

Ethics Opinion 256

Inadvertent Disclosure of Privileged Material to Opposing Counsel

Where a lawyer has inadvertently included documents containing client secrets or confidences in material delivered to an adversary lawyer, and the receiving lawyer in good faith reviews the documents before the inadvertence of the disclosure is brought to that lawyer's attention, the receiving lawyer engages in no ethical violation by retaining and using those documents. Where, on the other hand, the receiving lawyer knows of the inadvertence of the disclosure before the documents are examined, Rule 1.15(a) requires the receiving lawyer to return the documents to the sending lawyer; the receiving lawyer also violates Rule 8.4(c) if the lawyer reads and/or uses the material.

Depending on the facts, the lawyer making the inadvertent disclosure may, by so doing, violate Rule 1.1, requiring a lawyer to use diligence and care in a representation.

Applicable Rules

- Rule 1.1 (Competence)
- Rule 1.6 (Confidentiality of Information)
- Rule 1.15 (Safekeeping Property)
- Rule 8.4(c) (Misconduct: Dishonesty, Fraud, Deceit, or Misrepresentation)

Inquiry

The inquirers are opposing lawyers in a securities arbitration. During the course of discovery in the arbitration proceeding, the lawyer for the respondent was given unrestricted access by claimant's lawyer to a substantial volume of documents. After their review, respondent's lawyer identified documents for copying; the copying was accomplished by claimant's lawyer and the copies were delivered to respondent's lawyer.

After copying and delivery of the documents, claimant's lawyer informed respondent's lawyer that one or more documents, consisting of handwritten notes, contained privileged attorney-client communications. The documents themselves, on their face, did not contain any indication of their privileged status.

Lawyers for both the claimant and the respondent have inquired whether the disclosure of the privileged material, under the circumstances described above, constitutes a waiver of the attorney-client privilege and whether respondent's lawyer may, without violating ethical rules, use the assertedly privileged material which he now has in his possession.

Discussion

The inquiry raises for the first time in this jurisdiction the ethical issues raised by the no longer infrequent occurrence of inadvertent disclosure of confidential documents to opposing counsel.

¹ The situation can occur, as here, in the context of a document discovery, through a secretarial error in mailing or, as an unfortunate (but not uncommon) consequence of an increasingly electronic world, as when a facsimile or electronic mail transmission is mistakenly made to an unintended recipient.

While the question of waiver of an evidentiary privilege is beyond our authority,² the inquiry does present two important questions of legal ethics:

(1) What are the ethical obligations of a lawyer who receives confidential material inadvertently disclosed by opposing counsel; and

(2) Whether an inadvertent disclosure of information which a lawyer is ethically obliged to protect itself constitutes an ethical violation.

Ethical Obligations of a Lawyer Who Receives Inadvertently Disclosed Confidential Material

There are several different scenarios under which a lawyer might inadvertently be sent another party's confidential information. In the inquiry presented to us, the information was included with other documents intended to be provided the lawyer. The confidential information was not marked as such, and contained no indication that it was not freely provided to the receiving lawyer; and the receiving lawyer did not learn of the assertedly confidential nature of the documents until *after* he had read them.

In other situations, confidential information might be received by a lawyer who knows that it was not intended for him. This could occur, for example, when the sending lawyer specifically communicates to the receiving lawyer, before that lawyer reads a document that bore no indication of confidentiality, that the document was misdirected and should be returned unexamined.

Between these two poles—of complete lack of awareness of the inadvertence of the disclosure and actual knowledge of it—lies a continuum of fact situations in which there may be differing levels of indication of the possibility of an inadvertent disclosure.

1. Inadvertently Disclosed Documents—Where There Is No Indication of Confidentiality

No Rule of Professional Conduct directly addresses the conduct in issue in this inquiry. However, if we dissect the individual components of the activity we are examining, substantial guidance emerges. First, where the confidential document is received by opposing counsel with *no* indication that the disclosure was inadvertent, and is read by opposing counsel before being otherwise informed of these circumstances (as through a communication from the sending lawyer), we see no ethical violation if the receiving lawyer retains the documents and uses the disclosed information. Such a situation would arise under the facts of this inquiry, where privileged documents (containing no indication of such status) were included in a large document production and were reviewed in the ordinary course by receiving counsel before being notified of the inadvertent disclosure.

