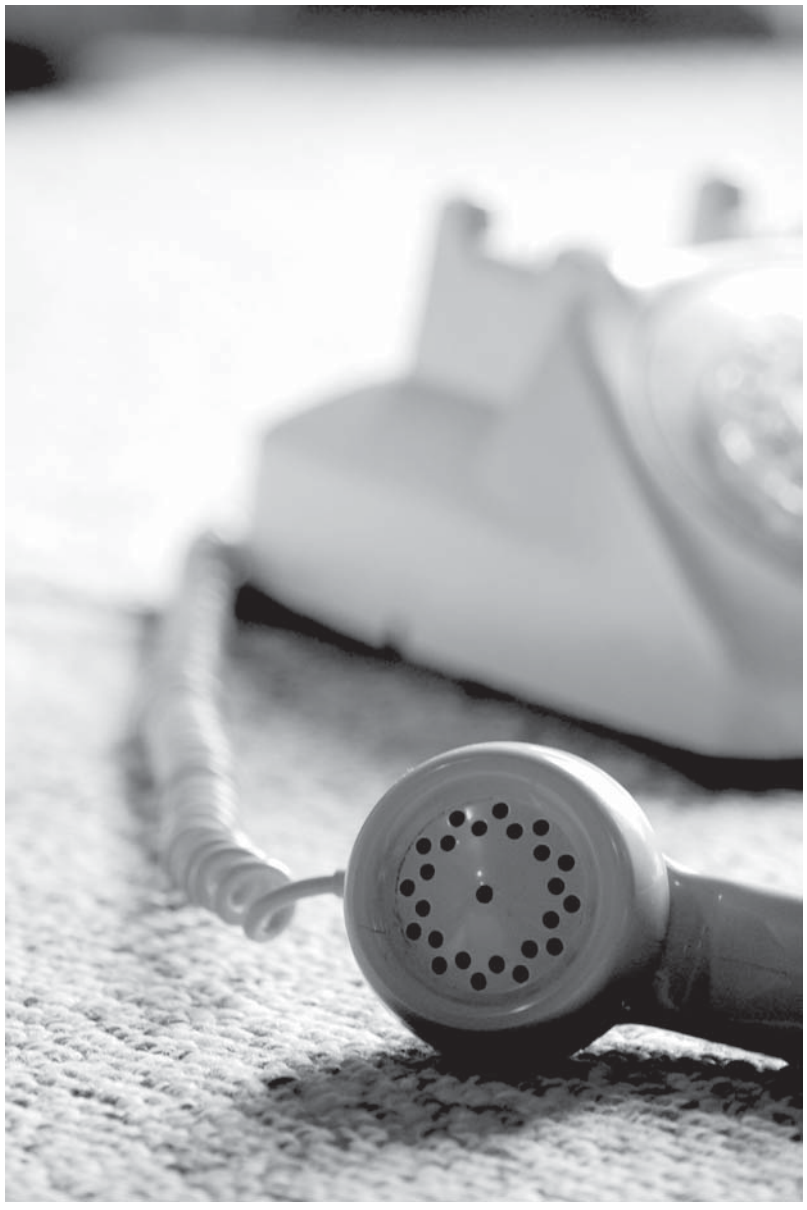
Inadvertent Disclosure

A Cautionary Tale of a Speakerphone and a Voicemail Message

By Grace M. Giesel

A recent California Court of Appeal case, one that the California Supreme Court has already agreed to hear, presents an inadvertent disclosure in a novel and sinister context. The Court of Appeal's treatment of this disclosure may well be one of the best examples of the old adage, "What goes around comes around." But that adage is not the true lesson of this column. Rather, the case creates a great backdrop for an outline of the principles that apply to all sorts of unintended, that is, inadvertent, disclosures.

The parties in *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.,* 117 Cal. App. 4th 794, 12 Cal. Rptr. 3d 123 (2004), review granted & opinion superceded, 94 P.2d 475 (Cal. 2004) (granting review but deferring further action), were semiconductor designers and manufacturers. The companies were in the process of working out a deal in which Marvell would purchase a portion of Jasmine's technology and some of its engineers. Marvell agreed that it would be exposed to trade secrets and patents but could not copy or remove them. Marvell also agreed not to contact employees in the engineering group unless Jasmine representatives were present.



One day, three Marvell employees called Jasmine's senior director of legal and business affairs. The three Marvell employees were the general counsel, an in-house patent attorney, and the vice president of engineering. The Marvell trio did not reach the Jasmine official, so they left a message on that official's voicemail.

