

Ethics Opinion 318

Disclosure of Privileged Material by Third Party

When counsel in an adversary proceeding receives a privileged document from a client or other person that may have been stolen or taken without authorization from an opposing party, Rule 1.15(b) requires the receiving counsel to refrain from reviewing and using the document if: 1) its privileged status is readily apparent on its face; 2) receiving counsel knows that the document came from someone who was not authorized to disclose it; and 3) receiving counsel does not have a reasonable basis to conclude that the opposing party waived the attorney-client privilege with respect to such document. Receiving counsel may violate the provisions of Rule 8.4(c) by reviewing and using the document in an adversary proceeding under such circumstances and should either return the document to opposing counsel or make inquiry of opposing counsel about its status prior to determining what course of action to take.

Receiving counsel would not violate Rules 1.15(b) and 8.4(c) by reviewing and using the document whose source is unknown if: 1) its privileged status is not readily apparent on its face, or if privileged, receiving counsel has a reasonable basis to conclude that the privilege has been waived; and 2) receiving counsel did not know that the document came from someone who was not authorized to disclose it. Rule 1.3(a)'s emphasis on zealous representation may provide support for receiving counsel to review and use the document in such a situation. The Committee takes no position with reference to the question whether review and use of documents that are confidential but non-privileged would violate Rules 1.15(b) and 8.4(c) because it is outside the scope of the inquiry.

Counsel who created the opportunity for the disclosure or was otherwise responsible for maintaining the confidentiality of the document may violate Rules 1.1(a) and (b) and 1.6(a) and (e) by failing to exercise reasonable care to prevent the unauthorized disclosure of the client's confidences and secrets.

Applicable Rules

- Rule 1.1(a) and (b) (Competence)
- Rule 1.3(a) (Diligence and Zeal)
- Rule 1.6(a) and (e) (Confidentiality of Information)
- Rule 1.15(b) (Safekeeping Property)
- Rule 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation)

Inquiry

The inquirer, inside corporate counsel for an entity involved in a contested administrative proceeding, states that a temporary employee of the entity obtained a copy of an attorney-client privileged document containing client confidences and secrets either by theft or without authorization and disclosed it to the opposing party in the proceeding. The actual manner in which the temporary employee gained access to the document is not known. The document was not marked “attorney-client privileged,” “attorney work product” or “confidential,” but the information contained at the top of the first page of the six page document makes it clear that the document was from the entity’s inside counsel, was sent to members of its management team, and addressed a number of legal questions and concerns. Some of the legal analysis in the document was pertinent to the dispute that was the subject of the administrative proceeding.

After receiving the document, the opposing party gave it to its litigation counsel, who reviewed the document and then used it as part of a filing with the administrative tribunal without first contacting opposing counsel. It is not known whether the receiving counsel knew the source of the document or the manner in which his client received it. When the inquirer learned of the pleading, he challenged the admissibility of the document on grounds that it was privileged and that the privilege was not waived. Receiving counsel filed an opposition, asserting that the document was admissible because it was relevant to an issue in the proceedings, had not been marked “confidential,” and had been “leaked” by a temporary employee to his client. The dispute over the admissibility of the document was never resolved in the administrative proceeding because the matter was settled, but the inquirer has asked for our opinion regarding the ethical implications of its submission to the tribunal.

Discussion

In 1995, this Committee adopted Opinion No. 256, which determined that a receiving lawyer did not violate the D.C. Rules of Professional Conduct by reviewing privileged documents inadvertently delivered by opposing counsel during discovery so long as receiving counsel was unaware of the inadvertent disclosure prior to the time the documents were examined. The Committee has now been asked to review a related issue: Does receiving counsel violate the D.C. Rules of Professional Conduct by reviewing and using what may be a privileged document in an adversary proceeding that receiving counsel’s client or other person obtained from a third party who may have stolen the document or taken it without authorization?

This is a matter of some importance because, as Judge Royce Lamberth noted in *Wichita Land & Cattle v. American Federal Bank*, 148 F.R.D. 456, 458-59 (D.D.C. 1992), efforts are more commonly being used to “surreptitiously gain access to confidential communications.” Despite some obvious differences from, situations involving inadvertent disclosures, the Committee finds that the conclusions reached in Opinion No. 256, with some modifications, apply to this inquiry as well.

