BY DAVID D. DODGE

Honoring Confidentiality When Communications Take a Wrong Turn

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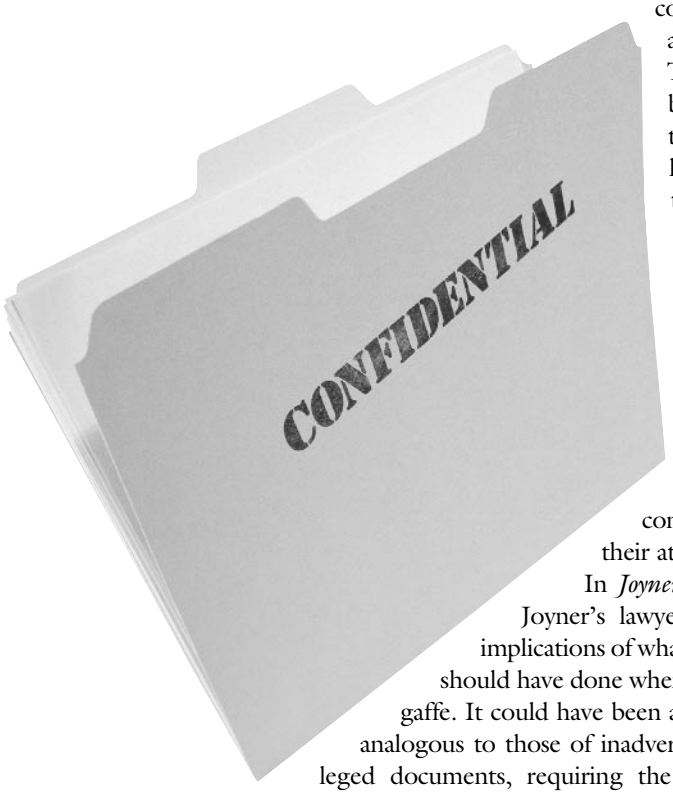
A PREVIOUS COLUMN reviewed the ethical obligations of a lawyer who received documents from opposing counsel that were privileged but sent by mistake.[1] What are the ethical considerations, however, when a party, without his lawyer's knowledge, mistakenly leaves a confidential message on opposing counsel's voice-mail?

In *Joyner v. Southeastern Pennsylvania Transportation Authority*, 199 Pa. Commw. LEXIS 586 (1999), Mr. Joyner was one of the plaintiffs in a personal injury case. Thinking he was calling his own lawyer, Joyner left a voice-mail message on the defendant lawyer's telephone. In the message, Joyner asked if he could resume an activity he claimed he could not do as a result of the accident; the clear implication was that Joyner was capable of resuming the activity but would not if it affected his case. Defense counsel successfully moved to have the voice-mail received in evidence, and Joyner lost his case. On appeal, Joyner's lawyer claimed that the message was a confidential communication subject to attorney–client privilege. The court disagreed because Joyner was not talking to his lawyer and had not demonstrated that he reasonably believed the voice-mail was his attorney's. The court stated that its decision would have the "salutary effect of encouraging parties to take reasonable steps to assure that the individual they wish to communicate with is in fact their attorney."



In *Joyner*, neither the court nor Joyner's lawyer discussed the ethical implications of what the defendant's lawyer should have done when he discovered Joyner's gaffe. It could have been argued that the case was analogous to those of inadvertent disclosure of privileged documents, requiring the defendant's lawyer to recognize that a mistake had been made and to honor the confidentiality of the communication. Joyner's lawyer might have directed the court's attention to ABA Formal Opinion 92-368 (November 10, 1992) (inadvertent disclosure of confidential materials); it states that the confidentiality of attorney–client communications in any form is a concept that is so fundamental to our legal system that it would be unprofessional to capitalize on the errors of opposing parties and their counsel when an obvious mistake has been made and a confidence has been disclosed to someone for whom it was not intended. The opinion argues that returning the inadvertently disclosed document, e-mail, fax message or tape upholds the principle of confidentiality and its importance in our system of justice and that honoring the confidentiality of the communication enhances the credibility and professionalism inherent in "doing the right thing" and the lawyer's standing with the other party, opposing counsel and the court.

Apparently, nobody ever thought of viewing *Joyner* as an ethical problem. Of course, nothing like that would ever happen in Arizona. Our Supreme Court has adopted the ABA's Model Rules of Professional Conduct,[2] and the State Bar generally gives due consideration to ABA formal opinions.[3] In Arizona Ethics Opinion No. 93-14 (September 23, 1993), our Ethics Committee was presented with a case involving a tape recording left by the husband in a divorce case at the community home after he had collected his property and left pursuant to an agreement of the parties. The wife found the tape, listened to it and discovered that it included conversations the husband had with several individuals, including his lawyer. The Committee cited applicable ethical rules, including ER 3.4 (fairness to opposing party and counsel) and ER 4.4 (respect for rights of third persons).[4] The Committee also cited ABA Formal Opinion 92-368 but distinguished the case from the situation in which the

attorney has obtained confidential or privileged information due to the obvious inadvertence of opposing counsel. On the assumption that the other party did not consider the tape confidential, the Committee opined that opposing counsel could listen to the tape. The Committee went to some lengths to point out that if it were ever demonstrated that the tape was confidential and had been left inadvertently, opposing counsel ran the risk of being disqualified and would have to return the tape, subject to any issues concerning waiver of the attorney–client privilege.

An Arizona court probably would agree with *Joyner* that the communication via voice-mail was not privileged.[5] The ethical resolution, however, would require disclosure to opposing counsel of the receipt of the communication and, perhaps, resort to the court for guidance. The court could have allowed Joyner to withdraw the part of his damage claim that he admitted in his voice-mail was not genuine; if Joyner refused, the court could have admitted the voice-mail in evidence. The lesson in this is that ethical considerations often transcend the legal aspects of some disputes. In this age of push-button electronic communication, attorney–client privilege or the work-product doctrine rarely will resolve cases of inadvertent disclosure.

ENDNOTES

1. David D. Dodge, *Inadvertent Disclosure of Privileged Documents*, ARIZ. ATTORNEY, Nov. 1999, at 24.
2. Rule 42, ARIZ.R.S.CT.
3. *See* Heidi L. McNeil & Christopher J. Littlefield, *The Inadvertent Disclosure of Privileged Documents*, ARIZ. ATTORNEY, Nov. 1993, at 10, 15–16. Committee on Rules of Professional Conduct, State Bar of Arizona, *Statement of Jurisdictional Policies,* May 6, 1998.
4. Arizona Rules of Professional Conduct, ARIZ.R.S.CT. 42.
5. *Lietz v. Primock*, 84 Ariz. 273, 327 P.2d 288 (1958) (lawyer could not invoke attorney–client privilege unless he could demonstrate he was acting as an attorney for the person speaking); *accord*, *Samaritan Foundation v. Superior Court*, 173 Ariz. 426, 844 P.2d 593 (1992), *affirmed in part, vacated in part*, 176 Ariz. 497, 863 P.2d 870 (1993).

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