Oh, what a message they recorded! After asking that the Jasmine official return the call, the Marvell employees neglected to hang up the speakerphone. The Jasmine official checked her voicemail later and discovered a conversation during which the Marvell employees revealed that Marvell did not intend to abide by the terms of the contract and intended to steal Jasmine's trade secrets and key employees. The conversation even included a discussion of who in the company might go to jail as a result of the scheme.

The inadvertent disclosure here is, of course, the conversation preserved by voicemail. The California Court of Appeal reversed the lower court's grant of a preliminary injunction restricting the use of the transcript of the voicemail message. The Court held that the attorney-client privilege had been waived and, even if it had not been waived, Jasmine had demonstrated a prima facie case of fraud sufficient to support application of the crime-fraud exception to the attorney-client privilege. This exception provides that no communication otherwise privileged is privileged if the communication is in furtherance of a crime or fraud. The application of this exception seems fairly simple on these facts. Thus, what goes around comes around.

Ethical Duties of the Disclosing Attorney

Most attorneys who make inadvertent disclosures are, in contrast, not sinister. They are attorneys who make small mistakes like sending an e-mail to the wrong distribution list.

The rules of ethics have no specific rule applicable to the disclosing attorney in an inadvertent disclosure situation, but there are two rules that are relevant. First, Kentucky Rule of Professional Conduct 1.6 (Kentucky Supreme Court Rule 3.130(1.6)) states the basic confidentiality duty for attorneys. Rule 1.6(a) states: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)." Paragraph (b) then states a few limited circumstances in which an attorney may—but not must—disclose confidences.

In addition, Kentucky Rule of Professional Conduct 1.1 (found at Kentucky Supreme Court Rule 3.130(1.1)) states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." The lesson is that an attorney must take care to avoid inadvertent disclosures of all sorts.

Ethical Duties of the Receiving Attorney

The present Kentucky Rules do not address the ethical duties of the attorney receiving the disclosure. A new version of American Bar Association Model Rule 4.4(b) states: "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." The Comment clarifies:

> Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may

(continued on page 20)

Inadvertent Disclosure

(continued from page 4)

> have been wrongfully obtained by the sending person.

Until Kentucky adopts this provision, if it adopts this provision, Kentucky lawyers have Kentucky Bar Association Ethics Opinion 374 as guidance. E-374 answered two questions.

Question one was as follows: "If a lawyer received materials that were not intended for the receiving lawyer, should the lawyer be disciplined if the lawyer attempts to use the documents pursuant to a good faith claim that any privilege or protection that would otherwise have obtained has been waived?" The opinion responded: "No. While such conduct is discouraged (see answer to question 2), a lawyer should not be disciplined if the lawyer is making a good faith legal argument on behalf of the lawyer's client."

The opinion then followed up with another question: "If a lawyer received materials under circumstances in which it is clear that they were not intended for the receiving lawyer, should the lawyer refrain from examining the materials, notify the sender, and abide by the instructions of the sender regarding the disposition of the materials?" The opinion answered this question simply: "Yes." See also American Bar Association Formal Opinion 92-368.

Aside from the question of the ethical behavior of the attorneys involved is the question of whether the disclosed information retains privileged status even after disclosure. Kentucky Rule of Evidence 503 has no specific provision regarding inadvertent disclosure but does state the traditional requirement that the communication must have been intended to be confidential. Kentucky Rule of Evidence 503(a)(5) states: "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."

When an attorney makes an inadvertent disclosure, usually the question is whether the disclosure has waived the privilege that otherwise attached. There are three approaches. Under one approach, the attorney-client privilege must be knowingly waived. Thus, the determination of inadvertence is the end of the analysis since there is no knowing waiver. A second approach is to view any document produced, either intentionally or otherwise, as no longer privileged. The third and most common approach requires the court to analyze factors such as the following:

1. the reasonableness of the precautions taken to prevent inadvertent disclosure,
2. the number of inadvertent disclosures,
3. the extent of the disclosure,
4. the promptness of measures taken to rectify the disclosure, and
5. whether the overriding interest of justice would be served by relieving the party of its error.

See, e.g., *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993); *Harp v. King*, 835 A.2d 953 (Conn. 2003); *Save Sunset Beach Coalition v. City and County of Honolulu*, 78 P.3d 1 (Hawai'i 2003). This approach recognizes the fallibility of human beings while also providing a significant disincentive to lax practices. See also Restatement of the Law Governing Lawyers § 79, comment h.

Grace Giesel, Distinguished Teaching Professor and James R. Merritt Fellow, teaches at the Louis D. Brandeis School of Law. ■