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The limits of inadvertent disclosure

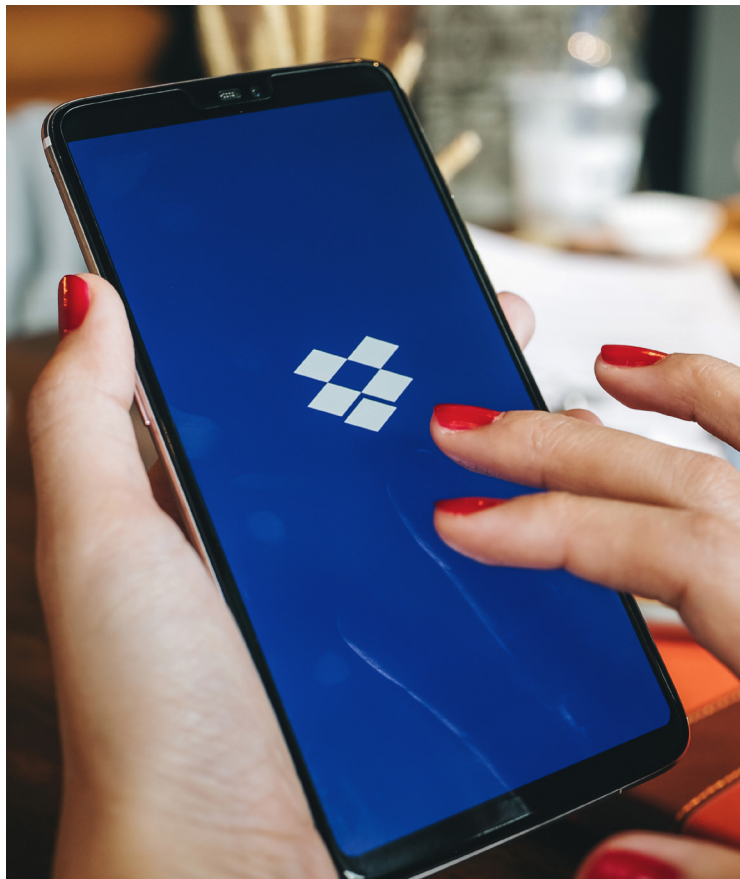
The Fourth District draws a clearer line on inadvertent disclosures, holding that only obviously privileged or work product materials — not all documents produced by mistake — must be returned.

By Sanford Jay Rosen
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How far does the duty to return inadvertently produced documents extend? Does it require returning unprivileged and non-work product material that was part of an inadvertent production? No, answered the Fourth District Court of Appeal in *Popa v. Simpson* (June 23, 2026) 2026 WL 1802196, 2026 Daily Journal D.A.R. 5141.

In 1992, the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 92-368, stating that a lawyer who received material that appeared privileged had a duty to refrain from reviewing it, to notify the sending party, and to abide by the sending party's instructions. The ABA later withdrew Formal Opinion 92-368, after the Model Rules committee declined to include its entire content in the Model Rules of Professional Conduct.

Shortly afterward, the First District Court of Appeal decided *Aerojet-Gen. Corp. v. Transp. Indem. Ins.* (1993) 18 Cal. App. 4th 996. The trial court imposed monetary sanctions on an attorney who had received a packet from an Aerojet employee that included a memorandum identifying a witness, describing an interview, and counsel's assessment of the witness's potential. The court of appeal reversed the sanction, holding that receiving counsel had done nothing wrong by receiving the information, that the protected nature of the memorandum was not obvious on its



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face in context of the overall production, and most important, that the identity of a witness is an underlying fact that cannot be made privileged by including it in a client memo.

Aerojet's unique facts left California law somewhat undefined as to the duties of a lawyer who inadvertently receives truly privileged material. *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal. App. 4th 444 clarified the law. In a

traditional paper production, sending counsel inadvertently included 273 pages of privileged summaries. Receiving counsel gave the documents to an expert and refused to return them. The trial court sanctioned the receiving attorney, relying on the 1992 ABA Opinion. The court of appeal reversed, holding that there was no established California law and that the ABA Opinion did not set California's ethical standards. The WPS court then set

out a standard for future cases that tracked the ABA Opinion — requiring that the recipient of inadvertent privileged disclosures refrain from further review, notify the sending party, and, either dispose of the documents as the sender instructs, or seek guidance from the court.

