

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 11-460

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Duty when Lawyer Receives Copies of a Third Party's E-mail Communications with Counsel

When an employer's lawyer receives copies of an employee's private communications with counsel, which the employer located in the employee's business e-mail file or on the employee's workplace computer or other device, neither Rule 4.4(b) nor any other Rule requires the employer's lawyer to notify opposing counsel of the receipt of the communications. However, court decisions, civil procedure rules, or other law may impose such a notification duty, which a lawyer may then be subject to discipline for violating. If the law governing potential disclosure is unclear, Rule 1.6(b)(6) allows the employer's lawyer to disclose that the employer has retrieved the employee's attorney-client e-mail communications to the extent the lawyer reasonably believes it is necessary to do so to comply with the relevant law. If no law can reasonably be read as establishing a notification obligation, however, then the decision whether to give notice must be made by the employer-client, and the employer's lawyer must explain the implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision.

This opinion addresses a lawyer's ethical duty upon receiving copies of e-mails between a third party and the third party's lawyer.¹ We explore this question in the context of the following hypothetical scenario.

After an employee files a lawsuit against her employer, the employer copies the contents of her workplace computer for possible use in defending the lawsuit, and provides copies to its outside counsel. Upon review, the employer's counsel sees that some of the employee's e-mails bear the legend "Attorney-Client Confidential Communication." Must the employer's counsel notify the employee's lawyer that the employer has accessed this correspondence?²

When an employer's lawyer receives copies of an employee's private communications with counsel, which the employer located in the employee's business e-mail file or on the employee's workplace computer or other device, the question arises whether the employer's lawyer must notify opposing counsel pursuant to Rule 4.4(b). This Rule provides: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

Rule 4.4(b) does not expressly address this situation, because e-mails between an employee and his or her counsel are not "inadvertently sent" by either of them. A "document [is] inadvertently sent" to someone when it is accidentally transmitted to an unintended recipient, as occurs when an e-mail or letter is misaddressed or when a document is accidentally attached to an e-mail or accidentally included among other documents produced in discovery. But a document is not "inadvertently sent" when it is retrieved by a third person from a public or private place where it is stored or left.

The question remains whether Rule 4.4(b) implicitly addresses this situation. In several cases, courts have found that Rule 4.4(b) or its underlying principle requires disclosure in analogous situations, such as when "confidential documents are sent intentionally and without permission." *Chamberlain Group, Inc. v. Lear Corp.*, 270 F.R.D. 392, 398 (N.D. Ill. 2010).³ In *Stengart v. Loving Care Agency, Inc.*,

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

² For a discussion of the employee's lawyer's obligation to take reasonable steps to prevent a situation such as this from arising, see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 11-459 (2011) (Duty to Protect the Confidentiality of E-mail Communications With One's Client).

³ See also *Webb v. CBS Broadcasting, Inc.*, No. 08 C 6241, 2011 WL 1743338, at *12-13 (N.D. Ill. May 6, 2011); *Burt Hill, Inc. v. Hassan*, No. Civ.A. 09-1285, 2010 WL 419433, at *3-5 (W.D. Pa. Jan. 29, 2010); *Allen v. Int'l Truck & Engine*, No. 1:02-CV-0902-RLY-TAB, 2006 WL 2578896, at *11-12 (S.D. Ind. Sept. 6, 2006). But see *Mt. Hawley Ins. Co. v. Felman Production, Inc.*, 271 F.R.D. 125, 130-31 (S.D. W. Va. 2010) (lawyer receiving inadvertently sent materials not required to notify another party or that party's

990 A.2d 650, 665 (N.J. 2010), the court found that the employer's lawyer in an employment litigation violated the state's version of Rule 4.4(b)⁴ by failing to notify the employee's counsel that the employer had downloaded and intended to use copies of pre-suit e-mail messages exchanged between the employee and her lawyers.⁵

Since Rule 4.4(b) was added to the Model Rules, this Committee twice has declined to interpret it or other rules to require notice to opposing counsel other than in the situation that Rule 4.4(b) expressly addresses.⁶ In ABA Formal Op. 06-442 (2006), we considered whether a lawyer could properly review and use information embedded in electronic documents (i.e., metadata) received from opposing counsel or an adverse party. We concluded, contrary to some other bar association ethics committees, that the Rule did not apply. We reasoned that "the recent addition of Rule 4.4(b) identifying the sole requirement of providing notice to the sender of the receipt of inadvertently sent information [was] evidence of the intention to set no other specific restrictions on the receiving lawyer's conduct."⁷ Likewise, in ABA Formal Op. 06-440, this Committee found that Rule 4.4(b) does not obligate a lawyer to notify opposing counsel that the lawyer has received privileged or otherwise confidential materials of the adverse party from someone who was not authorized to provide the materials, if the materials were not provided as "the

lawyer of receipt as matter of compliance with ethics rules).

⁴ The New Jersey rule provided: "[a] lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender." New Jersey Rule of Professional Conduct 4.4(b) (2004).

⁵ The *Stengart* court found that the employee "had an objectively reasonable expectation of privacy" in the e-mails based on the fact that the employee "could reasonably expect that e-mail communications with her lawyer through her personal account would remain private, and that sending and receiving them via a company laptop did not eliminate the attorney-client privilege that protected them." 990 A.2d at 655. In contrast, other decisions arising in different factual situations have found that the attorney-client privilege did not protect client-lawyer communications downloaded by an employer from a computer used by its employees. These other decisions have not suggested that the employer's lawyer had a notification duty when the employer provided copies of the employee's attorney-client communications to the employer's lawyer. See, e.g., *Long v. Marubeni Am. Corp.*, No. 05-CIV-639(GEL)(KNF), 2006 WL 2998671, at *4 (S.D.N.Y. Oct. 19, 2006); *Kaufman v. SunGard Inv. Sys.*, No. 05-CV-1236 (JLL), 2006 WL 1307882, at *3 (D.N.J. May 9, 2006); *Scott v. Beth Israel Medical Center, Inc.*, 847 N.Y.S.2d 436, 444 (Sup. Ct. 2007).

