

Inadvertent Disclosure of Confidential Materials

By the NHBA Ethics Committee

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RULE REFERENCES:

- *Scope
- *Rule 1.2(d)
- *Rule 1.4
- *Rule 1.6
- *Rule 4.1(b)

SUBJECTS:

- *Attorney-Client Relationship
- *Client Communications
- *Conduct Toward Opposition
- *Confidentiality

CODE REFERENCES:

- *DR 4-101

ANNOTATIONS:

A lawyer who receives materials that appear on their face to be confidential and not intended for receipt by that lawyer, as a matter of ethical conduct contemplated by the precepts underlying the Model Rules, (a) should not examine the materials once the inadvertence is discovered, (b) should notify the sending lawyer of their receipt and (c) should abide by the sending lawyer's instructions as to their disposition.

A lawyer who reads inadvertently sent materials before discovering their confidential nature (a) may use the information contained therein under most circumstances and (b) should notify the sending lawyer under most circumstances that the materials have been received and inadvertently read.

A lawyer who receives inadvertently sent confidential materials and returns them unread has no obligation to notify his or her client of such actions. Where the receiving lawyer has read the materials, however, the nature and extent of the obligation to notify the receiving lawyer's client will depend on the facts and circumstances of the case.

The American Bar Association has recently considered the situation of a lawyer who comes into possession of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the materials were not intended for the receiving lawyer. Under these circumstances, the ABA has concluded:

that the receiving lawyer, as a matter of ethical conduct contemplated by the precepts underlying the Model Rules, (a) should not examine the materials once the inadvertence is discovered, (b) should notify the sending lawyer of their receipt and (c) should abide by the sending lawyer's instructions as to their disposition.

ABA Formal Opinion 92-368 (11/10/92), ABA/BNA Lawyers' Manual on Prof. Conduct 1001:155, col. 2 ("Lawyers' Manual")

One typical example would be the lawyer who receives a fax, the cover of which clearly proclaims that it was sent from opposing counsel to opposing counsel's client; but this type of mistake is hardly unique to modern technology. Many lawyers have received copies of letters not intended for their eyes, or found privileged documents included in piles of documents produced in discovery. Technology just makes it easier to mess things up.

A. Synopsis of ABA Opinion.

The Opinion begins by warning that a satisfactory answer to the question posed cannot be drawn from a narrow literalistic reading of the black letter of the Model Rules. Lawyers' Manual at 1001:155, col. 2. The Opinion goes on to quote the following sentence from the Preamble to the Rules:

The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.

Lawyers' Manual at 1001:155, col. 2. *See* NH RPC Scope at ¶2.

1. Confidentiality.

The Opinion first suggests that confidentiality forms the core of the attorney client relationship. The Opinion then looks at the language of Model Rule 1.6, noting that this Rule was broadened from the provisions of the Model Code of Professional Responsibility, DR 4-101.

The Opinion goes on to balance the importance of client confidentiality against several “potentially competing principles.” The Opinion examines these competing principles which include several arguments that some might raise against the Opinion’s conclusions.

The next major section of the Opinion discusses cases dealing with the inadvertent disclosure of materials subject to the attorney-client privilege. The Opinion observes that most cases hold that mere inadvertent disclosure does not always waive the privilege, but notes that a minority of jurisdictions find that any unforced disclosure destroys confidentiality and terminates the privilege. The New Hampshire Supreme Court has not yet ruled on this issue.

The Opinion apparently reads Rule 1.6 and these privilege cases as supporting the placement of a burden on the receiving lawyer to preserve the confidentiality of the missent materials.

2. *Bailment.*

The Opinion next turns to the common law of bailment which may characterize possession of missent property “as a bailment implied by law, or a constructive bailment.” Lawyers’ Manual at 1001:159, col. 2. The Opinion suggests that an examination of the law of bailment may prove “instructive in suggesting how, as a matter of ethics, the receiving lawyer should conduct himself when he receives materials clearly not intended for him.” *Id.* col. 1.

If the law of bailment did apply, the recipient of missent property would have an obligation to return the property when requested. The Opinion concludes that any attempt to use the bailed property would probably constitute “unauthorized use” in violation of the terms of the implied bailment. Lawyers’ Manual at 1001:160, col. 1.

