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Inadvertent Disclosure

Model Rule 1.15: The Elegant Solution to the Problem of Purloined Documents

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Lawyers are plainly challenged by cases in which they receive an adversary's privileged or confidential information that is clearly intended for them, but furnished by someone who may not have been authorized to have it in the first place. Consider, for example, a scenario in which a lawyer represents a plaintiff in employment litigation and laments that the case would be much stronger if only they had some e-mails that they are certain that the plaintiff's supervisor must have sent to others in the company. Days later, hard copies of the e-mails appear in the lawyer's mail in an envelope bearing no return address. The plaintiff denies obtaining the e-mails. What is the lawyer to do? This scenario is now aggravated by technological advances that allow litigants and their allies to download stagger-

ing amounts of data onto electronic storage devices that seem to get smaller and smaller in size with every passing week.

Castellano v. Winthrop, 27 So. 3d 134, 26 Law. Man. Prof. Conduct 94 (Fla. Dist. Ct. App. 2010), exemplifies both the increasing ease of access to large swaths of information belonging to others and the likeliest of consequences for lawyers and law firms that find themselves holding such information where a court concludes that the documents were illegally obtained by the source. *Castellano* began as a paternity action which transformed into lengthy litigation involving fights over custody issues and other disputes regarding the child's care and well-being. After the mother, Castellano, illegally obtained a USB flash drive that belonged to the father and reviewed its contents, she hired a law firm which then spent more than 100 hours reviewing the contents of the USB drive. The law firm then filed a petition on Castellano's behalf to vacate a prior final order that relied upon information obtained from the USB drive and which, in its title, accused the father of "repeated intentional fraud upon the court." *Id.* at 135. Once the father's lawyers understood that Castellano had obtained the USB drive, they demanded its immediate return. The USB drive was not returned; instead, Castellano's law firm filed the contents in the public court record and helped deliver the actual USB drive to law enforcement. The father then filed an emergency motion demanding return of the USB drive, seek-

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ing to disqualify Castellano's law firm, and requesting sanctions against Castellano.

After an evidentiary hearing, the trial court entered extensive findings of fact, including finding that the USB drive housed "thousands of pages of documents," including privileged communications between the father and his counsel, opinion work product in the form of musings on litigation strategy and even outlines for questioning witnesses, as well as confidential medical, financial, and business information of the father. *Id.* at 136. The court also found no evidence of fraud. The most damning aspect of the court's findings, however, related to the law firm's conduct in spending over 100 hours reviewing the contents of the USB drive "although it was apparent within moments of inspection that it belonged to the [f]ather and contained attorney/client communications with the [f]ather's current counsel . . . as well as a complete history and chronology of strategy, work product, and confidential communications spanning the near decade-long period of this litigation." *Id.*

Because an "informational advantage was obtained," the trial court concluded that Castellano's law firm had to be disqualified. The trial court also ordered a number of other remedies, including striking the petition, sealing the portions of the court file containing the information, requiring Castellano to return the USB drive and all copies, requiring Castellano and her law firm to delete the information from their computers and to make those computers available to a third-party to confirm the deletion, having Castellano and the law firm provide affidavits identifying anyone who had reviewed or been given any of the information on the USB drive, requiring Castellano and the firm to indemnify the father for any damages he might suffer from the improper use of the information, and enjoining Castellano from any use of the USB drive's contents. *Id.* The trial court left for another day the determination of whether the father should be awarded attorney's fees as a sanction.

Castellano appealed only the trial court's disqualification of her law firm, arguing that given all of the other remedial measures, disqualification was unnecessary and prejudicial—an argument that was summarily rejected by the Florida appellate court. The appellate court also embraced a 2007 Florida Bar Committee on Professional Ethics opinion and commended it as guidance to indicate that any attorneys faced with a similar situation as the mother's law firm are required to "advise the client that the materials cannot be retained, reviewed, or used without first informing the opposing party that the attorney and/or client have the documents at issue" and that in the event that the client will not consent, then the attorney must cease representation of the client. *Id.* at 137.

