ETHICS

By Meg Christensen

WHEN THE SIDESHOW TAKES CENTER STAGE, OR THE ETHICAL IMPLICATIONS OF PRODUCING PRIVILEGED INFORMATION

Although the actual provenance isn't clear, P.T. Barnum is often given credit for the phrase "There's a sucker born every minute." The lure created by Barnum's circuses seems to have been supplanted by YouTube clips of trial footage from celebrity lawsuits. Like moths to a flame, we all get drawn in to watch the latest soap opera play out in wood-paneled rooms across the country. The latest "Greatest Show on Earth" featured Alex Jones as the ringleader.

For those readers who are blissfully unaware, radio host Alex Jones was sued in Texas state court for defamation. The crux of the plaintiff's claims centered on Jones' statements on his show that the awful events at Sandy Hook were staged by the United States government as a

"false flag" effort to pave the way for more gun control. The trial produced evidence that Jones' acolytes took heed and set out to harass and intimidate families of the children who died at their elementary school. In the end, a jury returned a multi-million-dollar verdict against Jones, a result that will surely continue to be litigated in the months and years to come.

Salacious as it is, the actual subject matter of that suit wasn't the most pertinent topic for readers of *Res Gestae*. That honor goes to a discovery issue! While cross examining Jones at trial, lawyers for the plaintiffs sought to impeach Jones with his own text messages. While this effort is standard in courtrooms across the nation, in Jones' case, the distinguishing variable here was that the plaintiff's lawyers received the texts *inadvertently* from Jones' counsel. Boldly informing Jones that "*12 days ago, your attorneys messed up and sent me a digital copy of every text!*" (emphasis added), plaintiff's counsel proceeded to show Jones a text he had sent previously that was counter to his testimony at trial.

Perhaps a little late, Jones' lawyer then sought an "Emergency Motion for Protection" to prohibit further use of the unintentionally produced material. During a hearing on that request, it became clear the buildup to that dustup is something that keeps all litigators reading this article awake at night: a misdirected filesharing link to opposing counsel in an attempt to produce discovery. In sum, the link sent by Jones' counsel contained materials that contained privileged information. Upon receipt, the plaintiff's lawyers did what we've been trained to do: notified Jones' lawyers they believe the material was sent in error. Jones' lawyers quickly confirmed the same and asked them to "please disregard" the link. The end, right? Wrong.

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Per the local rules of the jurisdiction, once Jones' lawyers were notified of the error, they had 10 days (remember the "*12 days ago...*" part?) to specifically assert privilege and seek protective relief from the court to prevent usage, or else they waived it. Jones' lawyers didn't seek a protective order, so the plaintiffs' lawyers took it and ran. And here we are. While this circus played out on a national YouTube stage, it is certain that it's been repeated, and will be repeated throughout our state.

SO, WE ASK: WHAT DO YOU DO AS LITIGATOR IF YOU FIND YOURSELF IN THIS CIRCUS TO AVOID BECOMING THE CLOWN? LUCKILY, WE ARE HERE TO HELP.

The facts of the Jones' discovery debacle present ethical quandaries for both the producing lawyer and the receiving lawyer. The conduct of the producing lawyer could implicate competence and diligence. Lawyers must provide competent representation to a client. Ind. R. Prof. Cond. 1.1. This requires the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.* Of relevance for Jones' lawyer, Comment [6] to Rule 1.1 explains "a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with the technology relevant to the lawyer's practice.**" Digital document production is standard operating procedure, and no one can reasonably fault Jones' lawyer for attempting to respond to discovery with a filesharing link (assuming the lawyer has properly vetted the filesharing software and is satisfied with its security).

Readers of *Res Gestae* know fileshare productions are cheaper, faster,

and generally more efficient for the producing and the receiving party. Jones' lawyers surely should have slowed down and double checked the filesharing link before transmitting it, but a single instance of a mis-sent link does not amount to ethical incompetence. After all, Rule 1.1 imposes a standard of reasonable thoroughness. Of greater concern to Jones' lawyer would be Rule 1.3, which requires lawyers to act with diligence and promptness in representing a client. Comment [2] clarifies that lawyers should control their workload to ensure competent representation and Comment [3] warns against the dangers of procrastination.

