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## INADVERTENT DISCLOSURE OF PRIVILEGED OR CONFIDENTIAL DOCUMENTS

Adopted May 20, 2000 Revised December 15, 2018

### Advisory

This opinion is undergoing review by the Ethics Committee. In the meantime, practitioners are advised that, since this opinion was adopted, the Colorado Supreme Court has enacted Colo. R.P.C. 4.4(b) and 4.4(c) that address ethical obligations of a lawyer who receives documents relating to the representation of a client which were inadvertently sent. Additionally, lawyers are advised to review Fed. R. Civ. P. 26(b)(5)(B) and C.R.C.P. 26(b)(5)(B) and Fed. R. Evid. 502 and C.R.E. 502, which address inadvertent disclosures during the disclosure and discovery phases of litigation.

### Introduction

This opinion addresses the ethical obligations of a lawyer who receives from an adverse party or an adverse party's lawyer documents that are privileged or confidential and that were inadvertently disclosed, whether in a civil, criminal, or administrative proceeding or in a context that does not involve litigation. This opinion does not purport to address all the situations in which a lawyer receives privileged or confidential documents belonging to a person other than his or her client.<sup>1</sup> For purposes of this opinion, "confidential" documents are those that are subject to a legally recognized exemption from discovery and use in a civil, criminal, or administrative action or proceeding, even if they are not "privileged" *per se*.<sup>2</sup>

### Syllabus

The ethical obligations of a lawyer who receives from an adverse party or an adverse party's lawyer documents that are privileged or confidential and that were inadvertently disclosed depends on whether the receiving lawyer knows of the inadvertence of the disclosure before examining the documents.

A lawyer who receives documents from an adverse party or an adverse party's lawyer ("sending lawyer") that on their face appear to be privileged or confidential has an ethical duty, upon recognizing their privileged or confidential nature, to notify the sending lawyer that he or she has the documents, unless the receiving lawyer knows that the adverse party has intentionally waived privilege and confidentiality. Although the receiving lawyer's only ethical obligation in this situation is to give notice, other considerations also come into play, including professionalism and the applicable substantive and procedural law. Once the receiving lawyer has notified the sending lawyer, the lawyers may, as a matter of professionalism, discuss whether waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the sending lawyer or the receiving lawyer may seek a determination from a court or other tribunal as to the proper disposition of the documents, based on the substantive law of waiver.<sup>3</sup>

However, the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents, for example, if the sending lawyer discovers the error and notifies the receiving lawyer before he or she has examined the documents. In this situation, as a matter of ethics, in addition to the duty of notice discussed above, the receiving lawyer must not examine the documents and must abide by the sending lawyer's instructions as to their disposition.

### Opinion

Although the Colorado Rules of Professional Conduct do not expressly address these issues, the Committee concludes that Rule 8.4(d) requires a lawyer to respect the privileged and confidential status of documents belonging to non-clients in order to ensure the orderly administration of justice. Colo. RPC 8.4(d). *See* CBA Formal Ethics Ops. 86, 102; *see also State Compensation Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799, 808 (Cal.Ct. App. 1994); Utah State Bar Ethics Op. 99-01 (1999). As the California Court of Appeals concluded:

The conclusion we reach is fundamentally based on the importance which the attorney-client privilege holds in the jurisprudence of this state. Without it, full disclosure by clients to their counsel would not occur, with the result that the ends of justice would not be properly served. We believe a client should not enter the attorney-client relationship fearful that an inadvertent error by its counsel could result in the waiver of privileged information or the

retention of the privileged information by an adversary who might abuse and disseminate the information with impunity. In addition, it has long been recognized that “[a]n attorney has an obligation not only to protect his client’s interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.”

*WPS*, 82 Cal.Rptr.2d at 808 (citations omitted).

Typically, an inadvertent disclosure of privileged or confidential documents occurs in two situations. One situation is where a lawyer receives documents 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. This may occur because the document is addressed to the sending lawyer’s client, but it is inadvertently sent to the physical address, facsimile transmission number, or e-mail address of the receiving lawyer, his or her adversary. Another situation is where one party inadvertently produces documents that are privileged or confidential to the adverse party in a civil, criminal, or administrative proceeding or in a context that does not involve litigation, such as a business transaction.