We begin our analysis with the belief that a lawyer (no different than any other person) should be able to presume that materials delivered to him or her in the ordinary course were intended to be so delivered. Such a presumption accords with both common sense and experience; moreover, the absence of such a presumption would place the unreasonable burden on a lawyer of examining the circumstances of the delivery of all mail, faxes and other material before reading them.

And so, in the situation described above, the documents were freely provided by the sending lawyer, the receiving lawyer could reasonably presume the documents were intended for that lawyer, the documents themselves did not inform the receiving lawyer that their disclosure was inadvertent, and the documents were examined by opposing counsel in good faith before being informed of the claim of privilege. Under these circumstances, we see nothing improper or unethical about counsel's use of the disclosed document. Rule 1.6 (Confidentiality of Information) is obviously inapplicable to the conduct of the receiving lawyer, as it only governs a lawyer's disclosure and use of confidences and secrets of the lawyer's client. We see no other Rule applicable to this situation which would prohibit use of the document.

Indeed, we do not see how the receiving lawyer could be prohibited from using the information acquired during the document review. First, and most importantly, under case law likely applicable in this jurisdiction, the facts we have assumed—an inadvertent disclosure of confidential documents—constitute a *waiver* of the attorney-client privilege. Such a waiver occurs when the privileged communication is disclosed to a third-party, and the law in this jurisdiction appears to be that even an inadvertent disclosure to a third-party operates as a waiver. *See, e.g., Wichita Land & Cattle Co. v. Amer. Fed. Bank*, 148 F.R.D. 456 (D.D.C. 1992); *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989).³ In *Wichita Land & Cattle*, the facts were similar to those presented in the inquiry described above: allegedly privileged materials were inadvertently included in a document production and were reviewed by opposing counsel before their privileged status was ascertained and asserted. The court found a waiver, holding that any uncompelled disclosure of otherwise privileged information is inconsistent with the evidentiary privilege, and therefore results in its loss.

In *In re Sealed Case*, the document in issue was a memorandum of a corporate vice-president to the company's chief accountant containing the advice of the company's lawyer. During a routine audit of the company's defense contracting business, the memorandum was given to a government auditor. When, many months later, the company resisted a subpoena for this document on the ground of

attorney-client privilege, the government argued that the prior disclosure constituted a waiver of the privilege. The court agreed, holding that the possessor of privileged information must guard it carefully—“like jewels”—and that any un compelled disclosure will waive the privilege. *Id.* at 980.

Thus, where (as in this jurisdiction) the underlying law holds that inadvertently disclosed information is no longer protected, there would appear to be no justification for requiring the receiving lawyer to accord it special treatment.⁴

Second, once read, the inadvertently disclosed information becomes part of the body of knowledge residing in the mind of the receiving lawyer, who may wish to use it to further the interests of that lawyer’s client. For example, under the facts of this inquiry, if the assertedly privileged information revealed that the securities arbitration claimants (whose lawyers produced the documents) possessed actual knowledge of the truth of matters alleged to have been misrepresented to them, and if this were relevant to the defense of their claims, respondent’s counsel (the receiving lawyers) would not likely be able to accord confidential status to the information and still properly represent their client.⁵ Should those lawyers take action, such as directing discovery to the claimant, seeking to develop evidence of that party’s prior knowledge of allegedly fraudulent representations, the lawyers would be courting an ethical violation unless they could establish that their litigation strategy derived from some source other than the inadvertently disclosed information.

