

# ALASKA BAR ASSOCIATION

## ETHICS OPINION NO. 2019-2

### **A LAWYER’S DUTY UPON RECEIPT of CONFIDENTIAL INFORMATION – Inadvertent but Unauthorized Disclosure**

The Committee has been asked to provide an opinion about a lawyer’s professional responsibility when presented with confidential information from an opposing party when the disclosure was *inadvertently* made.<sup>1</sup> Lawyers, their staff members and clients occasionally send confidential information to opposing counsel by mistake. In light of the rapid changes in technology for both lawyers and clients alike, and the frequency with which this issue arises, the Committee takes this opportunity to revisit the lawyer’s essential duty upon receipt of inadvertently disclosed confidential materials.

In earlier times, these mistakes typically occurred when a fax was sent to the wrong phone number, or an address label was switched on an envelope. With the proliferation of email, text messages, social media, cloud computing and electronically stored information (“ESI”), the potential for misdirection of confidential information has increased exponentially. Litigation cases now regularly involve thousands, and sometimes millions of client documents which need to be collected and reviewed for privilege and potential production. The sheer volume of information and documents can make even routine discovery a daunting task. As a result, the incidence of inadvertent disclosure is increasing.

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<sup>1</sup> The receipt of confidential information generally falls into three categories: 1) the inadvertent disclosure scenario; 2) the intentional disclosure by one with authority (i.e., a willing party); and 3) the intentional but unauthorized disclosure by a party’s agent. This opinion addresses inadvertent disclosure only. Ethics Opinion No. 2019-3 addresses intentional disclosure by one with authority, while Ethics Opinion No. 2019-1 addresses the intentional but unauthorized disclosure by a party’s agent.

## Summary of Opinion

The lawyer who receives <sup>2</sup> confidential information in an inadvertent disclosure<sup>3</sup> must promptly notify the opposing party's lawyer. The lawyer should either follow the instructions of the adversary's lawyer, or refrain from using the materials until a definitive resolution is obtained from a court. Additional obligations may also be imposed by law.

## DISCUSSION

Rule 4.4(b) addresses the ethical obligations of the lawyer who receives a document or ESI that was inadvertently sent.

A lawyer who receives a writing or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the writing or electronically stored information was inadvertently sent shall promptly notify the sender.<sup>4</sup>

The rule recognizes that lawyers occasionally receive information that was mistakenly sent or produced by opposing parties or their lawyers. Further, the comment makes clear the purpose of providing notice to the opposing lawyer is to permit the person to take protective measures. The comment goes on to note that whether the receiving lawyer must take additional steps, including return of the writing or electronic information are matters of substantive law beyond the

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<sup>2</sup> This opinion addresses the ethical issues for the *receiving lawyer*. The obligations of all lawyers to maintain the confidences and secrets of their clients are addressed in ARPC 1.6.

<sup>3</sup> All lawyers have a duty to maintain competence, including a basic understanding of the benefits and risks associated with relevant technology. See ARPC 1.1 Comment (Maintaining Competence). A number of state Bar Associations have issued Ethics opinions requiring lawyers to keep current on changing technology. See, e.g., Fla. Ethics Op. 10-2 (2010) (lawyer must keep current with developments in technology to protect confidential information stored on electronic devices); NY State Ethics Op. 842 (2010) (lawyer has duty to keep up with advances in technology used in law practice.)

<sup>4</sup> ARPC 4.4(b).

scope of the rules of ethics.<sup>5</sup> It also notes that some lawyers may choose to return a writing or delete electronically stored information unread. The decision to make voluntary return or deletion is a matter typically left to the professional judgment of the receiving lawyer. As a matter of professional courtesy, and to avoid unnecessary disputes, it may be advisable before using any such documents to obtain a definitive ruling from the court regarding whether the documents must be returned or deleted.

Alaska's rule is sometimes referred to as a "stop and notify" rule. Other states go farther and require the receiving lawyer to affirmatively set aside the material and take no further action on the documents, including reading them, in order to preserve the status quo.<sup>6</sup> For example, the New Jersey rule provides: "[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."<sup>7</sup>

In Alaska Bar Association Ethics Opinion 97-1<sup>8</sup>, the Committee distinguished the mistaken or inadvertent disclosure of confidential information from other situations. The discussion regarding inadvertently disclosed information in Ethics Opinion 97-1 was based, in part upon ABA Formal Opinion 92-368, which was later withdrawn due to the amendment of Model Rule 4.4.

In the Committee's view, the provisions of Rule 4.4(b) and its commentary control the obligations of the lawyer who receives any information from an opposing party or lawyer that appears to have been inadvertently disclosed. If

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<sup>5</sup> Lawyers practicing in Federal Court will note that Federal Rule of Civil Procedure 26(b)(5) now contains a specific "claw back" provision relating to production, presumably inadvertent, of privileged material.

<sup>6</sup> See generally James M. Altman, *Model Rule 4.4(b) Should Be Amended*, 21 Prof. Law., no. 1, at 16 n.7 (2011) (noting that nine jurisdictions prohibit the receiving lawyer from reading further after realizing the document is confidential).

<sup>7</sup> New Jersey RPC 4.4(b) (2004).

<sup>8</sup> Ethics Opinion 97-1 was adopted before the addition of Rule 4.4(b).

the receiving lawyer knows, or has reason to know, the material was sent inadvertently, the lawyer must notify the opposing lawyer. The lawyer should also carefully review any legal requirements that may be imposed by other law. Finally, the lawyer may consider further voluntary action consistent with the lawyer's professional judgment under Rules 1.2 and 1.4.

Approved by Alaska Bar Association Ethics Committee on January 23, 2019.

Adopted by the Board of Governors on January 31, 2019.