The ethics rules are silent on the review and use of privileged materials which may have been stolen or otherwise acquired without permission from their rightful owners by third parties. In the absence of precise direction from the rules, the Committee must begin its analysis by looking for guiding principles that will help shape the ways in which the ethics rules are interpreted. The guiding

principles most pertinent to our problem relate to the primacy given in the ethics rules to confidentiality, zeal, and fair dealing with opposing counsel.

To begin with, the need to protect the confidentiality of the attorney-client relationship permeates the ethics rules. As noted in Comment [4] to Rule 1.6: “A fundamental principle in the client-lawyer relationship is that the lawyer holds inviolate the client’s secrets and confidences.” Comment [4] further reflects that knowing that this confidential relationship exists encourages a client “to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.” Maintaining confidentiality is so essential that a lawyer is required to exercise reasonable care to prevent others with whom the lawyer works from disclosing or using a client’s confidences or secrets. Rule 1.6(e). A lawyer is arguably also obliged to protect client confidentiality under his or her broader mandate to “serve a client with skill and care.” *See* Rule 1.1(b). There clearly is a tension between these ethical and evidentiary principles and the notion that in their efforts to seek the truth, tribunals should, for the most part, have unfettered access to relevant evidence. *See Wichita Land & Cattle*, 148 F.R.D. at 462.

While fidelity to the principle of protecting client confidentiality is a basic tenet of the rules, so is the notion that in the exercise of professional judgment, a lawyer should act in a manner consistent with the best interests of the client. Rule 1.3(a), Comment [5]. The rules require that a lawyer represent a client zealously within the bounds of the law. Rule 1.3(a). This may have implications for a lawyer who gains access to a document that can beneficially be used on a client’s behalf in an adversary proceeding without first being aware that it is privileged. But such an attorney is also constrained by ethical principles of fair dealing. Rule 1.15(b), for example, requires a lawyer who receives property in which third persons have an interest to notify these persons and promptly deliver the property to them. This is consistent with commentary to Rule 1.3 that the duty of a lawyer to represent a client with zeal “does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.” Rule 1.3, Comment (6). A lawyer who reviews and uses material that he knows is privileged may be engaging in a dishonest act in violation of Rule 8.4(c). *See* D.C. Ethics Opinion 256 n.8.

In its assessment of the inadvertent disclosure of privileged material to opposing counsel, the Committee previously concluded that receiving lawyers engage in no ethical violation by retaining and using those materials if they review them in good faith before the inadvertence of the disclosure is brought to their attention. D.C. Ethics Op. 256. Under that Opinion, however, receiving lawyers must return privileged documents without reviewing them if they learn about their privileged nature before reviewing the documents. Opinion 256 further reflects that lawyers who make the inadvertent disclosures may violate Rule 1.1 if they do so by failing to exercise diligence and care during a representation. The conclusions reached in Opinion 256 were largely consistent with earlier ABA Formal Opinions, Formal Opinions 92-368¹ and 94-382 and with case precedents in this circuit. *See In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989), and *Wichita Land & Cattle v. American Federal-Bank*, 148 F.R.D. 456 (D.D.C. 1992) (inadvertent disclosure of privileged documents waives the attorney-client privilege).

The question of what ethical obligations exist when privileged material *may have been* stolen or taken without authority is not addressed in either Opinion 256 or in ABA Formal Opinion 92-368. ABA Formal Opinion 94-382, however, did address the issue of the unsolicited receipt of privileged or confidential materials. It concluded that a lawyer who receives such materials of an adverse party should refrain from using them if she *knows* that they are privileged. The District of Columbia Circuit specifically reserved decision on the issue of the unsolicited receipt of privileged documents in *In re Sealed Case* when it stated that “[w]e do not face here any claim that the information was acquired by a third party despite all possible precautions, in which case there might be no waiver at all.” 877 F.2d at 980, n.5.

This issue was addressed, however, in *In re Grand Jury Proceedings Involving Berkeley & Co.*, 466 F. Supp. 863 (D. Minn. 1979). In *Berkeley*, a former employee allegedly stole corporate documents and turned them over to the government. The company argued that the documents should be returned because they were privileged. The court noted initially that it had long been assumed that the privilege was deemed waived for all involuntary disclosures of privileged documents, even those that were stolen. This had been the position taken in Dean Wigmore’s highly respected treatise on evidence. See 8 *Wigmore on Evidence* §§ 2325-26 (McNaughton rev. 1961).

