

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 06-440

May 13, 2006

Unsolicited Receipt of Privileged or Confidential Materials:

Withdrawal of Formal Opinion 94-382 (July 5, 1994)

The Committee has considered recent changes to Model Rule of Professional Conduct 4.4(b) and its comments in relation to its earlier Formal Opinion 94-382 dealing with the subject of a lawyer's unsolicited receipt of privileged or confidential materials. Under the same reasoning that led the Committee recently to withdraw Formal Opinion 92-368, on which Formal Opinion 94-382 was based, and which dealt with a subject the Committee then considered analogous, the Committee here withdraws Formal Opinion 94-382.

Formal Opinion 94-382¹ addresses the obligations under the Model Rules of Professional Conduct² of a lawyer who is offered or is provided, by a person not authorized to offer them, materials of an adverse party that the lawyer knows to be, or that on their face appear to be, subject to the attorney-client privilege of the adverse party or otherwise confidential within the meaning of Rule 1.6. Notwithstanding several state ethics opinions having considered the subject and having reached a different conclusion,³ and acknowledging that the unauthorized sending of documents was not inadvertence, the Committee nevertheless reasoned that because the materials in question would not have been sent intentionally by the lawyer or the adverse party, their unauthorized disclosure by others was "no more intended and no more consensual than when disclosure occurs because of an error in transmission."⁴

The opinion found no basis in the Rules for requiring the lawyer to return the materials to their rightful owner or even to forbid their use. However, it

1. ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 94-382 (July 5, 1994) (Unsolicited Receipt of Privileged or Confidential Materials), in *FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998* at 233 (ABA 2000).

2. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2003. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in the individual jurisdictions are controlling.

3. *FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998* at 236.

4. *Id.* at 235.

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applied the same requirements identified in (now withdrawn) Formal Opinion 92-368,⁵ stating:

[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 possess 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.⁶

In Formal Opinions 92-368 and 94-382, the Committee was influenced by principles involving the protection of confidentiality, the inviolability of the attorney-client privilege, the law governing bailments and misappropriation, and general considerations of common sense, reciprocity, and professional courtesy. Application of other law is beyond the scope of the Rules, as noted expressly in comments to Rule 4.4(b) and in Scope [15]. Scope [16] notes that the Rules do not exhaust the moral and ethical considerations that should inform a lawyer. Certainly, the considerations that influenced the Committee in Formal Opinion 92-368, which carried over to Formal Opinion 94-382, are part of the broader perspective that may guide a lawyer's conduct in the situations addressed in those opinions. They are not, however, an appropriate basis for a formal opinion of this Committee, for which we look to the Rules themselves.

As was noted in Formal Opinion 05-437, Rule 4.4(b) requires only that a lawyer who receives a document relating to the representation of the lawyer's client and who knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender. The Rule does not require refraining from reviewing the materials or abiding by instructions of the sender. Thus, even assuming that the materials sent *intentionally* but without authorization could be deemed "inadvertently sent" so that the subject is one addressed by Rule 4.4(b)⁷, the instructions of Formal Opinion 94-382 are not supported by the Rule.

It further is our opinion that if the providing of the materials is not the result of the sender's inadvertence, Rule 4.4(b) does not apply to the factual situation addressed in Formal Opinion 94-382. A lawyer receiving materials under such circumstances is therefore not required to notify another party or that party's lawyer of receipt as a matter of compliance with the Model Rules. Whether a lawyer may be required to take any action in such an event is a

5. See generally ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 05-437 (October 1, 2005) (Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368 (November 10, 1992)).

6. FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 237 - 38.

7. The Committee does not so assume.

matter of law beyond the scope of Rule 4.4(b).⁸

Accordingly, because the advice presented in Formal Opinion 94-382 is not supported by the Rules, the opinion is withdrawn in its entirety.

8. If the sender of privileged or confidential material has engaged in tortious or criminal conduct, a lawyer who receives and uses the materials may be subject to sanction by a court. *See e.g.*, *Maldonado v. New Jersey*, 225 F.R.D. 120 (D.N.J. 2004) (plaintiff's counsel disqualified after retaining and using privileged letter that had allegedly appeared without explanation in plaintiff's workplace mailbox); and other liabilities, *see e.g.*, RESTATEMENT (SECOND) OF AGENCY: INTENTIONALLY CAUSING OR ASSISTING AGENT TO VIOLATE DUTY § 312, cmt. c (1958). These issues are matters of substantive law, at least in the first instance. To the extent the lawyer would be engaged in criminal conduct, Rule 8.4(b) may be implicated. Other factual circumstances present may implicate Rule 8.4(c) (conduct involving dishonesty), but those circumstances are not the subject of either Formal Opinion 94-382 or this opinion.