

**American Bar Association  
Adopted by the House of Delegates  
August 7-8, 2006**

RESOLVED, That the American Bar Association recommends that consistent rules be established throughout the federal, state and territorial courts to address how the courts and counsel should resolve issues involving claims of inadvertent disclosure of materials protected by the attorney-client privilege or attorney work product doctrine (collectively “privilege”).

FURTHER RESOLVED, That the American Bar Association recommends that relevant Federal Rules of Evidence and/or Federal Rules of Civil Procedure, and state rules be adopted or amended to provide as follows:

1) A producing party should be required to raise the privileged status of inadvertently disclosed materials within a specified period of days of actually discovering the inadvertent disclosure by giving notice to the other parties and amending its discovery responses to identify the materials and the privileges. The period should commence when the party actually discovers the disclosure has been made, not from when the material was produced.

2) A party receiving notice that any inadvertently disclosed materials have been produced to it should be required to promptly return, sequester or destroy the specified materials and any copies and may not use or disclose the materials until the issue is resolved.

3) Specific grounds for testing the inadvertent disclosure should be set forth and should include the following general provisions:

A) The receiving party should be allowed to challenge the disclosing party’s claim that the material is privileged.

B) The receiving party should be allowed to challenge the timeliness of the producing party’s notice recalling the material on a claim of privilege.

C) The receiving party should be allowed to assert that the circumstances surrounding the production or disclosure warrant a finding that the disclosing party has waived any claim of privilege.

4) In deciding whether privilege has been waived, the court should apply the generally accepted multi-factor analysis followed by the majority of federal courts and many state courts that assesses (a) the reasonableness of the precautions taken to prevent inadvertent disclosure; (b) the scope of discovery; (c) the extent of the disclosure; and (d) whether the interests of justice would be served by relieving the party of its error.