ABA Committee's Views. The variations on ways that lawyers can find themselves in a position where they possess documents that could create a difficult ethical dilemma are seemingly unlimited. Assume that you are representing a plaintiff in connection with a workplace injury, and one day he shows up at your office to hand you a letter he says was in his mailbox at work. The letter is written by a defendant in the case and is addressed to her lawyer asking for legal help and outlining thoughts about why your client had sued her, and providing facts about various witnesses that could affect their credibility. Or, imagine instead that you've

been engaged by several executives who are interested in suing their former employer. Prior to suing on their behalf, one of your clients tells you that an envelope full of documents showed up mysteriously yesterday at his office, that the envelope does not reflect who sent them, but that he has read them and they appear to be very helpful in that they seem to prove a number of the wrongful things that his former employer was doing. These documents would likely form the basis of his and your other clients' claims against their former employer. The client excitedly tells you that he is on his way to your office to deliver the folder full of documents to you for your review.

Many authorities have focused on state analogs of Model Rule 4.4, but the application of that rule is less than seamless.

What would you do in either of those scenarios? Well, the Model Rules of Professional Conduct are not a source of definitive guidance if the ABA's Standing Committee on Ethics and Professional Responsibility is to be believed. The trail to this conclusion starts back in 1994, when the Committee issued a formal opinion that initially answered this kind of thorny question, but it was not based on any sound reasoning tethered to the Model Rules. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-382 (1994). In Formal Opinion 94-382, the Committee determined that when a lawyer receives, or receives an offer for, privileged or confidential materials belonging to an adversary from a person not authorized to have or disclose them, the lawyer must follow the same requirements outlined in Formal Opinion 92-368 for lawyers receiving inadvertently disclosed privileged materials. Namely, the lawyer must not review the materials beyond what is required to determine how to proceed; must notify the adverse party or its lawyer about the possession of the documents; and must either follow the adversary's instructions or seek a definitive resolution from a court. See Am. Bar Ass'n, Standing Comm. on Ethics & Prof'l Responsibility, Formal and Informal Ethics Opinions 1983-1998 237-38 (2000) (reprinting Formal Op. 94-382). In addition, the lawyer must not use the materials until obtaining such a ruling.

Twelve years after issuing that opinion, and one year after withdrawing Formal Opinion 92-368, the Committee issued Formal Opinion 06-440, withdrawing Formal Opinion 94-382. In so doing, the Committee explained that because the scenario described in our hypothetical examples does not involve inadvertence, Model Rule 4.4(b) and its notice requirement do not even apply. Ultimately, the Committee simply concluded that "[w]hether a lawyer may be required to take any action in such an event is a matter of law beyond the scope of Rule 4.4(b)." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-440, at 2-3 (2006).

The Magic Mailbox. While the Committee opined that determining what lawyers should do is a question of law rather than rule-based professional responsibility, courts do not necessarily agree. A New Jersey federal court ordered the disqualification of the plaintiff's law-

yers whose client gave them a letter from the defendants to their lawyer that the plaintiff claimed had shown up in his work mailbox in *Maldonado v. New Jersey*, 225 F.R.D. 120, 21 Law. Man. Prof. Conduct 7 (D.N.J. 2004). Maldonado, a probation officer, had filed a complaint for employment discrimination and retaliation against his employer, the Administrative Office of Courts of the State of New Jersey, and several individual defendants. Two individual defendants wrote a letter in October 2001 to their attorney seeking legal assistance, providing information relating to the credibility of certain witnesses, and containing certain assertions about Maldonado's motivations in suing. This letter eventually found its way into Maldonado's work mailbox and he in turn provided it to his lawyers. A dispute over the letter followed and the authors of the letter and the intended recipient offered ample proof that Maldonado likely took a copy of the letter from out of a folder in the office of another probation officer; however, there was no "direct evidence offered by either party explaining how the letter appeared in Maldonado's mailbox." *Id.* at 126.