The Opinion thus reads the law of bailment as supporting, at least by analogy, the position that the receiving lawyer should not “use” the materials (by reading them) and should return them to the sender.

3. *Analogous Cases.*

The Opinion next suggests that the receipt of missent materials is “not unlike” the situation presented in ABA Informal Opinion 86-1518 (2/9/86). In that Informal Opinion, a lawyer received a draft of an agreement in which the sending lawyer had left out a key provision that the parties had agreed to. The Informal Opinion concluded that the “error is appropriate for correction between the lawyers without client consultation.” The Informal Opinion thought that a knowing failure to correct the error might constitute fraud on the part of the receiving lawyer’s client and therefore violate Rules 1.2(d) and 4.1(b).

The fax Opinion acknowledges that “Informal Opinion 86-1516 is not on all fours with the instant situation.” The fax Opinion relies instead on:

its charitable view toward inadvertence, its unwillingness to permit parties to capitalize on errors, its recognition of a limitation on client decision making authority and its respect for the role of counsel.

Lawyers’ Manual at 1001:160, col. 2.

The Opinion next considers other hypothetical situations where most would agree that a lawyer should not take advantage of an opportunity to review confidential materials:

You return to a deposition early from lunch and notice that opposing counsel has left notes or other materials in the conference room.

Opposing counsel leaves a briefcase behind after a meeting at your office.

Court personnel inadvertently move opposing counsel’s notes to your table during a recess.

Most lawyers would intuitively conclude that these materials are completely off limits.

While these “analogous situations” can be readily distinguished from the errant fax, their emotional impact will remain strong. As a former Secretary of State once said, after closing down a cryptography department: “Gentlemen do not read each other’s mail.” H.L. Stimson, *On Active Service in Peace and War* (1948).

4. *Good Sense and Reciprocity.*

In the final section, the Opinion suggests that it may be in the best interests of the receiving lawyer and/or her client to “do the right thing.” The Opinion gives an example of a case where reading and using the missent materials resulted in delay and increased expense to, and ultimately produced no benefit for, the receiving lawyer. The Opinion also argues that

the credibility and professionalism inherent in doing the right thing can, in some significant ways, enhance the strength of one’s case, one’s standing with the other party and opposing counsel, and one’s stature before the court.

Lawyers’ Manual at 1001:161, col. 2.

B. Analysis.

As the Opinion readily acknowledges, it does not rely on a straightforward analysis of the literal rules. Accordingly, one may criticize much of the reasoning.

For example, the bailment analogy stretches the Opinion's analysis to its limits when applied to the errant fax. The sending lawyer, after using the receiving lawyer's fax equipment and telephone line, and consuming the receiving lawyer's fax paper, all without authorization, can hardly claim that the resulting product is in any sense the sending lawyer's property under a bailment theory.

In addition, the appeal to self-interest in section 4 may present good reasons why the receiving lawyer may want to return the materials. One may perhaps complain, however, that the appeal to self-interest fails to advance the analysis as to whether the receiving lawyer has an obligation to return the materials unread.

The Opinion is also somewhat unclear as to the nature, and extent, of the obligation it purports to find. The Rules themselves create professional obligations; but the Rules also recognize the existence of discretion in many areas of professional conduct.

Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These prescribe or limit the lawyer's professional conduct. Others, generally cast in the term "may," define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.

NH RPC Scope at ¶1.

The ABA Opinion uses the term "should" in stating its conclusion. The term "should" ordinarily seems stronger than the term "may" but presumably weaker than the term "shall." The Rule's Scope gives some guidance for interpreting the term.

Many of the Comments use the term "should." These Comments do not add obligations to those in the Rules but provide guidance for practicing in compliance with the Rules. *Id.*

The Opinion does not clearly state whether the receiving lawyer must return the fax or whether she has some discretion. The use of the term "should" suggests something less than an obligation. Nevertheless, the Opinion refers to

our conclusion that receiving counsel's *obligations* under those circumstances are to avoid reviewing the materials, notify sending counsel if sending counsel remains ignorant of the problem and abide sending counsel's direction as to how to treat the disposition of the confidential materials.

Formal Opinion 92-368, *supra*, Lawyers' Manual at 1001:161-2 (emphasis added).

We are reluctant to infer an affirmative obligation on the receiving lawyer from the penumbra of the Rules. Labeling something "imperative" suggests that a lawyer will be disciplined for violating it. We remain unpersuaded that a lawyer would, or should, be disciplined for reading a fax or a letter mistakenly sent to her, even if read with knowledge that it was mistakenly sent.

