

Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 99-01

Approved January 29, 1999

Question: What are an attorney's ethical obligations when the attorney or his client has lawfully obtained an attorney-client communication between an opposing party and opposing counsel under conditions where the opposing party may not have intended to waive the attorney-client privilege?

Opinion: A lawyer is required to bring to the attention of opposing counsel the receipt of any such communication unless it is clear from the circumstances that the attorney-client privilege has been intentionally waived.

Analysis: This general issue came to the Committee in connection with a specific set of facts that involved an attorney's client who is independent of the attorney; had obtained a potentially material attorney-client document that was not the subject of a conscious waiver of the attorney-client privilege by the other party. Because a variety of fact patterns of this type may arise, we will consider the general question of an attorney's ethical obligations when he lawfully obtains an attorney-client communication between opposing counsel and her client.

In some instances it may be clear that the opposing party waived the privilege. An opposing party's use of an attorney-client communication for which the privilege has been waived raises no ethical issues.

In other circumstances, however, it may be unclear whether the privilege was waived, and circumstances may even establish that the privilege was not waived. This raises the ethical question regarding what the receiving attorney may or may not do with the communication.

We find nothing in the Rules of Professional Conduct that directly addresses the attorney-client privilege as it applies to an opposing party, but we believe that Rule 8.4(d) places an obligation upon every lawyer to take steps to preserve the attorney-client privilege in order to effect the orderly

administration of justice. (fn2)

The introductory "Scope" of the Rules of Professional Conduct notes that the rules are not intended to exhaust the moral and ethical considerations that should govern a lawyer, but are designed to provide a framework for the ethical practice of law. This section also notes that the rules are not intended to govern or affect the judicial application of the attorney-client privilege, but that the client is entitled to expect communications within the scope of the privilege will generally be protected.

While not addressing the broad question presented above, the American Bar Association Standing Committee on Ethics and Professional Responsibility has issued two opinions on narrower issues directed to disclosure of attorney-client communications. Although the Committee does not necessarily subscribe to all of the conclusions of those two opinions, they do provide useful discussions relevant to the ethical issues currently before us.

ABA Formal Opinion 92-368, entitled "Inadvertent Disclosure of Confidential Materials," addressed the situation where counsel inadvertently faxed or mailed privileged documents to opposing counsel. The opinion determined that this circumstance should not result in waiver of privilege. It concluded that "A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them." Under these narrow fact circumstances, the ABA concluded that a receiving attorney has an ethical duty to return the attorney-client communications to opposing counsel without making any use of them.

ABA Formal Opinion 94-382 addressed the somewhat different situation where a third party provided an attorney-client communication to a lawyer, without being solicited to do so. In other words, unlike opposing counsel in Opinion 92-368 who made an inadvertent disclosure, the third party intended to send the materials to the receiving attorney. The ABA opinion declined to state an absolute rule regarding use of the materials, as some circumstances might call for waiver and others might not. The opinion concluded that the best course of action was for the receiving attorney to advise opposing counsel of the disclosure, and then either return the documents or seek assistance from the court in determining the appropriate course of action under the particular facts at hand:

A lawyer who receives on an unauthorized basis materials

of an adverse party that she knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how appropriately to proceed; she should notify her adversary's lawyer that she has such materials and should either follow instructions of the adversary's lawyer with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

As noted above, matters relating to the attorney-client privilege have been left to the courts to decide. Yet, the discussion contained in each of the two ABA formal opinions discussed above illustrates a potential void regarding what constitutes ethical behavior under some circumstances. Further, we find little guidance in the judicial decisions in this area. There appears no clear rule of law in the cases, and the decisions have often turned upon the specific facts of a particular situation. (fn3)

After reviewing the ABA opinions and the case law, the Committee finds that there is a substantial tension between the competing policies surrounding the concepts of privilege and waiver that is magnified by the desire to establish high ethical standards. Although it is troubling to attempt to establish ethical guidelines that are subject to the degree of uncertainty inherent in this area of law, the Committee has a responsibility to provide guidance to lawyers as they attempt to satisfy their ethical obligations.

It is also difficult for the Committee to provide ethical guidelines that may turn on such particular facts as whether someone throws away a document after balling it up, or first tears it up into a few pieces before placing it into the trash. Yet, attorneys need guidance regarding their ethical obligations in these situations.

Having so considered this issue, the Committee's view is that an attorney in possession of an opposing party's attorney-client communications for which the attorney-client privilege has not been intentionally waived should advise opposing counsel of the fact of its disclosure, regardless of the specific facts surrounding disclosure. We draw this conclusion primarily because to do otherwise would be inconsistent with the standards of Rule 8.4(d) (fn4) This approach has the virtue of separating the factual determination regarding the legal merits regarding waiver from the ethical determination of what an attorney ought to do. It also recognizes that the receiving attorney may not have all of the facts relevant to a legal determination, and it guards against subconscious bias in the receiving attorney's consideration of the facts. Finally, it avoids the appearance of impropriety inherent in allowing a receiving attorney to make the determination under what circumstances to advise

opposing counsel.