It took more than two years from the time that the letter was written for the defendants to learn that Maldonado's lawyers had the letter. They first requested that Maldonado's counsel return the letter, but they refused. The defendants then asked the court to order that the letter be returned, the attorney-client privilege not be waived, Maldonado's lawsuit be dismissed, and the plaintiff's lawyers be disqualified. The court, treating the situation as an involuntary disclosure case and applying the same middle-ground approach used there, concluded that the defendants had taken reasonable steps to protect their communication, that they had acted promptly upon learning of the disclosure to rectify it, and that all other relevant factors weighed against finding any waiver of the privilege.

Concluding that it did not have sufficient evidence to determine that Maldonado had acted willfully or in bad faith because the record reflected only "mere innuendo showing that Maldonado intentionally took the letter," and crediting Maldonado for delivering the letter to his lawyers, who would be the experts on its importance and whether it could be used in his case, the court declined to dismiss the lawsuit as a sanction. *Id.* at 134. The court, however, did conclude that Maldonado's lawyers failed in their handling of the letter and determined that they should be disqualified. *Id.* at 136-42. Although the court focused considerable attention on the lawyers' failure to comply with the "cease, notify, and return" protocol in ABA Formal Op. 94-382, the court disclaimed any reliance upon the opinion or any opinions of the New Jersey ethics committee as precedent; rather, the court concluded that disqualification was required according to a six-factor test. *Id.* at 139 (citing *Richards v Jain*, 168 F. Supp. 2d 1195, 1205 (W.D. Wash. 2001)). Of particular and obvious significance to the court was the clear privileged nature of the letter from even a facial review and the fact that the plaintiff's lawyers never notified defense counsel that they were in possession of the letter and made no attempt to either return the letter or cease review upon notice of possession. Had the defendants not figured out on their own that Maldonado had the letter, the issue likely would have never come up. *Id.*

'Anonymous' Aid. In *Burt Hill, Inc. v. Hassan*, No. Civ. A. 09-1285, 2010 WL 419433, 26 Law. Man. Prof. Conduct 127 (W.D. Pa. Jan. 29, 2010), a United States Magistrate Judge was faced with a series of dueling motions arising from a scenario in which apparently helpful documents, including documents that were privileged, proprietary, or otherwise confidential, allegedly showed up out of the blue from an anonymous source. The court, ultimately unconvinced that the defense lawyers who came to possess the "anonymously" provided documents acted appropriately, entered a sanctions order requiring not only the return of all the documents but also prohibiting those documents from ever being introduced into evidence even if they could have been otherwise obtained through legitimate, formal discovery efforts. *Id.* at *9. Interestingly, the court declined to disqualify the attorneys involved because they had previously obtained an opinion from an outside ethics expert blessing their retention of the documents in question. *Id.* at *6. Despite resisting disqualification, however, the court was none too subtle in criticizing the merits of the ethics expert's opinion. *Id.* at *5 ("Any suggestion that Defense counsel's receipt and retention of [the documents] carried no ethical concerns would come not from a careful study of the applicable law, but rather from a failure to appreciate it.").

The answer lies in Model Rule 1.15 and its provisions establishing lawyers' obligations with respect to "safekeeping property."

Despite its skepticism regarding the expert's opinion, the court in *Hassan* explained its rationale for not ordering disqualification as stemming from the fact that the lawyers "operated under a cloak of ethical propriety, having retained an expert who opined that the retention and review of [p]laintiff's privileged and confidential documents was permissible. However questionable the expert's reasoning . . . [d]efense counsel's reliance on his opinion mitigates against disqualification." *Id.* at *6. Yet, the court also explained the important issues at stake that merited a sanction more significant than merely requiring return of the documents:

[T]he [c]ourt cannot understate the importance of its duties to "preserv[e] the public trust," "the scrupulous administration of justice," and "the integrity of the bar." The [c]ourt also concludes that firm sanctions are necessary to discourage similar conduct in the future. There appears no way of preventing a litigant who has obtained his opponent's privileged and/or confidential materials from claiming that the materials were received through an "anonymous" source. Were the [c]ourt merely to require the return of clearly privileged documents, this would be to deny the recipient something he was never entitled to in the first place. Under the circumstances, restricting sanctions to the return of privileged documents would be to impose no meaningful sanction at all.