The facts in these situations are critical and vary widely. Accordingly, the courts and bar associations that have addressed the ethical obligations applicable to these situations have taken slightly different approaches. Almost all require the receiving lawyer to notify the sending lawyer that documents which appear on their face to be privileged or confidential have been disclosed. *American Express v. Accu-Weather, Inc.*, 1996 WL 346388 at \*2 (S.D.N.Y. 1996); *Transportation Equip. Sales Corp. v. BMY Wheeled Vehicles*, 930 F. Supp. 1187 (N.D. Ohio 1996); *Resolution Trust Corp. v. First of Am. Bank*, 868 F.Supp. 217, 219-20 (W.D.Mich. 1994); *WPS*, 82 Cal.Rptr.2d at 807-08; ABA Formal Op. 92-368 (1992); Utah State Bar Op. 99-01; North Carolina Bar Ass’n, Proposed RPC 252 (1997); Maine Advisory Op. 146 (1994); Florida Bar Ass’n Op. 93-3 (1993); *but see In Re Meador*, 968 S.W. 2d 346, 352 (Tex. 1998) (*dictum*).

The authorities differ, however, as to the receiving lawyer’s obligations beyond giving notice. In a seminal opinion, the Standing Committee on Ethics and Professional Responsibility of the ABA addressed the situation where a lawyer inadvertently sends a document that is privileged or confidential to his or her adversary instead of the intended recipient, such as by a misdirected fax. [ABA Formal Op. 92-368.] In this situation, the ABA Committee concluded that the receiving lawyer should not examine the documents 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. *Id.* Several courts have followed ABA Formal Opinion 92-368. *American Express*, 1996 WL 346388 at \*2; *First of Am. Bank*, 868 F.Supp. at 219-20; *WPS*, 82 Cal.Rptr.2d 799 at 807-08.

However, ABA Formal Opinion 92-368 is not universally followed. *See, e.g.*, Ohio Bar Ass’n Op. 93-11 (1993); Philadelphia Bar Ass’n Op. 94-3 (1994); *see also* Florida Bar Ass’n Op. 93-3 (requires only notice, but does not cite or analyze ABA Formal Opinion 92-368); *cf.*, D.C. Bar Ass’n Op. 256 (1995) (following ABA Formal Opinion 92-368 in part; receiving lawyer’s duties depend on whether he or she knows of the inadvertence of the disclosure before examining the documents). Indeed, the Ethics 2000 Commission of the ABA has recently proposed for comment a new Model Rule of Professional Conduct that would depart dramatically from the approach in ABA Formal Opinion 92-368. Ethics 2000 Comm., Proposed Rule 4.4 (Public Discussion Draft) (Nov. 15, 1999). As proposed by the Ethics 2000 Commission, the new rule would require the receiving lawyer only to notify the sending lawyer that the document was inadvertently disclosed and would not prohibit the receiving lawyer from reviewing the document or require the receiving lawyer to abide by the sending lawyer’s instruction as to its disposition. *Id.*

Further, where one party inadvertently produces documents that are privileged or confidential to an adverse party in a civil, criminal, or administrative proceeding, courts that have considered the ethical issues, rather than simply the evidentiary issue of waiver of privilege or confidentiality, have required the receiving lawyer to either follow the instruction of the adverse party’s lawyer with respect to the disposition of the documents or refrain from using them until a definitive resolution is obtained from a court regarding their proper disposition. *Transportation Equip. Sales*, 930 F.Supp. at 1187; *WPS*, 82 Cal.Rptr. 2d at 807-08; *cf.*, *In re United Mine Workers of America Employee Benefit Plans Litigation*, 156 F.R.D. 507

(D.D.C. 1994) (motion to reconsider magistrate judge's order compelling production of documents, including privileged and confidential documents that were inadvertently released for inspection by adverse parties; district court acknowledged the ethical issue, noted ABA Formal Opinion 92-368, but decided the motion based solely on the evidentiary issue of waiver of privilege and confidentiality).

In contrast, bar association ethics opinions are less stringent in this situation. The Utah State Bar concluded that once notice of the disclosure has been given, the lawyers can assess whether a waiver has occurred; that in some instances the lawyers may be able to agree how to handle the disclosure; but that in other instances, "it may be necessary to seek judicial resolution of the legal issues." Utah State Bar Op. 99-01. Similarly, the Florida Bar Association concluded that after the receiving lawyer has notified the sending lawyer, "[i]t is then up to the sender to take any further action." Florida Bar Ass'n Op. 93-3; *accord* Maine Advisory Op. 146 (a lawyer who receives documents that are privileged or confidential from an adverse party as part of a production of documents in a litigation should notify the producing lawyer of the disclosure and provide a copy of the documents to the producing lawyer if requested, but the receiving lawyer may use the documents in any way allowed under the rules of procedure and evidence). In this situation, too, the new rule proposed by the ABA Ethics 2000 Commission would require only notification. Ethics 2000 Comm., Proposed Rule 4.4 (Public Discussion Draft).

