

New York State Bar Association
Committee on Professional Ethics
Opinion 945 (11/07/2012)

Topic: Disclosure of client wrongdoing.

Digest: A lawyer may not disclose that the client has been reading the opposing party's client-lawyer e-mails, although not communicating the e-mails or their contents to the lawyer, unless (1) the lawyer knows that the client is committing a crime or fraud and no other remedial measures will prevent harm to the opposing party, or (2) governing judicial decisions or other law require disclosure.

Rules: 1.6, 3.3, 4.4(b), 8.4(d).

QUESTION

1. A lawyer represents a client in a matrimonial litigation. The client has disclosed that the client has access to, and has been reading, the spouse's e-mails, including e-mails with counsel. Although the client has not provided the spouse's lawyer-client e-mails or disclosed their contents to the lawyer, the client may be using knowledge of their contents in making decisions about the litigation. Must the lawyer disclose the client's conduct?

OPINION

2. A lawyer's knowledge that the client is reading the spouse's client-lawyer e-mails is "confidential information" subject to the lawyer's confidentiality duty under Rule 1.6(a). The lawyer should admonish the client to refrain from this conduct. However, absent an exception to the general duty to preserve a client's confidential information, the lawyer may not disclose the client's conduct to the court or opposing counsel.

3. One arguable source of a disclosure obligation in this situation is Rule 4.4(b), which requires a lawyer who "receives" an "inadvertently sent" document to notify the sender. By its terms, this rule is not applicable, however, since the lawyer has not "received" the e-mails from the opposing party or counsel or from anyone else. Further, even if the lawyer had received the e-mails from the lawyer's client, it is uncertain whether the rule would apply. At least in the view of the ABA ethics committee, the rule would be inapplicable because the e-mails, although wrongly obtained by the lawyer's client, have not been "inadvertently sent." *See* ABA Formal Op. 11-460 (2011); ABA Formal Op. 06-440 (2006). The Comment accompanying Rule 4.4(b) is consistent with the ABA's interpretation. *See* Rule 4.4(b), Cmt. [2] ("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 wrongly obtained by the sending person").

4. It might also be argued that notification is required by Rule 8.4(d), which forbids a lawyer from engaging "in conduct that is prejudicial to the administration of justice." N.Y. City 1989-1 supports this argument. The opinion considered the obligations of a lawyer whose client intercepted written communications between her spouse and her spouse's counsel and provided the communications to her lawyer. The opinion concluded that even if the lawyer did not intend to use the communications, the lawyer "must disclose (or call upon his client to disclose) his possession of the documents and return the documents or provide copies." The opinion reasoned that the receipt of the information, which is likely to be privileged and in any event was obtained outside normal discovery procedures, gives the lawyer and his client "an advantage that, however slight, they are not entitled to have," and that retaining that advantage without the opposing party's awareness

would be prejudicial to the administration of justice.

5. Opinion 1989-1 must be distinguished from the inquiry we address here, however, because the inquirer has not received the e-mails and is not in a position to use them. Although the client may have engaged in conduct prejudicial to the administration of justice, the lawyer has not done so. Additionally, this Committee has doubts whether Opinion 1989-1, if correct at the time it was issued, remains correct. *Compare* Arizona Op. 01-04 (2001) (where client wrongly procures former employer's privileged or confidential documents from a current employee, the ethics rules "prohibit the lawyer from notifying the ex-employer or its counsel of the documents' receipt without first obtaining client consent"). The New York judiciary's adoption of Rule 4.4(b), effective 2009, appears to reflect a judgment that the handling of improperly obtained documents should be left to case law and other law. That is the import of the accompanying Comment, quoted above.

6. One must also consider whether the inquirer has a disclosure obligation under Rules 3.3(b) & (c). Rule 3.3(b) provides that "[a] lawyer who represents a client before a tribunal and who knows that a person . . . has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(c) provides that this duty applies even if compliance requires disclosure of confidential information. The purpose of Rule 3.3(b) is "to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process." Rule 3.3, Cmt. [12].

7. Rule 3.3(b) is inapplicable unless the lawyer knows that the client's conduct in question is "criminal or fraudulent." Because this Committee interprets only the Rules of Professional Conduct and not other law, we do not express an opinion whether the client's conduct in reading the spouse's lawyer-client e-mail communications rises to the level of a crime or fraud. If it does, the lawyer's duty is to "take reasonable remedial measures," which do not necessarily include disclosure of client confidences. Since the lawyer has not gained access to the e-mails or their contents, it may be a sufficient remedial measure for the lawyer to persuade the client to cease the misconduct. If that is enough to avert harm to the client's spouse, then the rule would not require disclosure. However, disclosure must be made to the court or opposing counsel if the client's conduct is "criminal or fraudulent" and no other measures provide an adequate remedy.

8. Finally, Rule 1.6(b)(6) permits a lawyer to reveal confidential information "to the extent the lawyer reasonably believes necessary . . . when permitted or required under these Rules or to comply with other law or court order." Under this provision, when the law governing potential disclosure is unclear, a lawyer need not risk violating a legal or ethical obligation, but may disclose client confidences to the extent the lawyer reasonably believes it is necessary to do so to comply with the relevant law, even if the legal obligation is not free from doubt. *See* ABA 11-460 (2011).

9. Judicial decisions, without reference to the disciplinary rules, have found that lawyers have a notification obligation in some circumstances where clients wrongly procure the opposing party's documents. *See, e.g., Parnes v. Parnes*, 80 A.D.3d 948, 915 N.Y.S.2d 345 (3d Dep't 2011) (where the wife in a divorce action wrongly downloaded her husband's e-mails and provided them to her attorney, the intermediate appellate court observed: "we certainly do not condone the failure of plaintiff's counsel to promptly notify defendant's counsel that she had obtained the e-mails or her tactic of surprising defendant at his deposition by questioning him regarding those privileged documents"); *Lipin v. Bender*, 193 A.D.2d 424, 597 N.Y.S.2d 340 (1993), *aff'd*, 664 N.E.2d 1300 (N.Y. 1994) (where the plaintiff in an employment action removed and copied the opposing lawyer's internal memos while the lawyers were out of the room and provided the copies to her own lawyer, the plaintiff's lawyer should either have returned the documents or sought direction from the court rather than attempting to exploit the documents in settlement discussions); *Forward v. Foschi*, 27 Misc. 3d 1224A, 911 N.Y.S.2d 392, 2010 N.Y. Misc. LEXIS 1066 (N.Y. Sup. Ct., May

18, 2010) (“when he realized . . . his client had turned over to him communications between [the opposing party] and her attorneys, [the lawyer] should have disclosed his receipt of such communications and attempted to mitigate the circumstances, especially, if, as he asserts, the communications were of little value”). These decisions may be intended to impose obligations, pursuant to the courts’ supervisory authority, that are independent of the ethics rules and that go beyond the disclosure obligations of Rule 3.3(b) and other rules. The extent of any court-established disclosure obligations and whether they apply to the inquirer’s situation is a question of law that this Committee lacks jurisdiction to answer. If the inquirer reasonably believes that disclosure is necessary to comply with applicable judicial decisions, such disclosure is permitted by Rule 1.6(b)(6).

CONCLUSION

10. A lawyer may not disclose that the client has been reading the opposing party’s client-lawyer e-mails, although not communicating the e-mails or their contents to the lawyer, unless (1) the lawyer knows that the client is committing a crime or fraud and no remedial measures other than disclosure will prevent harm to the opposing party, or (2) governing judicial decisions or other law require disclosure.

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