An interpretation of the ethical rules that required the receiving lawyer to protect the confidentiality of these materials would, we believe, place too much of a burden on the exercise of a lawyer’s obligation to represent his client zealously and diligently (Rule 1.3). As the ethics committee of another jurisdiction observed in concluding that a lawyer may use inadvertently disclosed confidential information:

Once confidential material has been examined even if briefly, the information cannot be purged from the mind of the attorney who inadvertently received it.⁶

Indeed, if the receiving lawyer were under some ethical inhibition from using that information, the lawyer could have a prohibited conflict of interest under Rule 1.7(b)(4), which could require withdrawal under Rule 1.16(a). Rule 1.7(b)(4) prohibits a lawyer from representing a client in a matter if “the lawyer’s professional judgment on behalf of the client will be or reasonably may be adversely affected by . . . the lawyer’s own financial, business, property or personal interests.” If the receiving lawyer were under some ethical inhibition from using the inadvertently disclosed information to the fullest in a particular case, his professional judgment “reasonably may be adversely affected” in that case. In the example just noted, if the receiving lawyer in the securities arbitration learned from the disclosed document of a possible defense of “actual knowledge” to a misrepresentation claim, and was ethically inhibited from using that information in defense of his client, it is probable that his professional judgment “reasonably may be adversely affected” by a concern that his pursuit of this avenue of defense could result in a breach of professional ethics.⁷

Precedent from other jurisdictions is in accord with our conclusion that no ethical violation arises from a lawyer's use of inadvertently disclosed material, where the receiving lawyer had no knowledge that the materials were inadvertently disclosed before they were read. *Aerojet-General Corp. v. Transport Indemnity Ins.*, 22 Cal. Rptr. 862 (Ct. App. 1993), involved a situation where a lawyer for one party to litigation received a memorandum prepared by opposing counsel describing a witness interview. The document had been sent by the preparing lawyer to his client's insurer, which had mistakenly sent it to another insured, who happened to be the receiving lawyer's client. The memorandum bore no indication that it was privileged.

The court allowed the document to be used by the receiving lawyer, finding no ethical violation in his reading or use of it. According to the court:

Once [the receiving lawyer] had acquired the information in a manner that was not due to his own fault or wrongdoing, he cannot purge it from his mind. Indeed, his professional obligation demands the he utilize the knowledge about the case on his client's behalf. *Id.* at 867-68.

A similar conclusion was reached in *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223 (Tex. 1992), where privileged materials were included in a document production. Eleven months after the disclosure, and after the documents had been reviewed by the receiving lawyer, the disclosing lawyer sought their return and an order prohibiting their use. The court declined to do so, holding that the privilege had been waived and that the receiving lawyer engaged in no misconduct in reading and using the documents. *See also* Ohio Supreme Court Bd. of Comm'rs on Grievances and Discipline Op. 93-11 (Dec. 3, 1993) (decided under the Code of Professional Responsibility).

2. Inadvertently Disclosed Documents—Where the Receiving Lawyer Knows of the Inadvertence

On the other hand, where the receiving lawyer has not examined the misdirected material before gaining knowledge of the inadvertence of the disclosure, it is our opinion that the lawyer should, at a minimum, seek guidance from the sending lawyer and, if that lawyer confirms the inadvertence of the disclosure and requests return of the material, unread, the receiving lawyer should do so.

In our view, a failure to do so would be a dishonest act, in violation of Rule 8.4(c).⁸ A document received by a lawyer under these circumstances comes to the lawyer with "notice" that it does not belong to him. In that sense, it is little different than a wallet found on the street: the finder knows that it does not belong to him, and should he appropriate to himself the wallet's contents, the finder engages in the tort of conversion.⁹

Moreover, under such circumstances, there really has been no "disclosure" such as to invoke the holdings of *Wichita Land & Cattle* and *In re Sealed Case*. In reaching its decision in *Wichita Land & Cattle*, the District Court referred approvingly to *Chubb Integrated Systems, Ltd. v. Nat. Bank of Washington*, 103 F.R.D. 52 (D.D.C. 1984), which held that a disclosure of a document does not occur until some outsider to the asserted confidentiality learns the "gist" of its contents. *Id.* at 63. The District Court for this District recently applied *Chubb* in a case in which several boxes of privileged

documents were inadvertently disclosed as part of a large document discovery. Disclosing counsel discovered the inadvertence one week after the document production, and moved for their return. The court, in order to determine whether receiving counsel could use the documents, ordered a hearing to determine whether receiving counsel had learned their gist. *In re United Mine Workers of Amer. Employee Benefit Litigation*, 156 F.R.D. 507, 512 (D.D.C. 1984). Presumably, if receiving counsel could establish that he had learned of the gist of the documents before being informed of the inadvertence of the disclosure, the court would allow their use; otherwise, it would not.

