Ethical Obligations Regarding Inadvertently Transmitted E-Mail Communications

By Eric M. Hellige

On a daily basis, with a click of the mouse, hundreds of e-mails are exchanged between attorneys and their clients. Much of this traffic constitutes harmless correspondence, but often the content of the e-mail includes sensitive, confidential or privileged information. Occasionally, in the constant stream of e-mail exchange, an e-mail will inadvertently be sent directly or copied to the wrong party. This situation presents a serious concern for attorneys charged with maintaining their own confidentiality, as well as that of their clients. Despite how regularly these circumstances arise, there is no clear consensus among the relevant rules of professional conduct or the ethics opinions interpreting the rules on attorneys' ethical responsibilities regarding inadvertently sent or received e-mails, nor does the case law provide consensus concerning any use the recipient may make of inadvertently received e-mails, or their impact on the waiver of attorney-client privilege. As a result, attorneys face a conundrum when they receive inadvertently disclosed e-mails. This article presents attorneys practicing in the State of New York with some basics that will enable them to better deal with inadvertently transmitted communications.

Historical Development

In 1992, the American Bar Association (the "ABA") Committee on Ethics and Professional Responsibility issued ABA Formal Opinion 92-368, "*Inadvertent Disclosure of Confidential Materials*," which provided 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 by the instructions of the lawyer who sent them.[1]

However, the ABA Model Code of Professional Responsibility (the predecessor to the ABA Model Rules of Professional Conduct) provided no real basis for the duties imposed in ABA Formal Op. 92-368. In fact, ABA Formal Op. 92-368 was deigned to admit that "[a] satisfactory answer to the question posed cannot be drawn from a narrow, literalistic reading of the black letter of the [ABA] Model Rules."[2] As a result, the ABA Committee explained that it had derived these duties from five main principles:

> (i) the importance the [ABA] Model Rules give to maintaining client confidentiality, (ii) the law governing waiver of the attorney-client privilege, (iii) the law governing missent property, (iv) the similarity between the circumstances here addressed and other conduct the profession universally condemns, and (v) the receiving lawyer's obligations to his client.[3]

Following the issuance of ABA Formal Op. 92-368, New York weighed in with its responses. The New York County Lawyers' Association Committee on Professional Ethics issued Formal Opinion 730, "*Ethical Obligations Upon Receipt of Inadvertently Disclosed Privileged Information*," in 2002, which basically reiterated Formal Op. 92-368.[4] In 2003, the Association of the Bar of the City of New York (the "ABCNY") Committee on Professional and Judicial Ethics issued Formal Opinion 2003-4, "*Obligations Upon Receiving a Communication Containing Confidences or Secrets Not Intended for the Recipient*," which concluded that

> a lawyer receiving a misdirected communication containing confidences or secrets (1) has obligations to promptly notify the sending attorney, to refrain from review of the communication, and to return or destroy the communication if so requested, but, (2) in limited circumstances, may submit the communication for in camera review by a tribunal, and (3) is not ethically barred from using information gleaned prior to knowing or having reason to know that the communication contains confidences or secrets not intended for the receiving lawyer. However, it is essential as an ethical matter that the receiving attorney promptly notify the sending attorney of the disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary.[5]

In reaching this conclusion, ABCNY Formal Op. 2003-4 backed away from absolute imposition on lawyers of the duties outlined in ABA Formal Op. 92-368. In 2004, the New York State Bar Association (the "NYSBA") Committee on Professional Ethics, in Opinion 782, "*E-mailing*

Documents That May Contain Hidden Data Reflecting Client Confidences and Secrets," described the standard of care lawyers should follow when using e-mail communication, stating that "a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication…[t]he extent of [which] var[ies] with the circumstances."[6]

Addressing the Confusion

For many years, confusion remained as to whether the three duties set forth in ABA Formal Op. 92-368 were appropriate statements of professional responsibility to which lawyers must adhere. As a consequence, in the last major revision of the ABA Model Rules of Professional Conduct, the ABA adopted new rules governing inadvertent disclosure. ABA Model Rule 1.6(a), "*Confidentiality of Information*," prevented attorneys from revealing information about a client without consent and required them to protect confidential client information.[7] Comments to the rule required lawyers to safeguard client information from inadvertent or unauthorized disclosure, and to take reasonable precautions to prevent information from reaching unintended recipients.[8] ABA Model Rule 4.4(b), "*Respect for Rights of Third Persons*," reduced the ethical duties imposed on attorneys who receive inadvertent e-mails, leaving only the duty to notify the sender of the inadvertent transmission.[9] As a result of that change, in 2005, the ABA Committee on Ethics and Professional Responsibility issued ABA Formal Opinion 05-437, "*Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368 (November 10, 1992)*," withdrawing its previously expressed opinions in ABA Formal Op. 92-368.[10]