It is the opinion of the Committee that a lawyer who receives documents from an adverse party or an adverse party's lawyer that on their face appear to be privileged or confidential has an ethical duty, upon recognizing their privileged or confidential nature, to notify the sending lawyer that he or she has the documents unless the receiving lawyer knows that the adverse party has intentionally waived privilege and confidentiality. Although the only ethical obligation of the receiving lawyer in this situation is to give notice, other considerations also come into play, including professionalism and the applicable substantive and procedural law. Once the receiving lawyer has notified the sending lawyer, the attorneys may, as a matter of professionalism, discuss whether waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the sending lawyer or the receiving lawyer may seek a determination from a court or other tribunal as to the proper disposition of the documents, based on the substantive law of waiver.

The Committee is aware that, where an agreement is not reached and the matter is litigated, the receiving lawyer may misconstrue this opinion as a license to take advantage of the inadvertent disclosure in an effort to support a determination of waiver or to embarrass the sending lawyer, for example, by filing the arguably privileged or confidential documents in the public court file as attachments to a pleading or paper, or by quoting the content of the documents in pleadings or papers filed in the public court file. Although not prohibited as a matter of legal ethics, the Committee does not condone such practices. In this situation, both parties can litigate the matter without publicly disclosing the documents or their contents, for example, by filing the documents under seal or submitting them for *in camera* review and by referring to the content of the documents generally.

However, the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents. This includes the situation where the sending lawyer discovers the error and notifies the receiving lawyer before he or she has examined the documents. In this situation, it is the opinion of the Committee that, as a matter of legal ethics, in addition to the duty of notice discussed above, the receiving lawyer must not examine the documents and must abide by the sending lawyer's instructions as to their disposition. *E.g.*, *American Express*, 1996 WL 346388 at \*2 (S.D.N.Y. 1996); D.C. Bar Ass'n Op. 256; *see also* ABA Formal Op. 92-368.

The receiving lawyer who actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents has these additional duties for two reasons. First, in this situation, the receiving lawyer knows that the documents which were inadvertently sent are not his or her property; therefore, the receiving lawyer has a duty to safeguard the documents as property belonging to others under Rule 1.15(a), and to notify the sending lawyer and return the documents if requested under Rule 1.15(b). Second, the receiving lawyer is prohibited from acting dishonestly under Rule 8.4(c), and in this situation it would be dishonest for the receiving lawyer to examine the privileged or confidential docu-

ments knowing that the documents were sent inadvertently. As the District of Columbia Bar Association noted in this regard:

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. *See, e.g., Lipin v. Bender*, 644 N.E.2d 1300 (N.Y. 1994).

D.C. Bar Ass'n Op. 256 (footnote omitted).

Myriad situations will arise between these two extremes, where the receiving lawyer knows of the inadvertence of the disclosure before examining the documents and where the receiving lawyer does not know of the inadvertence before examining the documents. In these situations, there may be conflicting indications on the face of the document or in the overall context whether the disclosure was inadvertent or intentional. For instance, a letter meant for the sending lawyer's client might be put in an envelope addressed to the receiving lawyer or sent with a facsimile transmission sheet directed to the receiving lawyer, and the letter itself might be ambiguous whether it was meant for the receiving lawyer or the sending lawyer's client. *See, e.g., Philadelphia Bar Ass'n Op. 94-3*. Whether the receiving lawyer "knows" of the inadvertence of the disclosure before examining the documents depends on the specific facts and circumstances in each case. D.C. Bar Ass'n Op. 256. For this purpose, knowledge "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Colo. RPC, Terminology.

By requiring the receiving lawyer at least to give notice to the sending lawyer, as a matter of legal ethics, the interests in privilege and confidentiality that are so essential to the administration of justice will be protected, because the sending lawyer will be able to take protective measures. Moreover, as the Utah State Bar concluded, this approach has the virtue of separating the legal merits regarding waiver from the ethical determination of what an attorney ought to do. Utah State Bar Op. 99-01.