Once the fact of disclosure is before both parties, they can then turn to the legal implications of the disclosure and a legal assessment of whether waiver has occurred. In some instances the parties may be able to agree regarding how to handle the disclosure. In other instances, it may be necessary to seek judicial resolution of the legal issues.

APPENDIX A

Courts have routinely held in criminal matters that there is not a reasonable expectation of privacy protected by the Fourth Amendment in garbage placed outside their homes for collection. *California v. Greenwood*; (fn5) *U.S. v. Scott*. (fn6) Hence, such evidence can be used to find a defendant guilty of a crime.

The issue seems less settled when applied to communications between an attorney and a client. For example, in *Suburban Sew 'n Sweep, Inc. v. Swiss-Bernina, Inc.*, (fn7) defendant's president sent several confidential letters to counsel. The handwritten drafts were placed into a wastebasket and subsequently collected in a trash dumpster used only by defendant. The documents were collected from the trash dumpster by plaintiff. It was uncontroverted that defendant expected these communications to remain confidential. In an opinion containing a substantial discussion of the issues, including a discussion of the Fourth Amendment, the policies behind the attorney-client privilege and inadvertent-disclosure cases, the court stated that privilege is not automatically waived when confidentiality is breached. Rather, the relevant consideration was the intent of the defendant to maintain confidentiality as manifested in the precautions taken. The court identified two considerations: (1) the effect on uninhibited consultation between attorney and client of not allowing the privilege in these circumstances; and (2) the ability of the parties to the communication to protect against the disclosure. The court determined that the defendant could have shredded the documents in this case, and the privilege was waived.

A contrary result was obtained in *Mendenhall v. Barber-Greene Co.* (fn8) One basis of the decision in this case was the observation that proposed Rule 503(a)(4) of the Federal Rules of Evidence provided that a communication is "confidential" if not intended to be disclosed to third persons. Criticizing the *Sew 'n Sweep* case, the court further stated that inadvertent disclosure is the antithesis of an intentional waiver or abandonment of a right, such as the attorney-client privilege.

In *Stewart v. General Motors Corp.*, the court stated that the traditional rule is that any disclosure waives the privilege. The court stated that the modern trend,

purportedly now followed by a majority of courts, is that inadvertent disclosure may result in waiver, but the inadvertence of the disclosure is just one of a number of factors to consider in determining if waiver occurred. Factors to consider include: (1) the manner of the disclosure; (2) precautions taken to prevent disclosure; (3) the extent of the disclosure; (4) actions taken to rectify disclosures and any delay in taking such actions; (5) how the purposes of the privilege rule are best served; and (6) overriding issues of fairness and justice.

The case of *Resolution Trust Corp. v. First of America Bank* is also of interest. This was a case of inadvertent disclosure during discovery. The documents bore markings "privileged and confidential." The court stated that common sense and a high sensitivity toward ethics taken together with the importance of preserving attorney-client confidentiality and privilege should have immediately caused plaintiff's attorneys to advise defendant's counsel of the production. The court ordered that all copies of the document in plaintiff's possession and all notes relating to it be destroyed.

McCafferty's, Inc. v. The Bank of Glen Burnie involved a communication from defendant to its counsel that had been torn into 16 pieces before being then placed into the trash. The trash was collected in a dumpster in an area marked "no trespassing." The court held the attorney-client privilege was not waived, because the defendant had evidenced, by tearing up the document, an intent to preserve the confidentiality of the document, and there was a continued expectation of privacy based upon the posting of the dumpster against unauthorized entry.

In *U.S. v. McMahon*, the Fourth Circuit held that the attorney-client privilege was waived when the defendant discarded an intact letter into a dumpster located in the parking lot of his clinic both in respect to (1) the existence of the attorney-client relationship, and (2) the content of the document, to the extent the document contained what were intended to be confidential communications.

Footnotes

1. We assume lawful possession of the information in this Opinion. We do not pass judgment on this fact-driven legal determination in the specific case that brought the issue to our attention, nor do we address the situation where the attorney knows the client obtained the information illegally.

2."It is professional misconduct for a lawyer to: [e]ngage in conduct that is prejudicial to the administration of justice."

3. Appendix A contains a discussion of a sampling of such cases.

4. *See note, supra.*

5. 486 U.S. 35 (1988).

6. 975 F.2d 927 (1st Cir. 1992) (the warrantless seizure and reconstruction of shredded documents in a case involving charges of filing false income tax returns did not violate the Fourth Amendment).

7. 91 F.R.D. 254 (N.D. Ill. 1981).

8. 531 Supp. 951 (N.D. Ill. 1982).

ABA Formal Opinion:

92-368