The Opinion, by its existence if not its logic, however, gives ample discretion to lawyers to return the fax unread. The Opinion also contains strong arguments that a lawyer has a moral duty to return the fax unread. We would therefore urge all lawyers in the appropriate circumstances to exercise this discretion, thereby "achiev[ing] a level of professionalism which can only redound to the lawyer's benefit." *LawsTers' Manual* at 1001:162, col. 1.

C. Other Issues Not Addressed by the Opinion.

The Opinion does not address several other issues that may interest many lawyers. These issues arise once the receiving lawyer has read the materials, presumably before discovering that the materials were missent. The Committee has had some difficulty in reaching meaningful consensus on the answers to these questions; but we would like to at least raise and discuss them for whatever assistance this may give the practicing lawyer.

1. May the Receiving Lawyer Use Information Gained Through Inadvertent Reading of the Missent Materials?

The Opinion often hints that the receiving lawyer should not use any information inadvertently gained before discovery of the mistake. Perhaps recognizing that the basis in the Rules for such a conclusion is especially thin, the Opinion reaches no formal conclusion.

We can find no Rules-based obligation; and the "other ethical and moral considerations" do not really help answer the question. Many on the Committee believe that once one has innocently learned of the information, the receiving lawyer

owes a duty to her client to use the materials, or the information contained in the materials, in the best interests of the client. While the mandate for “zealous” representation of Canon 7 of the Model Code was not brought forward in the Model Rules, a lawyer’s obligation under Rule 1.3(a) to “act with reasonable promptness and diligence in representing a client,” taken together with the Model Comment’s admonition that a lawyer “should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf,” may include “an obligation to capitalize on an error of this sort on the part of opposing counsel.” See Lawyers’ Manual at 1001:157, col. 2.

The issue will probably have to be decided by the lawyers, and perhaps the courts as well, on a case-by-case basis.

2. If the Receiving Lawyer Reads the Materials, Should He or She So Inform the Sending Lawyer?

Analytically, any obligation to tell the other side that one has received the materials should not turn on whether the receiving lawyer has read the materials. If one agrees with the Opinion’s initial conclusion that the receiving lawyer should notify the sending lawyer of the mistake, then the answer is clear: the receiving lawyer should notify the sending lawyer even after he or she reads the materials.

The information contained in the materials may be substantially more valuable if the sending lawyer does not know the receiving lawyer has it. The receiving lawyer may be tempted to use the information to the best advantage of the client.

One may reasonably argue that the receiving lawyer has an obligation to represent the client and put the client’s interests first. This too may be a situation which must be viewed on a case-by-case basis.

3. Must the Receiving Lawyer Inform His or Her Client of His or Her Decision with Respect to the Materials or the Information Contained in Them?

Under NH RPC Rule 1.4, the receiving lawyer has an obligation to keep the client reasonably informed. The ABA Comment to Rule 1.2 also says:

[A] client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so.

This suggests that the lawyer does have an obligation to notify the client.

As discussed above, however, the Opinion cites ABA Informal Opinion 861518 (2/9/86) where the ABA concluded that the lawyer who discovered a mistake in the contract could correct the mistake with the other lawyer without notifying the client. The ABA analysis in the Informal Opinion arguably depends on the nature of the obligation on the lawyer, and the lawyer’s relative lack of discretion to choose among different courses of action.

The receiving lawyer’s obligation to inform his or her client may therefore depend on the nature and extent of the receiving lawyer’s obligations with regard to the materials. Accordingly, where the receiving lawyer returns the materials unread, the receiving lawyer has no obligation to notify the client in view of the strong ethical obligation to return the materials. Where the ethical issues are less well defined, as where the lawyer has inadvertently read the materials, the obligation to notify the client will depend on the facts and circumstances in each case as suggested above.

D. Conclusion.

The Committee concludes that the Rules provide insufficient direct guidance to answer most of the questions raised, including perhaps the ones raised and answered by the ABA. A new rule dealing with the situation would clarify the situation.

Drafting such a rule to balance the rights of both sides might be exceedingly difficult. In addition, any such rule that depended on the innocence of the receiving party in reading the missent materials would be difficult to administer.