Id. at *9 (quoting *Arnold v. Cargill*, No. 01-2086, 2004 WL 2203410, 20 Law. Man. Prof. Conduct 613, at *14 (D. Minn. Sept. 24, 2004)). Thus, the court concluded that the defendants and their counsel could not use in any way the documents from the anonymous source;

the plaintiff owed no duty to produce copies of the documents in discovery; the plaintiff could move to strike evidence in the future upon “a good faith reason to believe” that any evidence had been secured as a result of use of the excluded documents; and that if they were to receive documents from an “anonymous” source in the future, the defendants were to follow a specific protocol outlined by the court. *Id.* at **9-10.

Searching for the Relevant Rule. Over the years, there have been a number of efforts directed at fixing the scope of the lawyer’s duty where the lawyer is purposefully given helpful documents containing someone else’s privileged or confidential information, either from a client or a third-party, and where it appears either doubtful or uncertain that the ultimate source of the documents was authorized to possess or disclose them. Ethics opinions addressing these questions have taken different approaches depending on whether they were issued before or after ABA Formal Opinion 94-382 was withdrawn, and depending on whether wrongdoing by the lawyer’s client was or was not implicated.

The most intriguing aspect of this question of professional responsibility in litigation, however, is whether there is a place in the ethics rules indicating lawyers’ duties in the wide variety of circumstances that can arise in practice, or whether this is a question of law outside the scope of ethics rules. Many authorities have focused on state analogs of Model Rule 4.4, but the application of that rule is less than seamless. First, any effort to apply Model Rule 4.4(b) is little more than sophistry given the rule’s express requirement that what the lawyer must know or reasonably should know is that the document was “inadvertently” sent. Model Rules of Prof’l Conduct R. 4.4(b) (2009) (“A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document is inadvertently sent shall promptly notify the sender.”). Model Rule 4.4(a) is no help given that it prohibits “us[ing] methods of obtaining evidence that violate the legal rights of such a person,” which strongly implies something more than passive action by an attorney as a mere recipient of materials purloined by someone with whom the attorney has no relationship is necessary for a violation. *Id.* R. 4.4(a). Model Rule 8.4(a), which makes it professional misconduct for a lawyer to violate the ethics rules “through the acts of another” is a plausible mechanism for concluding that a lawyer who receives purloined documents from a stranger acts unethically because the theft, although the act of another, would clearly violate Rule 4.4(a) if committed by the lawyer. But such an analytical approach would grease a slope with respect to the ability to discipline a lawyer for actions undertaken by others outside of the lawyer’s control.

An argument could also be made, as was done in one ethics opinion, that Model Rule 8.4(d) and its prohibition on acts prejudicial to the administration of justice could be relevant at least as a basis for requiring notification to the party to whom the information belongs. Utah Ethics Op. 99-01, 1999 WL 48784, at *1 (Utah State Bar, Ethics Advisory Op. Comm. Jan. 29, 1999). In so doing, the Utah State Bar Ethics Advisory Opinion Committee acknowledged that there was nothing in the ethics rules directly addressing preservation of the attorney-client privilege but asserted its belief “that Rule 8.4(d) places an obligation upon every lawyer to

take steps to preserve the attorney-client privilege in order to effect the orderly administration of justice.” *Id.* The Utah Committee further explained that the benefit of requiring notification was that after “the fact of disclosure is before both parties, they can then turn to the legal implications of the disclosure and a legal assessment of whether waiver has occurred.” *Id.* at *3. Given the myriad other questions that Model Rule 8.4(d) raises with respect to what conduct falls within its scope, it seems a reluctant solution to add to it the implication that lawyers must take steps to preserve the attorney-client privilege or risk being accused of a Rule 8.4(d) violation. Moreover, while Rule 8.4(d) might provide a basis for disciplining lawyers who mishandle questionable information that falls into their hands, the rule offers no guidance to lawyers who are committed to ethical practice but simply need direction in understanding and meeting their professional obligations.

