FORMAL OPINION 2012-01

OBLIGATIONS UPON RECEIVING A DOCUMENT NOT INTENDED FOR THE RECIPIENT

TOPIC: Inadvertent Disclosure of Documents

DIGEST: A lawyer who receives a letter, fax, e-mail or other communication that the lawyer knows or reasonably should know was transmitted by mistake must promptly notify the sender, pursuant to Rule 4.4(b) of the New York Rules of Professional Conduct, and follow any other applicable law. To the extent that it imposed requirements beyond those set forth in Rule 4.4(b), ABCNY Formal Opinion 2003-04, which addressed the same issue under the New York Code of Professional Responsibility, is withdrawn, but there may be circumstances in which a lawyer may choose to act in conformity with the guidance in Formal Opinion 2003-04 without thereby per se violating Rule 4.4(b).

RULE: 4.4(b)

QUESTION: What are the ethical obligations of the lawyer who receives a misdirected document?

OPINION: A lawyer who receives a misdirected document should act in accordance with Rule 4.4(b), which provides that 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." Thus, a lawyer who receives such a document must promptly notify the sender (in addition to identifying and following applicable substantive law), but has no other obligations under the New York Rules of Professional Conduct with respect to the retention, return, destruction, review or use of the document or its contents. Rule 4.4(b) provides the only governing ethical rule on this topic (other than the normal duty of truthfulness set forth in Rules 4.1 and 8.4).

That said, several aspects of Rule 4.4(b) require further attention. First, as noted in the helpful Comments to Rule 4.4(b) adopted by the New York State Bar Association, "[f]or the purposes of this Rule, 'document' includes email and other electronically stored information subject to being read or put into readable form." New York Rules of Professional Conduct Rule 4.4, New York State Bar Association comment [2]. Thus, "documents" include not only paper correspondence but also emails, voicemails and other communications that may be read or transcribed.[1] Nor does it matter whether the

[1] In the context of evidentiary privileges (which protect interests that overlap with those which the rule serves), it is also clear that documents include communications that may be transcribed. *See, e.g.*, *Howell v. Joffe*, 2007 WL 1075172 (N.D. Ill. Apr. 11, 2007) (concluding that phone conversation between attorney and client who unwittingly continued to speak to each other while adversary's answering machine was recording was privileged). The same construction of "document" is appropriate here.

sender is a lawyer, a client, a third party, or even a tribunal; in each case, the rule still attaches.[2]

Second, the rule addresses only the obligations that arise with respect to documents that are "inadvertently sent." Thus, the rule would not apply if, for example, a lawyer obtained possession of a document that was deliberately sent to the lawyer's attention (including, for instance, a document obtained, perhaps improperly, and then transmitted by a person other than its original custodian).[3] Those scenarios would implicate different ethical considerations and/or questions of law, and may require a different response. Similarly, to the extent that metadata associated with a document may raise distinct ethical questions for its sender or recipient, *see generally* N.Y. State Op. 782 (2004), the rule (and the present opinion) does not address them.

Third, the rule requires the lawyer to notify the sender "promptly." This means as soon as reasonably possible, as the rule is designed in part to eliminate any unfair advantage that would arise if the lawyer did not provide such notice.

Other issues relating to involuntary disclosure, including substantive issues of state and federal law, are outside of the purview of this Committee. Counsel would do well, however, to remember the New York State Bar Association comment that "a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion." New York Rules of Professional Conduct Rule 4.4, New York State Bar Association comment [2].[4] As the Comments also note, counsel should keep in mind that, subject to applicable law and the responsibility of lawyers to consult with their clients, decisions as to how to use such documents are left to the lawyer's professional judgment. New York Rules of Professional Conduct Rule 4.4, New York State Bar Association comment [3] (citing Rules 1.2 and 1.4).

ABCNY Formal Opinion 2003-04, which addressed the questions discussed herein, was issued when the New York Code of Professional Responsibility was in effect. The Code contained no provision directly addressing a lawyer's responsibility with respect to inadvertently sent documents, and lawyers accordingly took guidance from judicial decisions and bar association opinions. Formal Opinion 2003-04, which was based on several Code provisions, was issued in that context. In certain respects, it imposed

---

[2] Of course, if a communication originates with a party represented by another lawyer, the lawyer who receives it should be aware of the constraints that may attach to any responding communication under Rule 4.2.

[3] *Cf. Lipin v. Bender*, 193 A.D.2d 424 (1st Dep't 1993) (disqualifying counsel who used documents containing adversary's work product that were improperly obtained).

[4] *See, e.g., People v. Terry*, 1 Misc.3d 475 (County Ct., Monroe Co. 2003) (precluding prosecutor from using documents inadvertently sent to him by defendant). Courts addressing such issues have on occasion cited Formal Opinion 2003-04, *see, e.g.*, *MNT Sales L.L.C. v. Acme Television Holdings, L.L.C.*, Index No. 602156/2009 (Sup. Ct., N.Y. Co. Apr. 14, 2010), and might continue to regard it as persuasive.

standards of conduct that go beyond the standards indicated by the text of Rule 4.4(b), which, along with the rest of the Rules of Professional Conduct, became effective on April 1, 2009. In particular, Formal Opinion 2003-04 required a lawyer who received a misdirected communication not only to notify the sender, but also, with limited exceptions, to refrain from reviewing the communication and to return or destroy it on request. To the extent that it imposes standards that go beyond the standard indicated by Rule 4.4(b), Formal Opinion 2003-04 is withdrawn. However, there may arise circumstances under which a lawyer, having considered Rules 1.2 and 1.4, determines that conduct that would be consistent with Formal Opinion 2003-04, such as destroying or not reviewing or using the communication, is right under the circumstances. Rule 4.4(b) and the present Formal Opinion should not be construed as per se prohibiting a lawyer from making that determination.