Applying this interpretation to the matter before us, there would be no “disclosure” to a receiving lawyer who has possession of a document and has not read it when the lawyer learns that the document was only inadvertently provided. Reading the materials under these circumstances should be treated as the equivalent of a lawyer opening the closed file folder of his adversary in a conference room, while the adversary was out of the room. Such conduct has been found in other jurisdictions to be dishonest. *Cf. Lipin v. Bender*, 644 N.E.2d 1300 (N.Y. 1994).¹⁰

We also ground our opinion on Rule 1.15 (Safekeeping Property). Documents (separate from the information contained in them) which are inadvertently delivered to a lawyer and which the lawyer knows are not his are the property of another and therefore subject to that Rule. Under Rule 1.15(a), the lawyer must safeguard that property, and under Rule 1.15(b), the lawyer must notify the sending lawyer of his possession of the documents and return them (if so requested). We reached precisely this conclusion in our Opinion No. 242, concerning a lawyer’s receipt from his client of documents belonging to a third party.

This different ethical result, when the receiving lawyer *does* know that documents were inadvertently disclosed, also finds support elsewhere. In *Resolution Trust Corp. v. First American Bank*, No. 4:94-CV-83 (W.D. Mich. 1994), a lawyer received a privileged document, known to be inadvertently disclosed. The court held that receiving counsel’s reading of such a document was improper.

ABA Formal Opinion 92-368 (Nov. 10, 1992) also addresses this issue. The specific situation it discusses is one where the inadvertently disclosed confidential material was received “under circumstances where it is clear that the materials were not intended for the receiving lawyer.” *Id.* at 1. The Opinion concludes that the receiving lawyer should not examine the materials once the inadvertence is discovered, should notify the sending lawyer of their receipt, and should abide by the sending lawyer’s instructions as to their disposition. That conclusion is in accord with ours.¹¹

We disagree, however, with the discussion in the ABA Opinion (at pp. 4-5) that its conclusion would also apply even where the receiving lawyer did not become aware of the inadvertence until *after* the lawyer read the documents. The Opinion overlooks the other important considerations that apply in such a circumstance (i.e., the fact that the information cannot be purged from the mind of the receiving lawyer, the lawyer’s obligation to his client of zealous representation, and the potential conflict of interest under Rule 1.7(b)), and may have been mistaken in its view that most courts do not

treat inadvertent disclosure as a waiver of the privilege. The courts in this jurisdiction, and several others, have reached a contrary conclusion.

The line we have drawn between an ethical and an unethical use of inadvertently disclosed information is based on the receiving lawyer's knowledge of the inadvertence of the disclosure. Thus, for example, where the document has no facial or contextual indication of privilege and the receiving lawyer has not learned of its inadvertent disclosure, the receiving lawyer who reads such a document commits no breach of ethics.

At the other extreme is the document for which the inadvertence of the disclosure is actually known to the lawyer before he reads it. Such a situation would exist, for example, when a confidential letter to a lawyer's client is inadvertently mailed to opposing counsel, and opposing counsel is specifically informed of the mailing error before the letter is delivered to his office. Opposing counsel's reading of the letter would be unethical.

Many situations will fall somewhere between these two clear examples, *i.e.*, there may be some indication on the document or in its context that the disclosure was inadvertent, but there may also be good reason for the receiving lawyer to conclude otherwise.¹² Whether a particular set of facts and circumstances constitutes dishonesty will depend on whether it shows the requisite knowledge on the part of the receiving lawyer (see paragraph [6] in the Terminology section of the Rules for the definition of "knows").¹³

Did the Inadvertent Disclosure Itself Constitute an Ethical Violation?

