

# Ethics Corner: Putting The Genie Back

## *What To Do When Your Client Has Stolen Documents*

By **Ronald C. Minkoff & Amelia K. Seewann**

It's one of the toughest ethics questions a lawyer can face: what to do when a client embroiled in a dispute with a former employer presents purloined (but helpful) documents? If the lawyer tells the employer, the client could get in serious trouble, and the case could be lost. But if the lawyer keeps silent or (worse) reviews the documents, the consequences can be equally severe. In both cases, the lawyer and the client find themselves at serious risk.

The ethics rules do not squarely address this no-win situation but, along with a growing body of case law, they do provide some guidance. In this article, we will first discuss a lawyer's ethical obligations upon receipt of improperly obtained materials. Second, we will discuss whether a court may prohibit a client from using the improperly obtained materials in an adversarial proceeding against the employer or impose other sanctions. Finally, we conclude with suggested steps for lawyers to follow in this situation that will allow them to comply with their ethical responsibilities while also vigorously representing the interests of their clients.

### The Relevant Ethics Rules

A lawyer representing a client who has improperly obtained documents from his or her employer must begin by reviewing the applicable rules and bar opinions in the relevant jurisdiction. The Model Rules of Professional Conduct (the "Model Rules") do not contain a rule specifically addressing this situation. Nevertheless, those rules, as adopted by the various states, are often invoked by courts and disciplinary authorities to impose obligations upon the lawyer-recipient.

#### Model Rule 4.4

A lawyer confronted with improperly obtained documents might first turn to [Model Rule 4.4](#), which governs a lawyer's duty to respect the rights of third persons and appears at first blush to address the situation. This appearance is deceiving. For example, subsection (a) of the rule provides, in pertinent part:

(a) In representing a client, a lawyer shall

not . . . use methods of obtaining evidence that violate the legal rights of [a third] person.

This rule only prohibits a *lawyer* from using methods of obtaining evidence that violate the rights of another. It does not explicitly apply where the *client* procured the evidence by violating another's rights. Though Model Rule 4.4(a) does not explicitly apply, some bar opinions have interpreted the rule to implicitly prohibit a lawyer from *reviewing* the improperly obtained documents, apparently because once the lawyer reviews the documents, the lawyer is deemed to be "us[ing] methods of obtaining evidence."

Subsection (b) of Model Rule 4.4 also appears applicable, but is not. It states:

(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.

As we will show below, the ABA and state bar ethics opinions interpreting this rule conclude that it does not apply where the documents were not sent inadvertently, but instead were misappropriated and sent deliberately to the attorney.

The Comments to Model Rule 4.4 mention our scenario, but only to point out that the Model Rules do not cover it. In a 2006 ethics opinion (Formal Op. 06-440), the ABA Standing Committee on Ethics and Professional Responsibility (the "ABA") opined that the Model Rules do not impose any ethical obligations on the attorney in this situation. In that opinion, the ABA withdrew a 1994 ABA ethics opinion that set forth guidelines for lawyers who receive "on an unauthorized basis materials of an adverse party that she knows to be privileged or confidential." The 1994 ethics opinion had stated that a lawyer receiving such materials had to take several steps, including:

(a) refraining from reviewing materials which

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are probably privileged or confidential . . . ; (b) notifying the adverse party or the party's lawyer that the receiving lawyer possesses such documents; (c) following the instructions of the adverse party's lawyer; or (d), in the case of a dispute, refraining from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

In Formal Opinion 06-440, the ABA noted that this earlier opinion found no basis in the Model Rules, but was based instead on various common law principles and the importance of protecting the attorney-client privilege. While noting that these principles "are part of the broader perspective that may guide a lawyer's conduct in [this] situation, . . . they are not . . . an appropriate basis for a formal opinion of this Committee, for which we look to the Rules themselves." It then determined that a lawyer receiving improperly obtained documents – *i.e.*, documents obtained intentionally – did not have to follow Model Rule 4.4(b) because that rule applies only where the sender's conduct was inadvertent. Intentional misconduct, the opinion said, was a matter of law outside the scope of the Model Rule 4.4(b). In making this ruling, the opinion did not suggest that a lawyer is under no obligation whatsoever to notify the adverse party or to refrain from reviewing the documents; rather, it stated that the language of Model Rule 4.4 does not itself impose those requirements.