But *Berkeley* concluded that the privileged status of document should not be lost in such circumstance if “the attorney and client take reasonable precautions to ensure confidentiality.” The approach taken in *Berkeley* has been largely adopted by the American Law Institute in the Restatement of the Law Governing Lawyers. Under § 129 of the Restatement, the attorney-client privilege is waived only if “the client, the client’s lawyer, or another authorized agent of the client *voluntarily* discloses the communication in a non-privileged communication.” Restatement of the Law Governing Lawyers § 129 (2000). See comment *g*. And, in one of the illustrations interpreting § 129, the Reporter states that the privilege is not waived if a burglar steals privileged files.

The Restatement comment also adopts the same basic approach taken in our Opinion 256 and ABA Formal Opinion 92-368 with reference to inadvertent disclosures of privileged materials. The Restatement concludes that waiver does not result from inadvertent disclosures as long as the client or any other disclosing person “took precautions reasonable in the circumstances to guard against such disclosure.” Restatement of the Law Governing Lawyers § 129, comment *h*.

These sources provide us with a basis for responding to this Inquiry. First, a lawyer cannot, consistent with the Rules of Professional Conduct, solicit or otherwise encourage a client or other person to obtain privileged or documentary evidence in an unlawful or unauthorized manner. If a lawyer receives materials that are privileged on their face, having a reasonable basis to conclude that the privilege has not been waived and that they have been obtained without authorization, he may violate Rules 1.15(b) and 8.4(c) by reviewing the material or by using it in an adversary hearing.² This is consistent with the position taken in ABA Formal Opinion 94-382. But the ethics rules are not violated unless the receiving lawyer acts knowingly.³

Other state ethics opinions have reached contrary results. *See, e.g.,* Maryland Bar Ass’n, Op. 89-53 (1989), Virginia Bar Ass’n Op. 1076 (1988); and Michigan Bar Ass’n, Op. CI-970 (1983). These opinions conclude that lawyers who receive privileged materials unsolicited have no obligation to make disclosure to a tribunal or an adverse party and may review and use such materials. But such a result is inconsistent with the conclusion reached by this Committee in Opinion 256.

The more difficult questions relate to situations in which a receiving lawyer does not have such knowledge of the document’s origin prior to conducting a review, or if the status of a document is unclear. A lawyer may still violate the ethics rules if the source and status of documents can be inferred from circumstances at the time he received them because “knowingly” is so defined in the Terminology Section of the Rules, Definition 6. Whether knowledge can be inferred from circumstances is fact specific. But if a lawyer receives what appears to be a privileged document under highly suspicious circumstances, such as from a client or other person who says with a wink, “don’t ask me how I got this,” the prudent receiving lawyer, would make further inquiry prior to reviewing or using the document.⁴

If, prior to his review, receiving counsel determines that a privileged document was obtained surreptitiously and without the knowledge or approval of the opposing party and its counsel, and has a reasonable basis to conclude that the privilege was not waived as to this document, receiving counsel should either return the document to opposing counsel, or make inquiry about its source and status prior to determining what course of action to take. This is consistent with the approach taken in ABA Formal Opinion 94-382.⁵

A receiving lawyer would not violate Rules 1.15(b) and 8.4(c) by reviewing and using the document whose source is unknown if: 1) its privileged status is not readily apparent on its face; and 2) receiving counsel did not know that the document came from someone who was not authorized to disclose it. If the privileged status of the document does not become apparent to receiving counsel until after the document has been reviewed, as reflected in D.C. Opinion 256, it is too late for receiving counsel to take corrective action because the information cannot be purged from his mind and his obligation of zealous representation under Rule 1.3 at that point trumps confidentiality concerns. The Committee takes no position with reference to the question whether review and use of documents that are confidential, but non-privileged would violate Rules 1.15(b) and 8.4(c) because it is outside the scope of the inquiry.

In the matter that is the subject of this Inquiry, there is no indication what the receiving lawyer’s client said about the document or its source at the time it was given to him. Receiving counsel asserted in a pleading that the document was not marked “confidential” and that it was leaked to his client by a temporary employee of the opposing entity. Even though the document was not marked “attorney-client privilege,” “attorney work product,” or “confidential,” the information at the top of the first page of the document made it clear that it was from the opposing entity’s inside counsel and that counsel was analyzing legal questions and concerns for members of the management team.

The Committee concluded in Opinion 256 that a receiving attorney could reasonably presume that documents were intended for him when they are disclosed to him by opposing counsel. This may not be the case when documents are disclosed to a lawyer by a third party. In such a situation, a receiving counsel may violate the ethics rules if he knowingly received privileged documents, had no basis to conclude that the privilege had been waived, and reviews and uses them anyway.