The facts of this opinion also raise the question of the ethical obligations of a lawyer to protect confidential documents from inadvertent disclosure. District of Columbia Rule of Professional Conduct 1.6(a) establishes the obligation of a lawyer to protect confidential and secret client information. It provides as follows:

Except when permitted under paragraph (c) or (d), a lawyer shall not *knowingly*:

- (1) Reveal a confidence or secret of the lawyer's client;
- (2) Use a confidence or secret of the lawyer's client to the disadvantage of the client;
- (3) Use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person. (*Emphasis added.*)

Rule 1.6(a) only prohibits disclosures of client confidences and secrets made "knowingly," a term is defined in the "Terminology" section of the Rules as denoting "actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances."

In a situation where the disclosure was truly inadvertent, that is, where it did not proceed from any actual knowledge that privileged material was contained in the production of discovery documents, from any actual knowledge that it was included in a mailing to opposing counsel, etc., we do not believe that Rule 1.6(a) is violated. Thus, a negligent disclosure of confidential or secret information would not violate this Rule.

There remains, however, the question whether the inadvertent disclosure of confidential or secret information violates some other ethical provision. Where the disclosure occurred through the conduct of a subordinate lawyer or employee in the sending lawyer's firm, a violation of Rule 1.6(e) may result. That Rule requires that:

A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client. . . .

Where, for example, a lawyer entrusts an associate lawyer or a non-lawyer employee with a document production, and fails to use reasonable care in instructing such person about the identification or handling of confidential or secret material, such supervising lawyer may violate Rule 1.6(e) if such material is improperly disclosed. *See also* Rules 5.1(b) and 5.3(b).

Where, however, the disclosure is solely the product of the lawyer's own inadvertence, Rule 1.6(e) would appear to be inapplicable. But the lawyer's inadvertence could violate Rule 1.1 (Competence), which provides as follows:

(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

(b) A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.

Because we are not in a position to determine the precise facts that led to the inadvertent disclosure in the matter presented to us, we cannot say whether it constitutes a violation of Rule 1.1. If, for example, the disclosure occurred because counsel failed to review the documents to be made available to opposing counsel with the thoroughness and preparation required under Rule 1.1(a) or the skill and care required under Rule 1.1(b), the inadvertence could be an ethical violation. On the other hand, the fact of an inadvertent disclosure would not itself be evidence of a violation of Rule 1.1, as such disclosure could well occur even in the presence of appropriate levels of attention and skill.