#### Model Rule 8.4

The more general provisions of [Model Rule 8.4](#)(b) and (c), which prohibit a lawyer from engaging in criminal or dishonest conduct, have also been applied to the purloined document scenario. Even where there is no finding that the conduct was illegal or dishonest, a lawyer may still violate Rule 8.4(d), which prohibits lawyers from engaging in "conduct that is prejudicial to the administration of justice." As discussed below, courts are more likely to impose sanctions where the improperly obtained documents contain information to which the client or the advocate would not otherwise have had access – *i.e.*, information which is privileged, work product or proprietary.

#### Additional Rules

Bar opinions from several states have cited a variety of

other ethical precepts to support ethical duties to, among other things, return or disclose the documents. For example, a Florida bar opinion stated that a lawyer would have to produce the improperly obtained documents in response to a valid discovery request. Additionally, if the documents themselves were stolen property, then ethical rules and/or substantive law may require the lawyer to turn over the documents.

Countering this, and showing how painful this dilemma can be, the very same bar opinions remind the lawyer to be mindful of ethical obligations owed to the client. These obligations include the duty to abide by a client's decisions concerning the objectives of the representation and the duty of confidentiality.

But these opinions do provide helpful advice. The Florida opinion stated that a lawyer must first determine whether the documents are stolen or contraband, and whether he or she has a legal obligation to disclose them or turn them over to the police. Even if the documents are not themselves contraband, the opinion continues, "the inquiring attorney must inform the client that the materials cannot be retained, reviewed or used without informing the opposing party that the inquiring attorney and client have the documents at issue," and must withdraw from the case if the client refuses.

The Pennsylvania Bar Association approached the situation a bit differently. Opinion No. 2008-02 (2008) states that the lawyer must first determine whether there is a risk of criminal or civil liability because of the way the documents were obtained and, if there is, and if the client insists on using the documents, the lawyer should "seriously consider withdrawing from the representation." But if the only concern is whether the documents themselves are confidential, the lawyer should have them reviewed independently. If it turns out the documents can be used, and their use "will significantly advance the client's interests," then there may be an "affirmative duty" to make them part of the case.

### **The Relevant Case Law**

Courts reviewing cases involving the unauthorized receipt of another's documents generally find that the ethics rules do not exhaust the considerations that should inform a lawyer's conduct. These courts, obligated to protect the integrity of

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the judicial system, fill the gap left by the ethics rules through their inherent powers to sanction offending litigants and lawyers. Available sanctions include, among other things, dismissal of claims or defenses, disqualification of counsel, the suppression or limitation of evidence, and the imposition of court costs. In order to determine the appropriate sanction, if any, courts generally weigh two factors: (i) the severity of the wrongdoing; and (ii) the prejudice to the adversary. This analysis is fact-driven and courts make decisions on a case-by-case basis.

#### Dismissal of Claims

Dismissal of a claim or a defense based on discovery misconduct is a “harsh sanction.” It should be imposed only after the court carefully considers, among other things, the degree of the wrongdoer’s culpability, the consideration of lesser sanctions, and the prejudice to the other party. Absent extraordinary circumstances, courts are reluctant to dismiss a client’s case for discovery abuse because a court’s primary purpose is to resolve litigation based on the merits. Nonetheless, courts have dismissed actions where the client’s misconduct was particularly egregious and where lesser sanctions could not rectify the harm because the client had wrongfully gained access to otherwise unavailable information that prejudiced the adversary.

#### Disqualification of Counsel

Like dismissal of an action, disqualification of counsel is a severe sanction and generally should be limited to situations where counsel unfairly gained access to information that he or she would otherwise not have known. Courts are more likely to disqualify counsel where counsel reviewed and relied upon the documents in the prosecution of the client’s case than if the documents are either irrelevant or are excluded from use in the case under the attorney-client privilege or the work product doctrine.

Courts will also consider whether the lawyer acted in bad faith, and are less likely to disqualify a lawyer or impose other sanctions where the lawyer reviewed the relevant ethical guidelines and/or obtained ethics advice. Courts will also look to whether counsel responsibly handled the documents (*i.e.* segregated them and/or declined to review them) once he or she learned that the client obtained the documents under suspicious circumstances.

#### Suppression of Evidence

Courts vary in their approaches to motions to preclude inappropriately obtained documents. Where the documents

would otherwise have been subject to production in the litigation, some courts have imposed restrictions on the use of the documents for the remainder of the litigation. Other courts permit the offending party to use the documents, relying on the “inevitable discovery” doctrine, which allows evidence that was unlawfully obtained to be used in litigation if it could and would have been lawfully obtained anyway. Under this approach, the court may order the former employee to return the documents to the employer, who will in turn produce all relevant, non-privileged documents to the employee and may require the employee to pay the costs of any related motion practice.

