

LEGAL ETHICS OPINION 1702

INADVERTENT RECEIPT OF  
CONFIDENTIAL INFORMATION;  
ZEALOUS REPRESENTATION.

You have presented a hypothetical situation in which Attorney A represents B in a suit against Y, represented by Attorney X. Attorney X sends Y confidential information which makes reference to confidences Y has revealed to Attorney X and also outlines trial strategy and evaluation constituting work product of Attorney X. This information was sent via facsimile transmission to Y. Through an error in Attorney X's office, the information was also sent via facsimile transmission to Attorney A. Attorney A's office is able to recognize from the first paragraph of the transmission that the information has been sent in error and that it contains confidential information and work product of Attorney X.

Under the facts you have presented, you have asked the committee to opine as to whether Attorney A's duty of zealous representation of his client requires that he read and use the information sent to him in error by opposing counsel's office. Also, even if Attorney A is not required to use the information, may he do so? Does it matter whether the cover sheet of the facsimile transmission contains a clause warning that the information may be confidential and is to be read only by the addressee?

The factual situation presented is not an uncommon occurrence in an age of instant high-tech electronic communication of information through facsimile machines and e-mail. The lawyer who receives inadvertently transmitted confidential information seemingly has conflicting ethical duties.

[T]here is a theoretical conflict between ethical rules that require fairness to the opposing party and counsel and prohibit methods for obtaining evidence that violates another's legal rights, on the one hand, and the duty of competent and diligent (zealous?) representation of one's client, on the other.

*What about inadvertently disclosed documents or information?*, 60 Def. Counsel J. 613 (1993); see *Inadvertent Disclosure in the Age of Fax Machines: Is the Cat really out of the Bag?*, 46 Baylor L. Rev. 385 (1994). The ethical conflict is not answered dispositively in the Disciplinary Rules or the ABA Model Rules. *Id.* No Disciplinary Rule explicitly mandates a standard of conduct encompassing the ethical obligations of a lawyer who receives an inadvertent transmission of confidential/privileged documents from an opposing lawyer, or a deliberate transmission from an unauthorized third party.

DR 7-101 requires zealous representation of a client. However, DR 7-101(B)(2) tempers the character of zealous representation by permitting a lawyer to withdraw if the client insists on the lawyer participating in conduct or pursuing an objective which is "repugnant or imprudent." DR 7-102(A)(8) also tempers the character of zealous representation by prohibiting a lawyer from knowingly engaging in illegal conduct or

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conduct contrary to a Disciplinary Rule. DR 1-102(A)(3) and (4) prohibit a lawyer from committing a deliberately wrongful act or engaging in conduct involving dishonesty, fraud or deceit that reflects adversely on fitness to practice law.

The absence of an explicit Disciplinary Rule does not create an ethical vacuum. EC 9-2 admonishes the following:

[W]hen explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

Similar aspirational guidance is stated in EC 9-6:

Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

A deliberate interception or procurement of confidential information is not ethically permissible, of course. A lawyer may not, for example, secretly tape record his telephone conversation with the adverse party (LEO No. 1635), or counsel his client to do so (*Gunter v. Virginia State Bar*, 238 Va. 617 (1989)). Nor may a lawyer procure information and documents from an opposing lawyer's former employee or rifle a file that an opposing lawyer inadvertently left in the lawyer's office following depositions. LEO No. 651. Each of those examples is controlled by DR 1-102(A)(3) and (4) and DR 7-102(A)(7) and (8) notwithstanding the duty of zealous representation contained in DR 7-101(A).

In LEO No. 1583 a lawyer wrote to a judge about whether the judge's markings on the reverse side of an arrest warrant for a third DUI constituted a conviction absent the judge's signature and a recorded finding of guilt. The judge replied to the lawyer and inadvertently enclosed the original of the arrest warrant.

The lawyer inquired whether he was permitted to use the arrest warrant or give it to his client, or was obligated to return it to the court. The committee relied on DR 7-102(A)(3), (7), and (8) and DR 1-102(A)(3) and (4), and referred to Code of Virginia §§ 18.2-111 and 17-44 and -45, in concluding that the lawyer had an ethical duty to return the arrest warrant and not to use it.

Ethics panels in other jurisdictions have expressed divergent opinions regarding the use or return of inadvertently transmitted confidential documents. District of Columbia Legal Ethics Opinion 256 (1995) advised that a lawyer who receives inadvertently sent confidential documents from opposing counsel may use them if he read them before discovering they were inadvertently sent to him. However, if the receiving lawyer knew

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the documents were inadvertently sent before reading them, then he was obligated to return them and not use them.

Maine Ethics Opinion 146 (1984) advised that a lawyer who received confidential documents inadvertently included in a discovery response was permitted to use them as permitted by the rules of procedure and evidence. Kentucky Ethics Opinion E-374 (1995) advised that a lawyer who uses inadvertently sent privileged documents will not be disciplined for using them.

