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Your Client Has Obtained Privileged Documents Belonging to the Adversary. What Do You Do Now?

As lawyers, we must frequently weigh our duties to our clients against our duties to courts and third parties, including adversaries. One way this tension presents itself is when a client comes into possession of confidential or privileged documents belonging to the other side. Should we look at the documents? Can we use them to our client's advantage? Must we disclose that our client has received the confidential information? The answers depend, to some extent, on how the information is obtained. If the documents are sent to the lawyer "inadvertently," Rule 4.4(b) requires the lawyer to "notify" the sender "promptly." A 2012 opinion by the New York City Bar ethics committee clarified that this rule (which took effect in New York in 2009) requires only notification, but does not require the lawyer to destroy the documents or return them to the sender. NY City Bar Op. 2012-1. Nevertheless, as the opinion notes, other rules or legal authorities may require the lawyer to take further action. (Ethics opinions are generally limited to interpreting the Rules of Professional Conduct.) Judges, in particular, may be unsympathetic to a lawyer who tries to take advantage of inadvertently disclosed materials. Arguably, however, the rule's notice requirement offers sufficient protection and properly places the burden on the adversary to seek relief from the court in the form of an order to destroy or return all copies of the confidential documents.

But what if the client obtains the documents by snooping on the adversary's computer or email account? This dilemma probably arises most often in matrimonial cases, where one spouse gains access to email communications between the other spouse and his/her lawyer, but it can also occur in other contexts, such as business or employment disputes. New York's Rules of Professional Conduct, like the ABA model rules, do not expressly address how a lawyer should treat improperly obtained documents. That omission leaves lawyers struggling to balance their duty under Rule 1.6 to protect client confidentiality against their duties of candor or fairness to courts and third parties. A recent opinion by the New York State Bar ethics committee comes down on the side of confidentiality, concluding that Rule 1.6 prohibits the lawyer from disclosing the fact that his client has obtained privileged documents belonging to an adversary unless the lawyer knows the client has engaged in fraudulent or criminal conduct or "governing judicial decisions or other law require disclosure." NY State Bar Op. 945.

Significantly, the opinion rejects the argument that Rule 8.4(d), which prohibits a lawyer from "engag[ing] in conduct that is prejudicial to the administration of justice," requires disclosure of the client's misconduct in obtaining the documents. The committee reasoned that, by adopting Rule 4.4(b), which deals only with inadvertent disclosure, the New York judiciary intended to leave the question of "improperly obtained documents . . . to case law and other law." The committee's logic is certainly debatable. One could also argue that the judiciary believed a specific rule was unnecessary, because Rule 8.4(d) - or some other rule, such as Rule 4.4(a) - implicitly covers wrongfully obtained documents.

The bottom line is that lawyers should not look exclusively to the ethics rules or ethics opinions to determine how to handle improperly obtained documents, particularly in the context of a pending lawsuit. Case law and court rules (not to mention the Judge's viewpoint) are equally relevant and, in some situations, may trump the rules. Lawyers who attempt to use their adversary's privileged documents may find themselves on the losing side of a disqualification, sanctions, or preclusion motion.

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