⁶ One might argue, for example, that the lawyer is prohibited from reading or using the e-mails by any of several other rules. These include Rule 4.4(a), which requires lawyers to refrain from using "methods of obtaining evidence that violate [a third person's] legal rights," and which, according to the accompanying comment, forbids "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." These also include Rule 8.4(c), which forbids "conduct involving dishonesty, fraud, deceit or misrepresentation," and Rule 8.4(d), which forbids "conduct that is prejudicial to the administration of justice."

⁷ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006) (Review and Use of Metadata). Prior to the adoption of Rule 4.4(b) in February 2002, this Committee had issued opinions addressing a lawyer's obligations upon receiving materials of an adverse party on an unauthorized basis when the lawyer knew that the materials were privileged or confidential, and addressing a lawyer's obligations when the opposing party inadvertently disclosed privileged or confidential materials. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-382 (1994) (Unsolicited Receipt of Privileged or Confidential Materials), in *FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998* (ABA 2000) at 233; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992) (Inadvertent Disclosure of Confidential Materials), *id.* at 140. The Committee concluded that the lawyer's obligations implicitly derived from other law and from provisions such as Rule 8.4 (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation" and conduct "prejudicial to the administration of justice") that did not expressly address these situations. *Id.* at 144-49, 234. However, the Committee withdrew both of these opinions following the adoption of Rule 4.4(b). See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-440 (2006) (Unsolicited Receipt of Privileged or Confidential Materials: Withdrawal of Formal Opinion 94-382); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005) (Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368).

result of the sender's inadvertence."⁸ We noted that other law might prevent the receiving lawyer from retaining and using the materials, and that the lawyer might be subject to sanction for doing so, but concluded that this was "a matter of law beyond the scope of Rule 4.4(b)."⁹

To say that Rule 4.4(b) and other rules are inapplicable is not to say that courts cannot or should not impose a disclosure obligation in this context pursuant to their supervisory or other authority. As Comment [2] to Rule 4.4(b) observes, "this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person."¹⁰ Pursuant to their supervisory authority, courts may require lawyers in litigation to notify the opposing counsel when their clients provide an opposing party's attorney-client confidential communications that were retrieved from a computer or other device owned or possessed by the client. Alternatively, the civil procedure rules governing discovery in the litigation may require the employer to notify the employee that it has gained possession of the employee's attorney-client communications. Insofar as courts recognize a legal duty in this situation, as the court in *Stengart* has done, a lawyer may be subject to discipline, not just litigation sanction, for knowingly violating it.¹¹ However, the Model Rules do not independently impose an ethical duty to notify opposing counsel of the receipt of private, potentially privileged e-mail communications between the opposing party and his or her counsel.

When the law governing potential disclosure is unclear, the lawyer need not risk violating a legal or ethical obligation. The fact that the employer-client has obtained copies of the employee's e-mails is "information relating to the representation of [the] client" that must be kept confidential under Rule 1.6(a) unless there is an applicable exception to the confidentiality obligation or the client gives "informed consent" to disclosure. Rule 1.6(b)(6) permits a lawyer to "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to comply with other law or a court order." Rule 1.6(b)(6) allows the employer's lawyer to disclose that the employer has retrieved the employee's attorney-client e-mail communications to the extent he or she reasonably believes it is necessary to do so to comply with the relevant law, even if the legal obligation is not free from doubt. On the other hand, if no law can reasonably be read as establishing a reporting obligation, then the decision whether to give notice must be made by the employer-client. Even when there is no clear notification obligation, it often will be in the employer-client's best interest to give notice and obtain a judicial ruling as to the admissibility of the employee's attorney-client communications before attempting to use them and, if possible, before the employer's lawyer reviews them. This course minimizes the risk of disqualification or other sanction if the court ultimately concludes that the opposing party's communications with counsel are privileged and inadmissible. The employer's lawyer must explain these and other implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision. See Rules 1.0(e) (Terminology, "informed consent"), 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"), and 1.6(a) ("lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [the exceptions under Rule 1.6(b)]").

⁸ *Supra* n. 7.

⁹ *Id.* A recent article suggests that Rule 1.15(d) imposes a notification duty in the analogous situation in which a lawyer comes into possession of physical documents that appear to have been wrongly procured from another party. Brian S. Faughan & Douglas R. Richmond, "Model Rule 1.15: The Elegant Solution to the Problem of Purloined Documents," 26 ABA/BNA LAW. MAN. PROF. CONDUCT 623 (Oct. 13, 2010). Rule 1.15(d) provides, in pertinent part: "Upon receiving ... property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person." The provision arises out of the lawyer's fiduciary duty to safeguard money and property belonging to another and entrusted to the lawyer. Regardless of whether this rule may apply when stolen physical items come into a lawyer's possession, we do not believe it applies when an organizational client gives its lawyer copies of documents that were on a computer in the client's lawful possession for the lawyer's potential use in litigation. What is at stake is not the third party's proprietary interest in the copies of e-mails but the third party's confidentiality interest, which Rule 1.15(d) does not address.

¹⁰ Accord ABA Formal Op. 06-440.

¹¹ See, e.g., Rule 3.4(c) ("A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.").

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