Most ethics panels agree on one point: a lawyer who receives inadvertently transmitted confidential documents from the opposing lawyer has a duty to notify the opposing lawyer promptly. Florida Ethics Opinion 93-3 (1994); Maine Ethics Opinion 146 (1994); Ohio Ethics Opinion 93-11 (1993).

The ABA Committee on Ethics and Professional Responsibility addressed the matter in Formal Opinion 92-368 (1992). It aptly observed the following:

A satisfactory answer to the question posed [i.e., the ethical duties of the lawyer receiving inadvertently sent confidential or privileged documents from the opposing lawyer] cannot be drawn from a narrow, literalistic reading of the black letter of the Model Rules. . .

Thus, the ABA Committee looked at the precepts underlying the Model Rules for guidance. The ABA Committee also examined the ethical mandate of confidentiality, cases rejecting a waiver of attorney-client privilege from mere inadvertence in delivery of documents, and finally, the law of bailments. The ABA Committee summarized its opinion, as follows:

*A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.*

A number of cases have addressed inadvertent waiver of attorney-client privilege and work product privilege based on evidentiary rules. *See generally Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437 (S.D.N.Y. 1995); ABA/BNA *Lawyers' Manual on Professional Conduct* 55:417 (1996). *Resolution Trust Corp. v. First of America Bank*, 868 F. Supp. 217, 220 (W.D. Mich. 1994), is one of few inadvertent disclosure cases that includes ethics in its analysis.

[C]ommon sense and a high sensitivity toward ethics and the importance of attorney-client confidentiality and privilege should have immediately caused the plaintiff's attorneys to notify defendant's counsel of his office's mistake. The lawyers who received the document must have known by the markings and the contents of the document that a clerk or secretary in

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the defendant's lawyer's office mistakenly included the privileged letter within the documents intended for the plaintiff's lawyers. . . . *While lawyers have an obligation to vigorously advocate the positions of their clients, this does not include the obligation to take advantage of a clerical mistake in opposing counsel's office where something so important as the attorney-client privilege is involved.*

(footnote omitted) (emphasis supplied).

The italicized language is a variation of the theme sounded by the ABA in 1908 in its adoption of canon 15:

[T]he office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. . . .

G. Warvelle, *Essays in Legal Ethics* at 222 (2nd ed. 1920).

The theme of professionalism in the practice of law, notwithstanding the absence of an applicable black letter Disciplinary Rule, is articulated in EC 9-2 and EC 9-6. Legal ethics, like ethics generally, is fraught with gray areas that do not fit under an explicitly applicable Disciplinary Rule. In that circumstance, the ethical polestar is conduct that reflects credit on and inspires public confidence in and respect for the integrity of the legal profession.

It is the committee's opinion that the conclusion reached in ABA Formal Opinion 92-368 correctly states the ethical duties of a lawyer who receives inadvertently transmitted confidential documents from opposing counsel or opposing counsel's client. Those ethical duties foster the bedrock ethical principle of safeguarding client confidences and secrets. *See* LEO No. 1643. Just as a lawyer may not take and use documents from opposing counsel's briefcase inadvertently left behind (LEO No. 651), it is not ethically permissible for a lawyer to keep and use documents inadvertently transmitted to him by opposing counsel. The situations are factually different, yet the sense of the Committee is that no difference exists in principle. Safeguarding client confidences and secrets is a categorical imperative that should not hinge on someone pushing the wrong number on a facsimile machine, or putting documents in the wrong envelope.

The committee is mindful of cases adopting a doctrinaire rule that even an inadvertent transmission of confidential documents causes a loss of attorney-client privilege and permits the receiving lawyer to use the documents. The rules of evidence do not, however, displace ethical standards governing lawyers. *See Gunter v. Virginia State Bar*, 238 Va. 617, 621 (1989), rejecting the argument "if it's legal, it's ethical," as far too restrictive under the Code of Professional Responsibility:

The lowest common denominator, binding lawyers and laymen alike, is the statute and common law. A higher standard is imposed on lawyers by the Code of Professional Responsibility, . . . . [W]e emphasize that more is

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required of lawyers than mere compliance with the minimum requirements of that standard. The traditions of professionalism at the bar embody a level of fairness, candor, and courtesy higher than the minimum requirements of the Code of Professional Responsibility.

In some cases it may not be apparent without reading the document received that it is confidential or was transmitted inadvertently. Boilerplate notices on fax cover pages do not necessarily put the receiving lawyer on notice of an inadvertent transmission to him. Hence, a rule prohibiting the receiving lawyer from reading an inadvertently transmitted document would violate reality. Even so, once the receiving lawyer discovers that he has a confidential document inadvertently transmitted by opposing counsel or opposing counsel's client, he has an ethical duty to notify opposing counsel, to honor opposing counsel's instructions about disposition of the document, and not to use the document in contravention of opposing counsel's instructions.

