

**ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 97-1**

**Notification of Opponent of Receipt
of Confidential Materials**

The Committee has been presented with a hypothetical situation in which a party in a divorce case intentionally mailed a copy of a confidential letter form her lawyer concerning the litigation to her adverse party's lawyer, and this was done without her lawyer's knowledge. Neither the adverse party, nor the adverse party's lawyer solicited the information. However, the receiving lawyer's client asked that his lawyer not disclose the receipt of the material because it might adversely affect his relationship with his estranged wife. The Committee was asked to opine whether the lawyer who received the letter must, over the objection of his client, notify the lawyer representing the party who mailed the letter.

The Committee believes that the receiving lawyer has no obligation to notify her opponent.¹ There is no Alaska Rule of Professional Conduct that directly controls this situation. ARPC 4.2 prohibits a lawyer from communicating about the subject of the representation with the person the lawyer knows to be represented by another lawyer in the matter. However, in the hypothetical before us, it cannot be said that the lawyer receiving the letter from the other party is communicating at all with the other lawyer's client; he merely received a mailing containing a copy of a confidential communication, which he neither invited nor anticipated.

Nor is this a situation in which a lawyer was mistakenly sent a confidential communication, such as by a misdirected facsimile transmission. In that situation, the ABA Standing Committee on Ethics and Professional Responsibility opined that a lawyer receiving inadvertent disclosure of confidential communication should return the communication unopened and unexamined to the opposing lawyer. ABA formal Opinion 92-368, Inadvertent Disclosure of Confidential Materials (November 10, 1991). In so concluding, the ABA Standing Committee relied, in large part, upon the critical importance of maintaining confidentiality in the attorney-client relationship. However, in the hypothetical before this Committee, disclosure was not inadvertent at all, but was intentionally made by the client, who is, after all, the beneficiary of the

¹This opinion does not address whether there are obligations under the Alaska Rules of Civil Procedure or other rules of court that require disclosure.

rules of protecting attorney-client confidentiality. This Committee finds no other overarching ethical principal embodied in the ARPC that would require notification of opposing counsel by the receiving attorney in this situation.

The situation presented to this Committee is more closely analogous to that of a lawyer who receives, on an unauthorized basis, materials of an adverse party that she knows to be privileged or confidential. In such a situation, the ABA Standing Committee on Ethics and Professional Responsibility, has opined that the receiving lawyer must, before reviewing the materials, notify her adversary's lawyer that she has the 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 on the proper disposition of the materials is obtained from a court. ABA Formal Opinion 94-382, Unsolicited Receipt of Privileged or Confidential Materials (July 5, 1994). State Bar Ethics Committees have disagreed with that result. *See*, Maryland Bar Association, Opinion 89-53 (1989) (receiving lawyer has no obligation to reveal the matter to the Court or opposing party; a lawyers' only obligation is to preserve originals from destruction); Virginia Bar Association Opinion 1076 (1988) (materials may be used although opposing counsel should be notified of their receipt as a matter of "professional courtesy"); Michigan Bar Association CI-1970-1983 (confidential document of the opposing party may be used at trial providing neither the attorney nor his client procured removal of the document from the possession of the opposing party).

ABA Formal Opinion 94-382, and the above-cited state ethics opinions, assumed that the disclosure was made by a third party, who was not authorized to do so. Here, however, the disclosure was made intentionally by the person who had unquestionable authority to do so, and on whose behalf confidentiality rules were promulgated: the client. Accordingly, the Committee does not believe an ethical obligation to disclose receipt of the material should be imposed on the receiving lawyer when the situation was created by the intentional, unsolicited acts of the opposing party, particularly when the disclosure may not be in the best interests of the lawyer's client.²

Approved by the Alaska Bar Association Ethics Committee on November 7, 1996.

² 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. However, absent specific provisions in the ARPC imposing such a duty, the committee declines to create one here.

Adopted by the Board of Governors on January 17, 1997.