



ILLINOIS STATE  
BAR ASSOCIATION

# ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.3, 1.4, 1.6, 1.7, 1.15, 4.4(b) and its Comment [2], 5.3, and 8.4. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

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## Opinion No. 98-04 January, 1999

Topic: Client confidentiality; Inadvertent Disclosure of Confidential Materials.

Digest: A lawyer who, without notice of the inadvertent transmission, receives and reviews an opposing party's confidential materials through the error or inadvertence of opposing counsel, may use information in such materials. A lawyer who knows of an inadvertent transmission before confidential materials of an opposing party have been opened and reviewed should return such materials without examination. A lawyer has a duty to advise a client that confidential information was inadvertently transmitted to and read by opposing counsel.

Ref: Illinois Rules of Professional Conduct, Preamble, Rules 1.3, 1.4, 1.6, 1.7, 1.15, 5.3, 8.4. ISBA Opinion No. 95-10 (1996).  
ABA Formal Opinions 90-358 (1990), 92-368 (1992) and 94-382 (1994).  
District of Columbia Bar Opinion No. 256 (May 16, 1995).  
Oregon State Bar Formal Opinion No. 1998-150 (April 1998).  
Restatement, The Law Governing Lawyers, Proposed Final Draft No. 1 (March 29, 1996), and Tentative Draft No. 8 (March 21, 1997).  
*Lipin v. Bender*, 84 N.Y.2d 562, 644 N.E.2d 1300 (1994).

### Facts

The inquiring lawyer describes two factual situations that raise similar questions. In the first case, the lawyer prepared a draft settlement agreement believed to be consistent with the client's understanding and approval. A spreadsheet analysis of the installment payments under the

settlement agreement was inadvertently sent to opposing counsel. The lawyer promptly notified opposing counsel that the material was an errant transmission and should not be used. When presented with the same information, the client stated that the spreadsheet did not reflect the settlement as he understood it. Subsequently, opposing counsel stated the spreadsheet accurately reflected the settlement agreement and that he intended to use it to enforce the settlement.

In the second situation, the lawyer prepared a draft settlement agreement and gave it to his partner for her review with the notation "Your comments re: preserving a cause of action for defamation." The partner orally advised the lawyer that the draft agreement did not preclude a subsequent action for defamation by the firm's client. The copy of the draft settlement agreement that was faxed to opposing counsel inadvertently included the notation. Opposing counsel subsequently returned a revised agreement including a bar to any action for defamation, even though that was not part of the settlement discussions. The transmitting lawyer first learned that the notation meant only for his partner had been faxed to opposing counsel in error when he received the revised draft agreement.

### Questions

The inquiring lawyer poses four separate questions arising out of these situations to the Committee:

1. What obligation does the lawyer have to advise the clients of the errant transmissions to opposing counsel?
2. What constraints are on opposing counsel to notify the lawyer of the receipt of errant transmissions and to refrain from using information inadvertently transmitted to the detriment of the lawyer's client?
3. Do opposing counsel have a duty to disclose to their clients the lawyer's concern about preserving a cause of action for defamation?
4. What exposure does the lawyer have for malpractice by sending an errant message that could prejudice the client?

### Opinion

This inquiry raises for the first time before this Committee several issues arising out of the inadvertent disclosure of confidential client information to opposing counsel. These issues involve a lawyer's duties of communication and confidentiality under the Illinois Rules of Professional Conduct. The relevant rules include Rule 1.4, Rule 1.6 and Rule 5.3. Rule 1.4 states:

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Illinois Rule 1.6, in pertinent part, states:

- (a) ... a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure.

Rule 5.3 generally requires a lawyer to make reasonable efforts to ensure that the firm has measures that give reasonable assurance that the conduct of nonlawyer employees is compatible with the professional obligations of the lawyer and the firm and further requires that each lawyer having

direct supervisory authority over a nonlawyer make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

Although these Rules provide a framework for the analysis, neither the Rules, prior ISBA advisory opinions, ethics opinions from other jurisdictions or case law provide satisfactory answers to the questions posed in this inquiry. Most of the reported judicial opinions concerning inadvertent disclosure of client confidences decide whether such disclosure constitutes a waiver of the attorney-client privilege. These opinions vary widely in both rationale and result. However, the determination of what particular circumstances might result in a waiver of the privilege is a question of the law of evidence beyond the scope of this Committee's mission, which is the consideration of a lawyer's duties under the Rules of Professional Conduct.

Other committees concerned with professional conduct have also reached quite different conclusions on these issues. For example, ABA Formal Opinion 92-368 (November 10, 1992) held that upon receipt of apparently privileged material that has been inadvertently transmitted, a lawyer has an ethical obligation to return the privileged material to the sender. The conclusion was based upon the values served by the principles of confidentiality and the lawyer-client privilege, the law of bailment and misdirected property (possession of property acquired by mistake is a bailment implied by law imposing duties on the bailee to return the property) and general considerations of common sense, reciprocity, and professional courtesy. That Opinion also expressed the view that disclosure to the receiving lawyer's client is not required because no decision by the client is called for in these circumstances (prompt notification by receiving lawyer to sending lawyer and non-use of confidential material).

Subsequently, ABA Formal Opinion 94-382 (July 5, 1994) discussed the duty of a lawyer who receives an adverse party's confidential materials from a third party (such as a dishonest former employee) not authorized to provide them. In that situation, the ABA concluded that the lawyer should either refrain from reviewing the materials or limit the review to the extent required to determine how to proceed appropriately. It also suggested that the receiving lawyer should notify opposing counsel of the receipt of the materials and follow that lawyer's instructions with respect to disposition or refrain from using the materials pending court resolution of the proper disposition of the materials.