In the facts you present, the committee believes that Lawyer A's obligation to zealously represent B does not require Lawyer A to read the misdirected confidential communication, since the mistake was immediately recognized by a member of Lawyer A's staff. Further, having immediately recognized that the fax was both confidential and misdirected, the committee opines that Lawyer A may not read the misdirected communication and must immediately notify the opposing counsel, Attorney X, of the mistaken receipt of the facsimile transmission, and abide by whatever instructions Attorney X may give in regard to the disposition of the document. The committee is of the opinion that Attorney A may not use the information contained in the misdirected fax to the benefit of B.

Although not presented by your request for an advisory opinion, the committee believes that the opinion expressed relative to inadvertent transmission of privileged/confidential documents warrants reconsideration of an earlier opinion relative to deliberate but unauthorized transmission by an unknown third party. LEO # 1076 concluded that, where an unknown third party sends a lawyer selected items from the opposing lawyer's file, the Code of Professional Responsibility does not obligate the lawyer to return the items or prohibit their use for the client's benefit. The committee suggested, however, that out of professional courtesy the receiving lawyer should inform the opposing lawyer of the receipt of the items, which one writer has labeled "The Southern Gentlemen" rule. 60 Defense Counsel J. at 614.

The Maryland Bar Association opined that a lawyer who receives copies of an opposing party's documents from an unidentified source is not obligated to make disclosure to the court or the opposing lawyer. However, if the lawyer receives original documents, not just copies, he is duty-bound to return them. Maryland Bar Assoc. Op. 89-53 (1989). In Michigan a lawyer may keep and use unknown third party-provided documents from the opposing lawyer's file if neither the receiving lawyer nor his client in any way procured the documents. Michigan Bar Assoc. Op. CI-970 (1983).

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ABA Formal Opinion 94-382 (1994) addressed the ethical obligation of the lawyer who receives an opposing lawyer's confidential/privileged documents from an unidentified source. Unlike ABA Formal Opinion 92-368, where the opposing lawyer or opposing party did not intend to transmit the confidential/privileged documents to the receiving lawyer, the unknown third party sender intended for the receiving lawyer to have and make use of the transmitted confidential/privileged documents.

Even so, the ABA Committee declined to adopt a rule that made it ethically permissible for a lawyer to have unlimited use of the opposing lawyer's confidential/privileged documents that were received from an unknown third party. Adopting an unlimited use rule, the ABA Committee observed, would subject the protection of client confidences and secrets to the whim or mischief of unauthorized efforts of others.

The ABA Committee also declined to adopt an absolute rule prohibiting a receiving lawyer from reviewing or using such confidential/privileged documents under all circumstances. It was noted, for example, that the receiving lawyer may have a legitimate claim that the documents had been wrongfully withheld from discovery responses. Or the receiving lawyer may seek to establish that the documents were received from someone acting under the authority of a whistle blower statute. *See e.g.*, Whistleblower Protection Act, 5 U.S.C. § 1201, *et seq.* (1988).

ABA Formal Opinion 94-382 sought to strike a balance of the competing interests, as follows:

[T]he Standing Committee is of the opinion that a lawyer receiving such privileged or confidential materials satisfies her professional responsibilities by (a) refraining from reviewing materials which are probably privileged or confidential, any further than is necessary to determine how appropriately to proceed, (b) notifying the adverse party or the party's lawyer that the receiving lawyer possesses such documents, (c) following the instructions of the adverse party's lawyer, or (d) in the case of a dispute, refraining from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

(footnote omitted).

It is fair to say that deception and conversion, and possibly even larceny, play a role in an unidentified third party's unauthorized raiding of the file of the opposing lawyer or of his client in order to obtain and then send privileged/confidential documents to the other lawyer. DR 1-102(3) and (4) would not permit the other lawyer to commission someone to procure such documents. They are tainted. Yet as the ABA Committee observed, there may be circumstances where the character of the documents and the justification for their use transcend the tainted acquisition.

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The committee is of the opinion that ABA Formal Opinion 94-382 fairly balances the competing interests and correctly states the ethical responsibility of a lawyer who receives from an unidentified source confidential/privileged documents taken without authorization from the file of the opposing lawyer or of the opposing party. LEO #1076 is therefore overruled.

The duty of competent, zealous representation of a client notwithstanding, the Committee believes that the guidelines articulated in EC 9-2 and EC 9-6, and applied in *Gunter*, circumscribe a lawyer's representation of a client. A "use whatever you have, no matter how you got it" rule may reflect the rules of the marketplace, yet *Gunter* admonishes that "Higher standards should prevail in the practice of law." *Id.* at 621. The practice of law is a profession and is the only one not regulated by the Virginia Department of Professional and Occupational Regulation. (*See* Code of Va. §§ 54.1-100, *et seq.*) The profession's unique status entails a heightened adherence to ethical standards that engender respect for and confidence in the integrity of the profession.