But again this responsibility only exists if the privileged nature of the document is apparent on its face. There is no indication in this Inquiry whether the receiving counsel knew about the nature of the document, other than that it was not marked “confidential,” at the time he received it. In the absence of additional facts, we can only reiterate the general guidance provided in Opinion 256: it would be unethical to read a document if the lawyer knew before reading it that it was privileged and that it had been sent inadvertently. The same would be true if receiving counsel reads a document that he knows is privileged and was either stolen by a third party or taken without authorization, unless he has a reasonable basis to conclude that the privilege was waived as to that document. See *also* ABA Formal Opinion 94-382.

On the other hand, Opinion 256 states that a receiving lawyer commits no breach of ethics if he reads a document that “has no facial or contextual indication of privilege and the receiving lawyer has not learned of its inadvertent disclosure.” Again, the Committee reaches the same conclusion for documents improperly taken by third parties.

The determination of what a receiving lawyer knows about the source of a document and about its privileged status, as noted above, is fact specific. A document is not necessarily privileged on its face even when it is marked “privileged” or “confidential,” as markings like this often are used indiscriminately. Opinion 256 at n 12. But a receiving attorney proceeds at his own risk if indicia of a privileged document do exist and there is not a reasonable basis to conclude that the privilege has been waived. This can often be gleaned by seeing on the face of a document the sending and receiving parties and the nature of the subject matter.

If, for example, sending and recipient parties are counsel and members of corporate management, respectively, the subject relates to the results of attorney-client communications or legal advice, and the document is marked “attorney-client privilege,” then the ethics rules are implicated. But, where the source of the document and/or its privileged status is less clear, as indicated in ABA Formal Opinion 94-382, the prudent course for a receiving lawyer might be to contact the opposing party and raise the issue directly, have another lawyer not working on the matter assess the document separately to help determine whether it is privileged, or refrain from reviewing the materials until a definitive resolution of the proper disposition of the materials is obtained from a tribunal. For comparable suggestions, see Opinion 256 at n.13. See *also* ABA Formal Opinion 94-382.

It also bears repeating that internal (or outside) counsel having the responsibility for protecting privileged documents that subsequently are “leaked” may violate Rules 1.1(a) and (b) and 1.6(a) and (e) if they fail to exercise reasonable care to prevent the unauthorized disclosure of their client’s confidences and secrets.⁶

Again, any such determination is fact specific. There is no indication in the Inquiry what steps had been taken to protect the confidentiality of the document at issue prior to the time it was obtained by the third party.

In summary, given the importance of preserving the confidentiality of privileged documents, lawyers have an ethical responsibility to take reasonable measures to ensure that confidential documents are protected so that they do not fall into the hands of third parties. The failure of counsel to take reasonable measures to protect a client's confidences and secrets can both waive the privilege and result in ethics violations.

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1. Opinion 256, however, rejected the position taken in ABA Formal Opinion 92-368 that a document must be returned even if the receiving lawyer learns about the inadvertent disclosure after the document had been reviewed.
 2. This Opinion does not address the question of whether all or just a portion of a particular document is privileged.
 3. This requires actual knowledge of the fact in question. See definition of "knowingly" in Terminology Section of the Rules, Definition [6]. As the Definition of "knowingly" indicates, however, knowledge can be inferred from circumstances.
 4. This is consistent with the admonition in Opinion 256 of what an ambivalent lawyer should do when receiving documents from another lawyer when there are conflicting indications as to whether the disclosure of privileged documents was inadvertent or not. D.C. Opin. 256 at n.13.
 5. As reflected in Opinion 256, a lawyer may also decline to review or use documents that may not be the subject of ethical restraints, and that he may otherwise be entitled to use, as a matter of "courtesy." See Opin. 256 at n.7. Depending on the significance of the documents, however, a lawyer may be required to consult with the client and Rules 1.2(a) and 1.4(b) prior to making such a determination.
 6. Opinion 256 provides some general guidance on the factors to be taken into account in making such assessments. If a lawyer fails to use reasonable care in instructing those who work for him on the handling of confidential material, that lawyer may violate Rule 1.6(e), if, as a result of his failure, the confidential material falls into the hands of a third party. A lawyer may also violate Rule 1.1 if he fails to devote sufficient care and attention to the protection of privileged documents. Both of these rules may be implicated, for example, if a lawyer fails to train his employees to properly mark and file confidential documents and to avoid leaving them in areas exposed to the general public.