An Elegant Answer. The Model Rules do, in fact, appear to offer an elegant answer for lawyers who question their professional responsibilities when they receive documents that may have been purloined or otherwise improperly obtained from another. The answer lies in Model Rule 1.15 and its provisions establishing lawyers’ obligations with respect to “safekeeping property.” See Model Rules of Prof’l Conduct R. 1.15 (2010). Although lawyers are generally familiar with Rule 1.15 in the trust account context, the scope of the rule is clearly not so limited, as amply evidenced by its repeated references not just to funds or fees or expenses, but also to “property.”

Model Rule 1.15(a) declares that “[a] lawyer shall hold property of clients or *third persons* that is in the lawyer’s possession in connection with a representation separate from the lawyer’s own property.” *Id.* R. 1.15(a) (emphasis added). Model Rule 1.15(d) further requires that “[u]pon receiving funds or *other property* in which a client or *third person* has an interest, a lawyer shall promptly notify the client or *third person*.” *Id.* R. 1.15(d) (emphasis added). Finally, Model Rule 1.15(e) mandates that “[w]hen in the course of the representation a lawyer is in possession of *property* in which *two or more persons* (one of whom may be the lawyer) *claim interests*, the *property* shall be kept separate by the lawyer until the dispute is resolved.” *Id.* R. 1.15(e) (emphasis added).

Analysis of over-the-transom deliveries through the lens of Rule 1.15 establishes that a lawyer, upon receiving purloined documents (or if not clearly purloined at least clearly reflecting privileged or confidential information belonging to someone other than the person who delivered the documents), is obligated to hold those documents separate from the rest of the lawyer’s documents, promptly notify the person from whom the documents were taken, and, if the lawyer is going to refuse to return the documents to that person (and thereby claim either that the lawyer or the lawyer’s client has an interest in them), continue to keep those documents segregated from the rest of the lawyer’s property until the dispute over the documents is resolved, presumably through a ruling by a tribunal. This approach places no meaningful burden on the receiving lawyer and respects the rights of the party to whom the materials belong.

Additional Considerations. Finally, a Florida ethics opinion makes important points regarding other potential obligations that a lawyer may have when it appears that a client has wrongfully obtained documents belonging to the other side. See Fla. Ethics Op. 07-1, 2007 WL 5404933 (Fla. State Bar Ass'n Comm. on Prof'l Ethics Sept. 7, 2007). The Florida State Bar Association's Professional Ethics Committee was presented with a scenario in which a lawyer representing a wife in a marriage dissolution action learned that his client, who prior to the parties' separation had often had access to her husband's corporate office space, had:

(1) Removed documents from her husband's office prior to and after separation; (2) Figured out husband's computer and e-mail password and, at his office, printed off certain documents, including financial documents of the corporation, husband's personal documents and e-mails with third parties of a personal nature, and documents or e-mails authored by husband's attorney in this action; (3) Accessed husband's personal e-mail from wife's home computer, and printed and downloaded con-

fidential or privileged documents; and (4) despite repeated warning of the wrongfulness of wife's past conduct by this office, removed documents from husband's car which are believed to be attorney-client privileged.

Id. at *1.

The Florida Committee, acknowledging that it was not authorized to answer questions of law, made clear that the lawyer would be obligated to produce the documents in response to any legitimate discovery request that encompassed them. *Id.* at *9. The Florida Committee also explained that if the documents were stolen, the lawyer would be obligated to turn them over to law enforcement authorities, stated that the attorney was ethically obligated to refrain from assisting the client in conduct that the attorney knew or reasonably should have known was criminal or fraudulent, and asserted that “[i]f the client possibly committed a criminal act, it may be prudent to have the client obtain advice from a criminal defense attorney if the inquiring attorney does not practice criminal law.” *Id.* at *10.