

ALASKA BAR ASSOCIATION

ETHICS OPINION NO. 2019-3

A LAWYER'S DUTY UPON RECEIPT of CONFIDENTIAL INFORMATION – Intentional Disclosure

The Committee has been asked to revisit Ethics Opinion 97-1, addressing a lawyer's obligation upon receipt of intentionally disclosed confidential information, in light of subsequent formal opinions issued by the American Bar Association.

The receipt¹ 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 the "willing party" scenario only.²

Summary of Opinion

The lawyer who receives confidential information in an *intentional and authorized* disclosure is not required to notify the opposing party's lawyer.³

¹ 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

² Ethics Opinion No. 2019-2 addresses Inadvertent Disclosure by opposing counsel or a party, while Ethics Opinion No. 2019-1 addresses the intentional but unauthorized disclosure by a party's agent.

³ The lawyer who receives confidential information in an intentional, but *unauthorized* disclosure must promptly notify the opposing party. Further, the receiving lawyer may find it appropriate either to follow the instructions of the adversary's lawyer, or to refrain from using the materials until a definitive resolution is obtained from a court. Additional obligations may also be imposed by law. See Ethics Opinion 2019-1 addressing intentional disclosure by an *unauthorized* agent.

DISCUSSION

The Committee has previously addressed the situation in which a lawyer obtained confidential information belonging to an opposing party from a person authorized to make the disclosure. In Ethics Opinion 97-1, the Committee was asked whether a lawyer has an obligation to notify his or her opponent upon receipt of confidential information directly from an adverse party. In the first instance, the Committee noted the lawyer had merely received a copy of a confidential communication, which he neither invited nor anticipated. Because the communication came directly and intentionally from the party, who had authority to make the disclosure, the Committee determined the receiving lawyer had no obligation to disclose receipt of the material to his or her opponent.⁴

Since our opinion in Ethics Opinion 97-1, the American Bar Association (ABA) has adopted two formal opinions which support the Committee's position in 97-1. In ABA Formal Opinion 06-440, the American Bar Association determined that materials sent *intentionally* are not the subject of Rule 4.4(b). If the materials were not "inadvertently sent" then the receiving lawyer is not ethically obligated to notify the sender's lawyer or return the materials.⁵

Similarly, ABA Formal Opinion 11-460 addressed the duty of a lawyer when receiving copies of a third-party's email communications with counsel. In that case, an employer's lawyer received copies of an employee's private emails with counsel, which the employer had located on the employee's workplace computer. The ABA determined that Rule 4.4(b) did not apply because the emails were not "inadvertently sent." Instead, they were obtained from a public or private place where they were stored. The opinion notes that some courts have implied a notification requirement upon the receiving lawyer, but the ABA interpreted the rule more strictly. Consequently, the ABA opinion expressly

⁴ Ethics Opinion 97-1 at p 2.

⁵ The ABA cautions that a lawyer may still be required to take action under court rules or other law. See ABA Formal Opinion 06-440 at p 2.

declined to interpret Rule 4.4(b) as requiring notice to opposing counsel except in the situation it expressly addresses (inadvertent disclosure).⁶

Still, the ABA Formal Opinion and other courts have noted general unease with the absence of clear guidance in Rule 4.4(b) as to how to proceed with the intentionally disclosed confidential or privileged information. Potential pitfalls await the receiving lawyer who seeks to make strategic use of an opponent's confidential communications.⁷ The receiving lawyer who chooses to sit quietly with an opponent's confidential information in hand and does nothing may risk disqualification.⁸

The Committee adheres to Ethics Opinion 97-1 and believes that a lawyer who receives the *intentional* disclosure of confidential information by one *authorized* to do so does not violate Rule 4.4(b) if he or she holds the documents without notifying opposing counsel, so long as the receiving lawyer *knows or reasonably believes* the sender was authorized to do so.⁹

In all situations involving receipt of confidential documents of an opposing party, the receiving lawyer would do well to remember that ethical issues should be "resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the

⁶ ABA Formal Opinion 11-460 at p. 2.

⁷ Some courts still rely upon the old ABA opinion framework and retain a notification requirement. See, e.g., *In Re Meador*, 968 S.W.2d 346, 350 (Tex. 1998) (noting failing to comply with ABA opinion 94-382 may require disqualification of counsel). Other courts have adopted notification requirements based on analogy to Rule 4.4(b). See, e.g., *Merits Incentives, LLC v. Eighth Judicial District Court of Nevada*, No. 56313, Slip. Op. at 11 (Nev. Oct. 6, 2011) (adopting a notification requirement based on analogy to Rule 4.4(b) for a lawyer receiving documents from an anonymous source).

⁸ See *Gifford v. Target Corp.*, 2010 US Dist. LEXIS 70293 (D. Minn. July 13, 2010); *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001).

⁹ As the Committee noted in its concluding comment in Ethics Opinion 97-1: "Ordinarily, it may be a good practice, as a matter of 'professional courtesy,' to inform the sending party's counsel of the receipt of the material. This will increase candor and trust between counsel and forestall allegations of wrongdoing." This admonition is just as applicable today.

lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."¹⁰

Approved by Alaska Bar Association on January 23, 2019.

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

¹⁰ ARPC Preamble.