In this regard, it should be noted that these issues of legal ethics are separate and distinct from the evidentiary issue of waiver of privilege or confidentiality. A substantial body of law exists in the field of evidence regarding the waiver of attorney-client privilege and work product protection by inadvertent production. *See, e.g., Alldread v. City of Granada*, 988 F.2d 1425 (5th Cir. 1993); *United States v. de la Jara*, 973 F.2d 746 (9th Cir. 1992); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 329-30 (N.D.Cal. 1985); *Floyd v. Coors Brewing Co.*, 952 P.2d 797 (Colo. App. 1997). *See generally, e.g.,* Section of Litigation, American Bar Association, *The Attorney-Client Privilege and the Work Product Doctrine* at 193-96 (3d ed. 1997).

### **Conclusion**

The ethical obligations of a lawyer who receives from an adverse party or an adverse party's lawyer documents that are privileged or confidential and that were inadvertently disclosed depend on whether the receiving lawyer knows of the inadvertence of the disclosure before examining the documents.

In the situation where a party or a sending lawyer inadvertently discloses to an adverse party or an adverse party's lawyer documents that on their face appear to be privileged or confidential, the Committee concludes that the receiving lawyer, upon recognizing their privileged or confidential nature, has an ethical duty to notify the sending lawyer that he or she has the documents. Although the only ethical obligation of the receiving lawyer in this situation is to give notice, other considerations also come into play, including professionalism and the applicable substantive and procedural law. Once the receiving lawyer has notified the sending lawyer, the lawyers may, as a matter of professionalism, discuss whether waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the sending lawyer or the receiving lawyer may seek a determination from a court or other tribunal as to the proper disposition of the documents, based on the substantive law of waiver.

However, the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents. In this situation, as a

matter of legal ethics, the receiving lawyer also must not examine the documents and must abide by the sending lawyer's instructions as to their disposition.

## NOTES

1. For example, this opinion does not address the ethical obligations of a lawyer who receives documents that are privileged or confidential from a non-party witness pursuant to a subpoena *duces tecum* in a civil or criminal action or proceeding. Instead, these obligations are addressed in Revised Formal Opinion 86 and Formal Opinion 102 of the Ethics Committee of the Colorado Bar Association.

Similarly, this opinion does not address the ethical obligations of a lawyer who purposefully obtains such documents from an adverse party directly or through his or her agent, such as the practice referred to colloquially as “dumpster diving” — that is, rifling through the garbage of an adverse party or an adverse party's lawyer in an effort to find documents that might be helpful to the rifling party's case. *See, e.g., McCafferty's, Inc. v. The Bank of Glen Burnie*, 179 F.R.D. 163 (D.Md. 1998); *Suburban Sew 'n Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254 (N.D.Ill. 1981). *See generally* Solovy & Byman, “Federal Practice/Discovery: Fighting Those Who Dive Into Hi-Tech ‘Dumpsters,’” *The National Law Journal* (Dec. 21, 1998).

In addition, this opinion does not address the ethical obligations of a lawyer who obtains such documents from his or her client.

2. Examples of such confidential documents may include those subject to the work product doctrine, *e.g.*, Fed. R. Civ. P. 26(b)(3); C.R.C.P. 26(b)(3); documents subject to a protective order that discovery not be had, that certain matters not be inquired into, or that the documents not be revealed or be revealed only in a designated way, Fed. R. Civ. P. 26(c)(1), (4), (7); C.R.C.P. 26(c)(1), (4), (7); records of services to the mentally ill, § 27-10-120(1), C.R.S.; reports of child abuse or neglect, § 19-1-307(1)(a), C.R.S.; and reports of AIDS or HIV-related illness, § 25-4-1404(1), C.R.S. In contrast, for purposes of this opinion, “confidential” documents do *not* include documents as to which some person has an expectation of privacy or confidentiality, but which are not subject to a legally recognized exemption from discovery or use in a civil action or proceeding, such as research, development or commercial information and personal correspondence or diaries (assuming that some other privilege does not otherwise attach to the letters or diaries, such as the attorney-client privilege or the Fifth Amendment privilege against self-incrimination). *See* CBA Formal Ethics Ops. 86 (revised 1998), 102 (1998).

3. The Committee is aware that, where an agreement is not reached and the matter is litigated, the receiving lawyer may misconstrue this opinion as a license to take advantage of the inadvertent disclosure, in an effort to support a determination of waiver or to embarrass the sending lawyer. Although such practices are not prohibited as a matter of legal ethics, the Committee does not condone them.