Inquiry No. 94-8-35

Adopted: May 16, 1995

-
1. We assume for the purpose of this inquiry that the disclosure of the privileged documents was truly inadvertent; that is, it was not specifically intended by plaintiff's counsel.
 2. Legal Ethics Committee opinions are limited to issues arising under the D.C. Rules of Professional Conduct. The question of whether any particular facts and circumstance constitute a waiver of the attorney-client privilege is one under the law of evidence. We therefore decline to respond to that part of the inquiry which seeks our opinion on whether, under the facts presented to us, there has been a waiver of the attorney-client privilege. See Ethics Committee Rule C-5, and Ethics Opinion No. 83. See also Comment [5] to Rule 1.6 (Confidentiality of Information): "This Rule is not intended to govern or affect judicial application of the attorney-client privilege or work product doctrine. . . ."
 3. These federal court decisions are federal question cases where, under Fed. R. Evid. 501, the existence of evidentiary privileges is governed by federal law. We are aware of no reported decisions on this subject under District of Columbia law. Many (but not all) other jurisdictions have reached the same conclusion about the consequence of an inadvertent disclosure of privileged information. See, e.g., *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223 (Tex. 1992); *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984); and *Aerojet-General Corp. v. Transport Indemnity Ins.*, 22 Cal. Rptr. 862 (Ct. App. 1993).
Cases in which the courts have examined other factors in deciding whether to find a waiver from an inadvertent disclosure include *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951 (N.D. Ill. 1982); and *Berg Electronics, Inc. v. Molex, Inc.*, No. 94-470 (D. Del., Feb. 8, 1995).
 4. In some jurisdictions, an inadvertent disclosure does not ipso facto waive the attorney-client privilege. See *supra* note 3. Were we in such a jurisdiction, our conclusion might be different.
 5. Actual knowledge of the truth of a misrepresented matter is usually a defense to a claim of fraud. See, e.g., *Mayer v. Oil Field Systems Corp.*, 803 F.2d 749 (2d Cir. 1986).
 6. Ohio Supreme Court Bd. of Comm'rs on Grievances and Discipline, Op. 93-11 (Dec. 3, 1993).
 7. By this conclusion, we do not imply that a lawyer must retain and/or use inadvertently disclosed materials that are not subject of ethical restraints. As a matter of courtesy or reciprocity, a lawyer may decline to retain or use documents that the lawyer might otherwise be entitled to use, although (depending on the significance of the documents) this might be a matter on which consultation with the client may be necessary. See Rules 1.2(a) and 1.4(b).
 8. In *In re Shorter*, 570 A.2d 760 (D.C. App. 1990), a disciplinary case, the Court of Appeals defined "dishonesty" as including "conduct evincing a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness. . . . Thus, what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty." *Id.* at 768.
 9. At common law, a finder of lost property, if he takes custody of it, is responsible to the owner of the property for its safekeeping and return. Cf. *Costello v. Ten Eyck*, 49 N.W. 152 (Mich. 1891); *Fisher v. Klingenberg*, 576 N.Y.S.2d 476 (Rochester City Ct. 1991). See also 1 Am. Jur. 2d *Abandoned, Lost and Unclaimed Property*, § 21 (1994); 36A C.J.S. *Finding Lost Goods* §§ 7, 8 (1961).
 10. Where the lawyer knows that a document was inadvertently disclosed, Rule 1.6 (Confidentiality of Information) presents no barrier to disclosure to the sending lawyer by the receiving lawyer of the fact of receipt of the inadvertently disclosed document. Rule 1.6(b) protects "confidences" (defined as information protected by the attorney-client privilege) and "secrets" (defined as "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client").
Under these circumstances, the fact of receipt of the inadvertently disclosed document is plainly not a "confidence" under Rule 1.6, as it was not part of an attorney-client communication. Nor is it a "secret": the client has made no request for inviolability, the disclosure would not be embarrassing to the client, and the disclosure could not be detrimental to the client, since the receiving lawyer has no right to use the information anyway.
Nor need the client be consulted about the course of action when the receiving lawyer is required to return the inadvertently disclosed documents, since such a requirement derives from an affirmative ethical obligation of the lawyer. Client consent is not necessary for the lawyer to fulfill this ethical obligation, and the client may not insist that the lawyer not return, unread, the subject documents any more than a client may not insist that her lawyer overlook a conflict of interest that, under the Rules of Professional Conduct, require withdrawal from representation. Of course, there is no reason why the lawyer may not inform the lawyer's client of the fact of receipt of the documents and the lawyer's actions in response thereto.
 11. We disagree with the ABA Opinion only as to the legal basis for the conclusion that the described conduct is unethical. The ABA Opinion found no Rule or Professional Conduct governing the activity in question, and so based its conclusion on general

"precepts underlying the Model Rules." Id. at 2. We believe that Rules 8.4(c) and 1.15 govern.

12. For example, a document when created may have been marked "Confidential" or "Privileged," without regard to whether the document was actually entitled to some legal evidentiary privilege. A copy of document so marked in a document production would not, in many circumstances, establish the receiving lawyer's knowledge of an inadvertent disclosure of privileged material. Such marking, as noted, is often indiscriminately used and, therefore, of no legal significance; also, the receiving lawyer may be entitled to assume that any privilege that did exist with respect to the document was being voluntarily waived, to further the interests of the sending lawyer, by inclusion in the document production.

13. There will be, we expect, some situations in which the receiving lawyer believes that his/her right to examine a document is ambiguous, because there are conflicting indications as to inadvertence. In such a situation, the prudent receiving lawyer would either contact the sending lawyer for instructions before examining the document, or have another person not working on the matter to which the document relates examine it to assist in clarifying its status.