Despite the ABA's adoption of rules governing inadvertent disclosure, the New York Lawyer's Code of Professional Responsibility, which governs the conduct of New York attorneys, lacked provisions expressly governing inadvertent disclosure until 2009. State courts and ethics committees struggled with how to deal with such situations, and a body of law developed to expressly address such issues. However, the New York Rules of Professional Conduct, which became effective on April 1, 2009, attempted to rectify this gap by including a provision that specifically addressed inadvertent disclosure. New York Rule 4.4(b), "*Respect for Rights of Third Person*," states that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."[11] Given the brevity of New York Rule 4.4(b), the comments to the rule, which specifically provide that the term "document" includes any electronically stored information that can be read (including e-mails), are more helpful in providing guidance to attorneys. The comments state as follows:

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] [Rule 4.4(b)] recognizes that lawyers sometimes receive documents that were mistakenly sent, produced, or otherwise inadvertently made available by opposing parties or their lawyers. One way to resolve this situation is for lawyers to enter into agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents. In the absence of such an agreement, however, if a lawyer knows or reasonably should know that such a document was sent inadvertently, this Rule requires only that the lawyer promptly notify the sender in order to permit that person to take protective measures. Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail and other electronically stored information subject to being read or put into readable form.

[3] Refraining from reading or continuing to read a document once a lawyer realizes that it was inadvertently sent to the wrong address and returning the docu-

> ment to the sender honors the policy of these Rules to protect the principles of client confidentiality. Because there are circumstances where a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document, however, this Rule does not subject a lawyer to professional discipline for reading and using that information. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document, or to return the document to the sender, or both. Accordingly, in deciding whether to retain or use an inadvertently received document, some lawyers may take into account whether the attorney-client privilege would attach. But if applicable law or rules do not address the situation, decisions to refrain from reading such documents or to return them, or both, are matters of professional judgment reserved to the lawyer.[12]

Addressing the same issue two years later under the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011, the ABA Standing Committee on Ethics and Professional Responsibility issued two opinions that address attorneys' ethical obligations concerning inadvertently disclosed correspondence under the ABA Model Rules.

ABA Formal Opinion 11-459, "*Duty to Protect the Confidentiality of E-mail Communications with One's Client*" explains that lawyers have a duty to warn clients about the risks of sending or receiving electronic communications where there is a significant risk that an employer or third party may gain access to privileged e-mail correspondence.[13] As a general rule, the ABA explains, lawyers should advise clients about the importance of communicating with the lawyer in a manner that protects the confidentiality of e-mail communications, and warn the client against discussing their communications with others. A lawyer should also instruct the client to avoid using an employer-issued computer, telephone or other electronic device to receive or transmit confidential communications. Despite e-mail becoming a common replacement for letters and in-person meetings, e-mail communications without safeguards can be just as risky as having a confidential face-to-face conversation in a setting where it can be overheard.[14]

The ABA also points to various factors that tend to establish an ethical duty on the lawyer to protect client-lawyer confidentiality by warning the client against using business devices for communications with their own counsel. Clients should be warned if (i) they have engaged in, or indicated an intent to engage in, e-mail communications; (ii) their employment provides access to workplace communication devices; (iii) given the circumstances, the employer or other third party has the ability to access e-mail communications; or (iv) as far as the lawyer knows, the client's employer's policies and the jurisdiction's laws do not clearly protect those communications.[15]

ABA Formal Opinion 11-460, "*Duty When Lawyer Receives Copies of a Third Party's E-mail Communications with Counsel*," explains that when an employer's lawyer receives copies of an employee's private communications with counsel, ABA Model Rule 4.4(b) does not require the employer's lawyer to notify opposing counsel of the receipt of the communications.[16] With ABA Formal Op. 11-460, the ABA has provided a clear distinction for dealing with inadvertently received communications based on how they were disclosed to the unintended recipients. In the case of a communication that is inadvertently sent to an unintended recipient by one of the parties to the communication, ABA Model Rule 4.4(b) "obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly."[17] However, when the communication has been retrieved by an unintended recipient from a public or private space where it is stored, such as in the context of an employer's access to an employee's files, then the ABA opines that ABA Model Rule 4.4(b) does not require the third party to notify opposing counsel of the receipt of the communications.[18]

It is important to note that the ABA Model Rules and the ABA formal opinions are not binding, and merely provide guidance to the states regarding the ABA's position on the rules of professional conduct, and how to interpret those rules. Therefore, attorneys should pay attention to developments on ethical issues in the state laws, ethical rules and case law of their local jurisdiction.

