

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 05-437

October 1, 2005

Inadvertent Disclosure of Confidential Materials:

Withdrawal of Formal Opinion 92-368 (November 10, 1992)

A lawyer who receives a document from opposing parties or their lawyers and knows or reasonably should know that the document was inadvertently sent should promptly notify the sender in order to permit the sender to take protective measures. To the extent that Formal Opinion 92-368 opined otherwise, it is hereby withdrawn.

On November 10, 1992, the Committee issued Formal Opinion 92-368, "Inadvertent Disclosure of Confidential Materials," in which we opined as follows:

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 the instructions of the lawyer who sent them.

The opinion covered the circumstances where a lawyer received information subject to the attorney-client privilege or that could otherwise be deemed confidential in a situation where it was clear that the information was inadvertently sent. In that instance, the Committee opined that the receiving lawyer had three obligations: (1) to refrain from examining the materials; (2) to notify the sending lawyer of the receipt of the materials; and (3) to abide by the instructions of the sending lawyer.

In February 2002, the ABA Model Rules of Professional Conduct¹ were amended pursuant to the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct. The amendment to Rule 4.4, "Respect for Rights of Third Persons," not only directly addressed the precise issue discussed in Formal Opinion 92-368, but narrowed the obligations of the receiving lawyer. The amendment added Rule 4.4(b), which states that "[a] lawyer who receives a document relating to the representation of the

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2003. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.

lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

Rule 4.4(b) thus only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. The rule does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer. Comment [2] to Rule 4.4 explains, "[w]hether 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 of whether the privileged status of a document has been waived." Comment [3] goes on to state the following:

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Thus, because the conclusion of Formal Opinion 92-368 presently conflicts with amended Rule 4.4, the opinion is hereby withdrawn.