Other authorities have disagreed with the position expressed in ABA Formal Opinion 92-368. In an article entitled "The Errant Fax" in the January 23, 1995 issue of *Legal Times*, Professor Monroe Freedman, citing two then recent state bar ethics opinions (Ohio Opinion 93-11 and Maine Opinion 146), contends that ABA Formal Opinion 92-368 is wrong. He argues that the conclusions reached in the opinion are not based on the ethics rules and contravene the duty of zealous representation imposed by Model Rule 1.3 upon counsel receiving the inadvertent transmission. Professor Freedman notes that the duty of confidentiality that the ABA Committee relies on is a duty owed to transmitting counsel's client, not a duty that receiving counsel owes to the client's opponent.

The draft Restatement of the Law Governing Lawyers also rejects the ABA position. See Comment *m* to § 112, and Comment *h* to § 129, Proposed Final Draft No. 1 (March 29, 1996) and Comment *e* to § 162, Tentative Draft No. 8 (March 21, 1997). The Restatement concludes that a lawyer who comes into possession of confidential information of a non-client, including inadvertent disclosures, may use the information under certain circumstances.

Another useful reference is District of Columbia Bar Opinion No. 256 (May 16, 1995), which

recognizes a distinction between two different “inadvertent production” situations. In the first, where a lawyer determines that a document appears to have been produced inadvertently only after reviewing it, the opinion concludes that there is “no ethical violation if the receiving lawyer retains the documents and uses the disclosed information.” In the second situation, the receiving lawyer learns of the inadvertent transmission prior to receipt or examination of the material in question. The opinion concludes that in the second situation, the receiving lawyer violates Rules 1.15(a) (safekeeping property) and Rule 8.4(c) (dishonesty, fraud, deceit or misrepresentation) of the District of Columbia Rules [substantially similar to Illinois Rules 1.15(a) and 8.4(a)(4)] if, contrary to the request of sending counsel, the lawyer subsequently opens and reviews the content of the materials.

On balance, the Committee believes that the District of Columbia opinion states the better view. ABA Formal Opinion 92-368 is unrealistic, expecting the receiving lawyer to “unring the bell” and ignore material information that has been received and reviewed in good faith. As the Ohio and District of Columbia opinions observe, once confidential material has been read, the information cannot be purged from the memory of the receiving lawyer.

Moreover, if the receiving lawyer were ethically prohibited from using the information, the prohibition could be a material limitation on the representation of the receiving lawyer’s client. That limitation (the obligation to protect the opposing party’s confidential information) could in turn constitute a conflict of interest under Rule 1.7(b). Illinois Rule 1.7(b) provides that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities ... to a third person unless the lawyer reasonably believes the representation will not be adversely affected and the affected client consents after disclosure. (See ABA Formal Opinion 90-358 (1992) for a discussion of the conflict of interest issues arising out of the acquisition of confidential information of a potential client.)

The ABA Formal Opinion 92-368 also places the burden on the wrong party, asking the receiving lawyer to act contrary to the interests of that lawyer’s client in order to protect the interests of the careless lawyer and that lawyer’s client. The Committee agrees, however, with the general conclusion of ABA Formal Opinion 94-382 that a lawyer should not use information that was disclosed as the result of deceitful or illegal conduct or breach of trust by an agent of the opposing party.

Like the District of Columbia Bar, the Committee believes that there are different considerations when the receiving lawyer has neither received nor examined the misdirected material before learning of the error. Reading inadvertently produced material after learning of the error is similar to copying papers from an opposing lawyer’s file folders during a break in a deposition. Such conduct has been found to be dishonest. See *Lipin v. Bender*, 84 N.Y.2d 562, 644 N.E.2d 1300, 1304 (1994). It would also be considered a form of “sharp practice” condemned by this Committee in Illinois Opinion No. 95-10 (January 1996). The Preamble to the Illinois Rules of Professional Conduct states that although lawyers should zealously pursue their client’s interests, “zealously” does not mean mindlessly, unfairly or oppressively. The Oregon State Bar has recently concluded that a lawyer’s duty of zealous representation does not obligate a lawyer to read an unexamined privileged document that had been inadvertently produced, and opined that a lawyer was ethically required to return the privileged document without first examining it. Oregon State Bar Formal Opinion No. 1998-150 (April 1998).

In summary, with respect to the first question, Rule 1.4 requires that a lawyer keep a client

reasonably informed about the status of a matter and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Rule 1.6 requires a lawyer to protect client confidences; and Rule 5.3 requires a lawyer or firm to take reasonable steps to assure compliance with this duty by nonlawyer personnel. In both situations described here, opposing counsel intends to use the information gained through the erroneous transmissions. The inquiring lawyer should inform the affected clients about the transmissions to opposing counsel to enable the clients to make fully informed decisions about the pending settlement negotiations.

In response to the second and third questions posed in this inquiry, the Committee believes, as noted by District of Columbia opinion, that there is no ethical prohibition against the receiving lawyer using information obtained during the review of a document sent by opposing counsel. Indeed, as Professor Freedman suggests, Rule 1.3 may well require the use of such information if it is material to the matter. A lawyer who receives misdirected material information in good faith has an obligation to disclose that information to the lawyer's client just as any other information relevant to the client's matter. On the other hand, a lawyer should not review or use confidential materials of an opposing party if the lawyer has notice of the inadvertent transmission before opening or reviewing the materials in question.

The fourth question requests an opinion on potential malpractice liability. This subject is beyond the scope of the Committee's mission.

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