The rationale behind this approach is that courts have an overarching responsibility to protect against the greater injustice that would result if documents that otherwise would be produced and admissible could not be considered in adjudicating the parties’ case.

#### **Another Analogy – The Real Evidence Situation**

One more body of case law that may provide guidance here is that involving a lawyer’s receipt from a client of illegal contraband, such as a weapon or the proceeds of a crime. Courts have rejected efforts to claim that this action – the receipt of the contraband itself – is a privileged attorney-client communication. Nor will courts countenance destruction of contraband or other evidence, often finding that lawyers who do have committed obstruction of justice.

More nuance, however, is required to address situations where the lawyer located contraband based on communications with his or her client. If the lawyer simply observes the contraband, but does not remove it, that *observation*, being the product of an attorney-client communication, is deemed protected by the attorney-client privilege.

But if the lawyer does remove the contraband, *e.g.*, to test it, he or she is then obligated to reveal it to the prosecutor, and to disclose its original location and condition. The prosecutor, in turn, must present the evidence in a manner that does not reveal the content of the attorney-client communication that led to its discovery.

It does not appear that the principles applicable to real contraband have been applied to cases involving inappropriately obtained documents. Nevertheless, the contraband cases suggest that lawyers and their clients are

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safest if they do not take possession of, and do not view, the documents, and that lawyers can gain their clients a measure of protection (*i.e.*, a requirement that the other side not reveal at trial the confidential communications regarding the source) by voluntarily producing the documents.

### Conclusion and Practice Tips

In sum, though no ethics rules squarely apply to our situation, the lawyer receiving improperly obtained documents undoubtedly owes obligations to third parties and to the court. Given that the documents were purposely and improperly obtained by the client to aid in his or her case, those obligations must be stricter than those required under Model Rule 4.4(b) for *inadvertently* produced documents.

As one court has recently noted, “[t]he justifications underlying the protections afforded to inadvertent productions, however, apply with even greater, and stricter, force in connection with advertent but unauthorized disclosures.” Thus, the lawyer may well be obliged to provide notice to the owner of the documents and additionally may have to refrain from reviewing and/or using the documents, notwithstanding any concerns about maintaining client confidentiality. Moreover, though the case law on this topic is fact-specific, it is clear that various sanctions may be imposed on the client and the lawyer depending on the severity of the conduct involved and the content of the documents. These potential sanctions are only further reason for a lawyer to adopt a conservative approach.

When confronted with a situation involving improperly obtained documents, we suggest the following step-by-step approach:

- ◆ Do not read the documents, or have anyone on your office staff do so.
- ◆ Discuss the situation, including the ethical dilemma, with your client. Try to determine how the documents were obtained, and if they contain proprietary information, trade secrets or attorney-client confidences. If the client possibly committed a criminal act, the client may need to obtain advice from a criminal defense attorney.
- ◆ The attorney should also find out the client’s objectives in the case, including whether the client would like to use the documents in the case. In doing so, the lawyer should inform the client of the potential risks involved, including the risk that the court may subject the client or the attorney to sanctions for their conduct if it finds that proper steps were not followed.
- ◆ If the client wishes to go forward with the case and the client does not want to disclose the documents to his or her adversary, the lawyer should segregate the documents and refrain from reviewing them. The lawyer may also wish to seek ethics advice from an independent lawyer to determine whether, based on the *independent lawyer’s* review of the documents, the client may review and/or use the documents in litigation.
- ◆ In the event that potential criminal or civil liability cannot be ruled out and the client persists in using the documents to advance the client’s case, the attorney should consider whether to withdraw from the representation.
- ◆ Alternatively, the lawyer can obtain the client’s permission to inform the opposing party that the lawyer has the documents, that they have been segregated and not reviewed, and that they will be returned on the understanding that the opposing party will (a) preserve them; (b) produce any responsive, non-privileged documents in discovery; and (c) provide a log of all privileged documents. If the opposing party does not agree, the lawyer may seek a court order.
- ◆ If there is any chance that the documents are originals or duplicates of documents that no longer exist, do not return them to the client. It is better to keep them segregated and unread than take the chance that the documents will be lost or destroyed, with the resulting risks of spoliation and obstruction of justice claims.

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