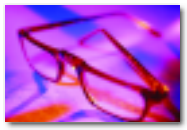

Inadvertent Disclosure Revisited

In previous articles[1] that predated new ER 4.4(b),[2] we reviewed the ethical course you were supposed to follow if you ever received documents through discovery, correspondence or otherwise from opposing counsel that were clearly sent to you inadvertently. This includes correspondence between opposing counsel and her client, litigation strategy summaries, interoffice correspondence between co-counsel and the like.

Prior to the adoption of new ER 4.4(b) in Arizona, it was suggested that all lawyers follow the aspirational though somewhat vague guidelines articulated in an ethics opinion from the American Bar Association,[3] subsequently adopted in Arizona.[4] This opinion concluded that a lawyer who receives privileged or confidential documents sent by mistake should (1) refrain from examining the materials, (2) notify the sending lawyer of the receipt of those materials and (3) abide by the instructions of the sending lawyer concerning their disposition.

These guidelines were often criticized as exulting the rights of a careless lawyer over the receiving lawyer's own obligations of zealous representation to his client. Other state ethics opinions flatly disagreed with them.[5]

The ABA relaxed its stance somewhat in a 1994 opinion,[6] stating that the obligation to stop reading the misdirected document was not absolute, and that the materials did not have to be returned to the sending lawyer immediately. There remained a lingering feeling among many lawyers, however, that they could be faulted by one side or the other regardless of what actions were taken, and the rules concerning inadvertent disclosure remained unsettled.

Then, on Dec. 1, 2003, new ER 4.4(b) became effective. This provision, consisting of a single sentence, was added to the existing ER 4.4 dealing with the lawyer's obligations to respect the rights of others. ER 4.4(b) states that a lawyer who receives a document he knows or reasonably should know was sent by mistake needs only to notify the sender promptly and to preserve the status quo long enough so that the sender has a reasonable opportunity to take "protective measures."

Note that the actual rule itself does not require the receiving lawyer to stop reading the material. Comment 2 to ER 4.4, on the other hand, states that the receiving lawyer is "required" to stop reading the document as soon as it is clear that it was sent inadvertently. This is an "Arizona-specific" requirement that is not found in the Comments to Model Rule 4.4(b), as it was adopted by the ABA, and is not mandated under the newest ABA opinion on the subject, which only requires prompt notification to the sender of the situation.[7]

Neither the new Arizona ER nor the Comment answer the question of how much of the document can be read before the receiving lawyer "knows" or "reasonably should know" that it was sent inadvertently, and this will continue to be a gray area in Arizona's ethics rules. On the other hand, neither the new Arizona ER nor the Comment requires the receiving lawyer to blindly follow the directions of the sender upon notification of the situation. The requirement of prompt notification to the sender is crystal clear, as is the admonition to maintain the status quo until either an agreement can be reached between counsel about what to do or a court order can be obtained.

Even with new ER 4.4(b), questions concerning whether the sending lawyer has waived the attorney–client privilege or the work product defense will still persist. For your part, however, as the recipient, your ethical "safe harbor" is to (1) stop examining whatever it is that you suspect was misdirected, (2) call opposing counsel and (3) do not do anything with the document(s) until the sender has had reasonable time to take protective measures. Violation of these provisions could subject you to sanctions and/or a Bar complaint.[8]

New this month on p. 52: "Bar Counsel Insider," insights from the State Bar's own Lawyer Regulation Department attorneys.

Ethics Opinions and the Rules of Professional Conduct are available at www.myazbar.org/Ethics

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endnotes

1. *Inadvertent Disclosure of Privileged Documents,* ARIZ. ATT'Y, Nov. 1999, at 24; *Honoring Confidentiality When Communications Take A Wrong Turn,* ARIZ. ATT'Y, Feb. 2001, at 14.
2. Rule 42, ARIZ.R.S.CT.
3. ABA Formal Op. 92-368 (Nov. 10, 1992).
4. Arizona Ethics Op. No. 93-14 (Sept. 23, 1993).
5. *See, e.g.,* Maryland Bar Ass'n Op. 89-53 (1989); Virginia Bar Ass'n Op. 1076 (1988); and Michigan Bar Ass'n Op. CI-970 (1983).
6. ABA Formal Op. 94-382 (Unsolicited Receipt of Privileged or Confidential Materials).
7. *Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368,* ABA Formal Op. 05-437 (Oct. 1, 2005).
8. An example of what never to do can be found in the case of *State Comp. Ins. Fund v. WPS, Inc.,* 82 Cal. Rptr. 2d 799 (Cal. Ct. App. 1999), in which the receiving lawyer not only failed to notify opposing counsel of the receipt of obviously privileged documents but then immediately sent the documents to his expert witness who in turn sent them to another law firm whom he was also assisting. The trial court's sanctions against the receiving lawyer were overturned on appeal, the California court saying that the ethical rules were not all that clear. This probably would not have been the result under Arizona's new rules.