LEGAL ETHICS OPINION 1871 INADVERTENT RECEIPT OF CONFIDENTIAL INFORMATION DURING THE DISCOVERY PHASE OF LITIGATION

In this hypothetical, a lawyer represents a client who is suing a law firm for legal malpractice. The underlying suit was dismissed because the defendant law firm failed to file suit within the statute of limitations. Plaintiff's lawyer served a Request for Production of documents, and defendant's lawyer subsequently invited plaintiff's lawyer to his office to inspect the defendant's files. While inspecting files, plaintiff's lawyer encountered a memorandum in which the defense lawyer summarized his interviews with various employees of the defendant. The interviews involved discussions suggesting why the defendant's law firm failed to file the underlying suit within the statute of limitations. Plaintiff's lawyer did not notify defendant's lawyer that he had found this document.

When plaintiff's lawyer was taking depositions in the malpractice case, defendant's lawyer discovered that plaintiff's lawyer possessed the memorandum. Defendant's lawyer demanded its return, asserting that the document was privileged and confidential.

QUESTION PRESENTED

What are a lawyer's ethical obligations upon inadvertently receiving privileged information during the pre-trial discovery phase of litigation?

APPLICABLE RULES AND OPINIONS

The applicable Rule of Professional Conduct is Rule 3.4(d)[1], along with Supreme Court of Virginia Rule 4:1(b)(6)(ii). The relevant Legal Ethics Opinion is 1702.

ANALYSIS

LEO 1702 concludes that when a lawyer inadvertently receives confidential information, he is ethically obliged to return that information to the lawyer from whom the information was received, or to otherwise follow the sending lawyer's instructions, even if those instructions are to destroy the document. A lawyer's duty to represent his client diligently, according to LEO 1702, does not allow the lawyer who inadvertently received the privileged information to use the information to his client's benefit.

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[1] Rule 3.4 Fairness to Opposing Party and Counsel
A lawyer shall not:
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(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

Since LEO 1702 was adopted in 1997, the Supreme Court of Virginia adopted Rule 4:1(b)(6)(ii)[2], which states that the recipient of inadvertently disclosed privileged information must either destroy or sequester the inadvertently disclosed material until the court resolves the privilege claim. Rule 3.4(d) requires a lawyer to obey standing rules of a tribunal. Thus, to the extent that the confidential information is received in the discovery phase of litigation, a lawyer: (1) may review the information if necessary to determine his obligations under the discovery rule; (2) must notify the party producing the documents that the lawyer is in possession of them; (3) is not ethically obligated to return the information to opposing counsel; and (4) may sequester the material pending a judicial determination of whether and to what extent the receiving lawyer may use the information.[3] Outside of the discovery process, the requirements of LEO 1702 fully apply.

In this hypothetical, plaintiff's lawyer should have promptly notified defendant's lawyer of his possession of the memo, in accord with LEO 1702, and then either sequestered or destroyed his copy of the memo pending a judicial determination of whether he could use the document.

This opinion is advisory only and not binding on any court or tribunal.

Committee Opinion
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[2] Rule 4:1(b)(6)(ii): If a party believes that a document or electronically stored information that has already been produced is privileged or its confidentiality is otherwise protected the producing party may notify any other party of such claim and the basis for the claimed privilege or protection. Upon receiving such notice, any party holding a copy of the designated material shall sequester or destroy its copies thereof, and shall not duplicate or disseminate such material pending disposition of the claim of privilege or protection by agreement, or upon motion by any party. If a receiving party has disclosed the information before being notified of the claim of privilege or other protection, that party must take reasonable steps to retrieve the designated material. The producing party must preserve the information until the claim of privilege or other protection is resolved. *See also* Fed. R. Civ. P. 26(b)(5)(B).

[3] In *Walton v. Mid-Atlantic Spine Specialists, P.C.*, 280 Va. 113 (2010), the Supreme Court of Virginia established a five-factor test for courts to apply in order to determine whether the attorney-client privilege was waived by an inadvertent disclosure of privileged information.