

## **RECORDKEEPING PROCEDURES CAN HELP PROTECT PRIVILEGED DOCUMENTS**

**By R. Carson Fisk (as seen in *Texas Construction* March 2010)**

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All too often, contractors do not have quality recordkeeping procedures. This can cause numerous problems, especially if issues are encountered during construction. Contractors often elect to create files for a specific project, which may contain subfolders for items such as contracts, submittals and correspondence. Unless company policy clearly states which information is to be placed into the project file, it is unlikely that all relevant information will be included. For example, as a project progresses, a project manager may use a work computer. At the close of the project, files created on the work computer may never be transferred to the project file. Equally problematic is including items in the project file that should not be included or that should be specifically identified, particularly e-mail.

E-mail has its benefits, but the sheer volume of correspondence can be difficult to manage. When problems are encountered on a project, the amount of correspondence will likely increase. If the problems are significant, the contractor may involve its attorney, even if this means simply having the attorney provide advice solely to the contractor. At this point, quality recordkeeping procedures are critical.

While attorney-client communications are generally privileged, they can be waived. The inadvertent production of privileged documents can serve as a waiver of the privilege.

The rules of procedure that govern state and federal court actions contain provisions concerning the inadvertent production of privileged documents. Both provide that the inadvertent production of privileged documents may not necessarily operate as a waiver of the privilege. However, certain steps must be followed. Some of this is the responsibility of the attorney. But contractors can play a role in ensuring that the inadvertent production of documents does not waive any privilege.

Prior to the production of documents, attorneys generally conduct a privilege review of a contractor's documents before providing them to the opposing party. With the introduction of e-mail, this task has become potentially extremely time consuming and expensive. Contractors increasingly want to perform the task internally. While this may save money, there is a significant risk that privileged documents may inadvertently be produced. The privilege may be reinstated and the document retrieved if the procedures set forth by the applicable rules are followed, but this does not address the fact that the opposing party may have observed privileged attorney-client information concerning legal strategies or the strengths or weaknesses of a contractor's position.

The rule concerning the inadvertent production of privileged documents in state court actions is more flexible than its federal counterpart. Under state rule, if a party produces a privileged document in litigation without intending to waive the privilege, the privilege will not be waived if the party notifies the other party through discovery responses within 10 days. Once the other party has been notified, it must promptly return the document and any copies. This task would generally seem to fall on the attorney as it is the attorney who is responsible for managing discovery responses.

Under the federal rule, the production of privileged documents does not waive the privilege if the disclosure is inadvertent, the producing party took reasonable steps to prevent disclosure and the producing party promptly took reasonable steps to rectify the error. These are newer rules and “reasonable steps” is open to interpretation.

It is entirely possible that a federal judge might not view having a client perform its own privilege review as a reasonable step to prevent disclosure. This is problematic if a contractor, in an effort to save costs, chooses not to have its attorney perform the privilege review and privileged documents are produced. Similarly, if a contractor’s recordkeeping procedures involve nothing more than dumping all documents pertaining to a project, including attorney-client communications, into one file, that could be construed as the failure to take reasonable steps to prevent disclosure.

Such issues are best addressed at the front end. A quality policy for recordkeeping procedures will help address these matters, in addition to likely having a positive impact on other aspects of the contractor’s business. Additionally, if any litigation is conducted in federal court, the inadvertent production should be less likely to operate as a waiver of a privilege.