Current Expectations of Professional Conduct

To review, the following are the current positions of the ABA and the State of New York of which every lawyer should be aware when he or she receives an inadvertently disclosed e-mail:

ABA

Sender's Duty When Transmitting E-mails

The sender has no explicit duty regarding the sending of e-mails. A lawyer's general duties with regard to the confidentiality of client information under ABA Model Rule 1.6 apply to e-mail communications as well.[19]

Must the Recipient Notify the Sender Upon Receipt of an Inadvertently Transmitted E-mail?

Yes. Under ABA Model Rule 4.4(b), a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."[20] However, ABA Formal Op. 11-460 clarifies that ABA Model Rule 4.4(b) does not impose notification obligations on lawyers that retrieve inadvertently disclosed communications from a public or private sphere, rather than receiving them from a specific sender.[21]

May the Recipient Review an Inadvertently Transmitted E-mail?

Yes. ABA Formal Op. 05-437 states that although ABA Model Rule 4.4(b) "obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly," it "does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer."[22]

New York

Sender's Duty When Transmitting E-mails

NYSBA Op. 782 notes that "a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication, and therefore must assess the risks attendant to the use of that technology and determine if the mode of transmission is appropriate under the circumstances."[23] The extent of reasonable care varies with the circumstances.

Must the Recipient Notify the Sender Upon Receipt of an Inadvertently Transmitted E-mail?

Yes. ABCNY Formal Op. 2003-4 concludes that an attorney who receives a communication and is exposed to its contents "prior to knowing or having reason to know that the communication was misdirected ... is not barred, at least as an ethical matter, from using the information," but also states that "it is essential as an ethical matter that a receiving attorney promptly notify the sending attorney of an inadvertent disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary to prevent any further disclosure."[24]

May the Recipient Review an Inadvertently Transmitted E-mail?

Yes. The comments to New York Rule 4.4(b) state that while "refraining from reading or continuing to read a document once a lawyer realizes that it was inadvertently sent to the wrong address" honors the policy of the Rules, since there may be "circumstances where a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document, [the] Rule does not subject a lawyer to professional discipline for reading and using that information."[25] The comments to New York Rule 4.4 do, however, warn lawyers to take into account any applicable law or rules before reviewing inadvertently received e-mails. In the absence of such law or rules, "decisions to refrain from reading such documents or to return them, or both, are matters of professional judgment reserved to the lawyer."[26]

Endnotes

1. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).
2. *Id.*
3. *Id.*
4. NYCLA Comm. on Prof'l Ethics, Formal Op. 730 (2002).
5. ABCNY Comm. on Prof'l and Jud. Ethics, Formal Op. 2003-4 (2003).
6. NYSBA Comm. on Prof'l Ethics, Formal Op. 782 (2004).
7. Model Rules of Prof'l Conduct. R. 1.6(a) (1983).
8. Model Rules of Prof'l Conduct. R. 1.6 cmt. (1983).
9. Model Rules of Prof'l Conduct. R. 4.4(b) (1983).
10. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).
11. NY Rules of Prof'l Conduct. R. 4.4(b) (2009).
12. NY Rules of Prof'l Conduct. R. 4.4 cmt. (2009).
13. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011).
14. *Id.*
15. *Id.*
16. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-460 (2011).
17. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).
18. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-460 (2011).
19. Model Rules of Prof'l Conduct. R. 1.6(a) (1983).
20. Model Rules of Prof'l Conduct. R. 4.4(b) (1983).
21. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-460 (2011).
22. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).
23. NYSBA Comm. on Prof'l Ethics, Formal Op. 782 (2004).
24. ABCNY Comm. on Prof'l and Jud. Ethics, Formal Op. 2003-4 (2003).
25. NY Rules of Prof'l Conduct. R. 4.4 cmt. (2009).
26. *Id.*

Eric M. Hellige is a partner at Pryor Cashman and can be reached at ehellige@pryorcashman.com. Durre S. Hanif is an associate at Pryor Cashman and can be reached at dhanif@pryorcashman.com.