In this instance, those local rules are crucial. Jones' lawyer was practicing in a jurisdiction with a 10-day time limit to obtain safe harbor for inadvertently produced information. Jones' lawyer either failed to know the rules or failed to act within a timely fashion. Had Jones' lawyer sought a protective order, perhaps the damaging text messages could have been suppressed.[1]

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But what about the receiving lawyer? If an Indiana lawyer receives privileged information, the Rules of Professional Conduct give only limited guidance:

> 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.

Ind. R. Prof. Cond. 4.4(b).

Here, the plaintiff's lawyer did exactly that: prompt notification. What next? Rule 4.4 does not address what happens after the receiving lawyer gives notice. Indeed, Comment [2] disclaims such instruction as "beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived." As a matter of professional judgment, some lawyers may decide to return the inadvertently sent document to the sender unread, but Comment [3] refers lawyers to Rules 1.2 and 1.4, which require lawyers to follow their clients' goals for the representation and communicate information impacting the representation to their clients.

Here, Jones' lawyers' inaction creates a conundrum. In Indiana, had they simply taken the additional step to notify the Plaintiff's lawyer of the production of privileged material, Indiana's Trial Rules kick in:

> Information produced. If information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may 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 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.

Ind. Tr. R. 26(B)(5)(b) (emphasis added); *see also* Fed. R. Civ. Proc. (b)(5)(B) (imposing nearly identical obligations).

Thus, a lawyer receiving potentially privileged information in an Indiana state or federal proceeding must not only advise the producing party pursuant to Professional Conduct Rule 4.4(b), he or she must also refrain from using that information unless and until a court resolves the question of privilege (and waiver). The impact of failure to adhere to Trial Rule 26(b)(5)(B) can be significant: the receiving party may be barred from using the information and the receiving counsel who failed to follow the rules may be disqualified. *See, e.g., McDermott Will & Emery LLP v. Hausman*, 10 Cal. App. 5th 1083 (Cal. Ct. App. 2017) (disqualifying counsel that failed to follow the requirements of California's corollary to Trial Rule 26(B)(5)(b) and insisted on using an inadvertently produced email despite the producing party's objection); *Arnold v. Cargill Inc.*, 2004 WL 2203410, at *10 (D. Minn. Sept. 24, 2004) (disqualifying counsel that received potentially privileged documents and failed to cease review of the documents, notify the privilege holder, and return the documents); *Harris Davis Rebar, LLC v. Structural Iron Workers Local Union No. 1, Pension Tr. Fund*, 2019 WL 447622, at *5 (N.D. Ill. Feb. 5, 2019) (restricting litigant's use of improperly obtained documents and limiting the scope of testimony the litigant could obtain regarding those documents). Given the potential for sanctions, there can be no dispute that it puts clients at peril when their lawyers ignore the obligations imposed by Professional Conduct Rule 4.4(b) and Trial Rule 26(B)(5)(b).

No matter the result, this situation is dramatic for all involved. Hence, the YouTube views, and articles (present company excluded) dissecting the same. As litigators, whether we like it or not, we will get drawn into the "big top." Take P.T. Barnum at his word: don't be a sucker. This isn't your minute.

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If you learn of an inadvertent production of information, don't delay—advise the receiving party and demand return of the information. To the extent it is accurate, assert the production includes privileged material. To the extent that it is accurate, assert the production includes material that is otherwise not discoverable. If the receiving party refuses to return the information or give assurances that it is sequestered, seek a protective order from the court.

If you receive information that has hallmarks of privilege, don't delay—stop reviewing the information and inform the opposing party. Then, if you (and your client) want to use the information, seek a declaration from the trial court as to waiver of privilege.

FOOTNOTE:

1. Of course, the question of whether it was discovery misconduct to withhold the non-privileged text messages in the first place remains. In any jurisdiction, when a lawyer learns of the existence of a responsive document that his or her client has claimed does not exist, the lawyer must supplement the discovery production. Or, if the client refuses to allow such action, the lawyer may face a conflict requiring withdrawal. However, this digression goes well beyond the scope of this article.