sup>46</sup>

In *Coral Reef of Key Biscayne Developers, Inc.*, 911 So. 2d 155 (Fla. 3d DCA 2005), the Third District Court of Appeal approved the standard of disqualification previously embraced by that court — that is, whether the recipient of the documents "gains an unfair tactical advantage by virtue of that disclosure."<sup>47</sup> However, in *Coral Reef*, because the trial court had ordered the production of the documents which were later determined to be privileged, the court determined that a "higher standard must apply for disqualifying counsel when the privileged documents are received pursuant to a court order that is subsequently vacated."<sup>48</sup> Rather than the mere possibility of a tactical advantage, the court held that "evidence of *actual harm* caused by opposing counsel's review of the privileged documents" must be demonstrated — a standard more akin to that embraced by the Southern District in *Preferred Care Partners*.<sup>49</sup> Nonetheless, the court concluded by cautioning that "[i]t bears repeating that we do not face a situation where a lawyer obtained privileged information inadvertently and then utilized it improperly. Undoubtedly, there are some situations when a party's lawyer reviews another party's privileged documents outside the normal course of discovery and, therefore, must be disqualified."<sup>50</sup>

## **Conclusion**

The prospect of your own disqualification after your opponent failed to do his or her job properly by producing privileged documents to you is distressing, but perhaps a necessary evil to preclude the appearance of an unfair advantage. Clearly, case law has put the onus on the receiving attorney to appropriately respond to his or her adversary's inadvertent disclosure, despite the lofty platitudes often employed by courts in their desire to preserve the client's choice of attorney whenever possible.

Based on Florida case law and the corresponding ethics rules, much of a court's analysis of a motion to disqualify will turn on the conduct of the receiving attorney. Did the attorney attempt to use the document in some way to gain a tactical foothold? Did the attorney refuse to return the documents to his or her adversary? Did the attorney attempt to introduce the documents into the record?

The best practice for an attorney who receives an inadvertently produced document is to immediately stop reviewing the document upon realizing that it may be privileged, thereby preempting opposing counsel's claim of an "informational advantage." Do not share the document with anyone else in your firm. Immediately contact your adversary, preferably in writing, to inform that you believe he or she may have inadvertently produced documents to you. If the documents were produced in hard copy, do not e-mail, copy, or electronically store the documents, as the Federal Rules of Civil Procedure require immediate sequestration, destruction, or return of the documents. Rather, send the documents back to opposing counsel

and allow counsel to determine whether he or she will be claiming a privilege. If the documents were sent to you electronically or on a compact-disk, inform opposing counsel that you have ceased your review of the documents and provide opposing counsel with the bates number of the offending documents. Then ask how counsel would like you to proceed. Most importantly, do not attempt to gain a tactical advantage as a result of the disclosure, or you face the prospect – at the very least – of an evidentiary hearing concerning the propriety of disqualification.

<sup>1</sup> See, e.g., Matthew A. Reiber, *Latching onto Laches: A Rules Based Alternative for Resolving Questions of Waiver Following the Inadvertent Production of Privileged Documents in Federal Court Actions*, 38 N.M. L. Rev. 197 (2008); Audrey Rogers, *New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials: Attorney Responsibility as the Governing Precept*, 47 Fla. L. Rev. 159 (1995); Robert J. Franco & Michael E. Prangle, *The Inadvertent Waiver of Privilege*, 26 Tort & Ins. L.J. 637 (1991); Alan Meese, *Inadvertent Waiver of the Attorney-Client Privilege*, 23 Creighton L. Rev. 513 (1990); Wesley M. Ayres, *Attorney Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases*, 18 Pac. L.J. 59 (1986); James M. Grippando, *Attorney-Client Privilege: Implied Waiver Through Inadvertent Disclosure of Documents*, 39 U. Miami L. Rev. 511 (1985).

<sup>2</sup> *Kusch v. Ballard*, 645 So. 2d 1035, 1036 (Fla. 4th D.C.A. 1994).

<sup>3</sup> *Government of India v. Cook Industries, Inc.*, 569 F.2d 737, 739 (2d Cir.1978).

<sup>4</sup> *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 224 (6th Cir.1988).

<sup>5</sup> Professional Ethics of The Florida Bar, Opinion 93-3.

<sup>6</sup> See Rules Regulating The Florida Bar, 4-4.4(b).

<sup>7</sup> *Id.* at 4-4.4.

<sup>8</sup> *Id.*, cmt.

<sup>9</sup> *Id.*

<sup>10</sup> Fed. R. Civ. P. 26(b)(5)(B) (emphasis added).

<sup>11</sup> Fed. R. Civ. P. 26, Advisory Committee's Note (2006).

<sup>12</sup> *General Acc. Ins. Co. v. Borg-Warner Acceptance Corp.*, 483 So. 2d 505, 506 (Fla. 4th D.C.A. 1986).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Abamar*, 698 So. 2d 276, 279 (Fla. 3d D.C.A. 1997).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 277.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (internal citations omitted).

<sup>21</sup> *Abamar Housing & Development v. Lisa Daly Lady Décor, Inc.*, 724 So. 2d 572, 573 (Fla. 3d D.C.A. 1998).

<sup>22</sup> *Id.* (quoting *Junger Utility & Paving Co., Inc. v. Myers*, 578 So. 2d 1117 (Fla. 1st D.C.A. 1989)).

<sup>23</sup> *Id.* at 573-4 (citations omitted) (emphasis added).

<sup>24</sup> *Id.* at fn 2 (emphasis in original).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Atlas Air*, 997 So. 2d 1117, 1119 (Fla. 3d D.C.A. 2008).

<sup>28</sup> *Id.* (J. Rosenberg, concurring).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1118.

<sup>31</sup> *Applied Digital Solutions, Inc. v. Vasa*, 941 So. 2d 404, 408 (Fla. 4th D.C.A. 2006).

<sup>32</sup> *Abamar*, 724 So. 2d at 574.

<sup>33</sup> *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 2009 WL 982456 (S.D. Fla. Apr. 10, 2009).

<sup>34</sup> *Id.* at \*2.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at \*3.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* See also Fed. R. Civ. P. 26(b).

<sup>41</sup> *Id.* at \*4.

<sup>42</sup> *Id.* at \*6.

<sup>43</sup> *Applied Digital Solutions v. Vasa*, 941 So. 2d 404, 407 (Fla. 4th D.C.A. 2006).

<sup>44</sup> *Kusch*, 645 So. 2d at 1035-6.

<sup>45</sup> *Id.* at 1035.

<sup>46</sup> *Id.* at 1035-6.

<sup>47</sup> *Coral Reef of Key Biscayne Developers, Inc. v. Lloyd's Underwriters at London*, 911 So. 2d 155 (Fla. 3d D.C.A. 2005) (citing *Abamar Housing & Dev., Inc. v. Lisa Daly Lady Decor, Inc.*, 724 So. 2d 572 (Fla. 3d D.C.A. 1998)).

<sup>48</sup> *Id.* at 157-8.

<sup>49</sup> *Id.* at 158.

<sup>50</sup> *Id.*

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