In 2007, the California Supreme Court decided *Rico v. Mitsubishi Motors Corp.* 42 Cal. 4th 807. In this vehicle rollover case, the Court granted review specifically to address the problem of inadvertent production. "Inadvertence" was somewhat in doubt in *Rico*, as the privileged documents — notes from a session between counsel and an expert witness — did not come in a document production, but were left in a conference room during a deposition break. The Court treated the matter as an inadvertent disclosure, however, because of disputed testimony how counsel ended up with the documents. The trial court and the court of appeal agreed that counsel should be disqualified for using the documents and not returning them. The Supreme Court also agreed, holding that unlike in *Aerojet*, the material was obviously work product. It did not matter that the material was not as clearly labelled as that in *State Farm*. The standard is an objective one — if reasonably competent counsel would conclude the materials were privileged, they must be returned.

Last month's decision, *Popa v. Simpson*, arose in civil suit for sexual battery. The parties produced material using Dropbox. The Dropbox link came in a document with

a category-by-category index to the Dropbox file, along with short commentary on the documents. The index document had no letterhead and was not addressed to anyone in particular. Receiving counsel agreed to destroy the index document with its commentary and summaries but refused to destroy the material retrieved from the Dropbox file. The material in the Dropbox file included otherwise discoverable, non-privileged, non-work product text messages, photographs, and other documents. Sending counsel moved to disqualify under Rico. The trial court's tentative was to deny, but the trial court reversed itself, concluding that receiving counsel should have immediately identified the list itself as privileged and therefore should not even have accessed the Dropbox material.

The Court of Appeal reversed on several grounds. First, it was not obvious under an objective standard that the untitled and unaddressed index document was work product or attorney-client communication. Second, disqualification cannot be based on the use of "non-privileged, discoverable, and highly relevant documents," which is what the Dropbox file contained. Relying on *Aerojet*, the court of appeal concluded that "[t]he use of nonprivileged and relevant evidence generally does not constitute an unfair advantage at

trial such that disqualification would be warranted." The court also rejected the idea that the mere structure of the documents in the Dropbox file constituted work product.

What are practical takeaways for producing counsel? First, do not let electronic review tools lull you into handling documents en masse. Get to know the structure of your client's documents and read them to make sure you are not inadvertently producing privileged or work product material. Double-check even after production and invoke your claw back rights promptly if you find an inadvertent production.

For receiving counsel, do not let incoming productions sit for a long time without review. If there are Rico issues, your conduct will be evaluated in part on your promptness in addressing them. If you identify inadvertently produced privileged or work product material, isolate it from discoverable material and notify opposing counsel immediately. If sending counsel demands return of a broader scope than you believe justified, meet and confer promptly, and seek a ruling from the court if necessary.

If you get a claim from producing counsel that privileged or work-product material was inadvertently produced, and you disagree as to the claim of privilege or work product, and the information matters to

your case, be prepared to litigate the privilege or work product issues on their merits. The inadvertent production itself does not waive privilege or work product protection per Evid. Code § 912.

If you attempt to assert an exception to privilege, such as the crime-fraud exception of Evidence Code § 956, the court will evaluate the exception independent of the inadvertent production and will not deviate from the strict crime-fraud rules, particularly the rule that the crime-fraud claim cannot be established by the disputed documents themselves. *Johnson v. Dep't of Transportation* (2025) 109 Cal. App. 5th

917. Note, also, that the crime-fraud exception does not apply to work product material at all.

"A trial is ultimately a search for the truth," wrote Acting Justice Sanchez in *Popa*. Stretching the Rico rule to conceal discoverable material because it was part of an inadvertent production, even one that includes an item of privileged material, impedes the search for the truth. *Popa* should give practitioners pause in responding to claims of inadvertent production, to make sure that the client is not ill-served by an overbroad return of material. If in doubt, present the matter to the court to prevent concealment of discoverable material.

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