SPECIAL COMMITTEE ON ATTORNEY ETHICS AND ADMISSIONS

REPORT AND RECOMMENDATIONS

May 12, 2015

Chair: Hon. James R. Zazzali
Vice Chair: Paula A. Franzese

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11. RESPECT FOR RIGHTS OF THIRD PERSONS – RECEIPT OF ELECTRONIC INFORMATION – RPC 4.4(b)

MODEL RULE OF PROFESSIONAL CONDUCT 4.4(b) (Resolution 105A Revised): A lawyer who receives a document "or electronically stored information" relating to representation who knows or should know that it was inadvertently sent shall notify the sender.

MODEL RULE OF PROFESSIONAL CONDUCT 4.4 Comment [2] (Resolution 105A Revised): Defines the term "inadvertently sent" to include certain electronically stored information such as embedded data (metadata).

MODEL RULE OF PROFESSIONAL CONDUCT 4.4 Comment [3] (Resolution 105A Revised): A lawyer may choose to delete an electronic document unread if the lawyer knows before opening it that it was misaddressed.

The Special Ethics Committee recommends that Rule of Professional Conduct 4.4(b) (Respect for Rights of Third Persons) be amended to include a reference to "electronic information;" to refer to "wrongfully obtained" information as well as "inadvertently sent" information; and to authorize a lawyer who receives such a document electronically to delete it.

Rule of Professional Conduct 4.4(b) protects the lawyer-client relationship from unwarranted intrusion by imposing an obligation on a lawyer who inadvertently receives a document, particularly one containing confidential or privileged information, to stop reading the document. The Rule further requires the lawyer to notify the sender that the information has been disseminated beyond its intended recipient and return the document to the sender.

Currently, the language of the Rule solely addresses misdirected communications (documents that are "inadvertently sent"). The Supreme Court has read the phrase "inadvertently sent" broadly to encompass protected documents that had not actually been misdirected. In Stengart v. Loving Care Agency, 201 N.J. 300 (2010), the Court

considered lawyer-client electronic communications sent by an employee on her employer-issued computer but through a private, password protected, web-based personal email account. After the employee was terminated, the employer retained a computer forensic expert to review documents on the employee's computer, retrieved the lawyer-client communications, and gave them to its own lawyer. The employer argued that the communications had been left behind on the computer and were not inadvertently sent; the employee asserted that she was unaware that her personal email would be stored on the company computer.

The Court found that the employer's lawyer had an obligation, under Rule of Professional Conduct 4.4(b), to stop reading the emails "once [the lawyer] realized they were attorney-client communications" and notify adverse counsel. Id. at 325-26. The public interest in protecting the lawyer-client relationship from unwarranted intrusion triggered the ethical obligation even though the documents were not, technically, "inadvertently sent." See also Advisory Committee on Professional Ethics Opinion 680 (January 1995) (lawyer must notify adverse counsel that client gained unauthorized access to its confidential documents). Hence, the obligations under Rule of Professional Conduct 4.4(b) arise in circumstances that do not squarely fall within the intuitive meaning of "inadvertently sent" documents.

To further the public interest the Rule is intended to protect and provide notice and guidance to lawyers, the Committee recommends that the Rule expressly encompass electronic information and also specifically address documents containing lawyer-client communications that are wrongfully obtained. Given modern technology, electronic

information is more easily intercepted or misappropriated than traditional paper documents.

For example, the lawyer's own client may acquire or intercept an emailed document from adverse counsel to the adverse party and then forward the information to his or her own lawyer. This occurs when the client has access to a formerly-shared email account or knows the password on someone else's computer. In this situation, the lawyer has received a privileged document that is not inadvertently sent – the client fully intended to send this document to the lawyer – but the lawyer should know, given the sensitivity of the information, that his or her client wrongfully obtained the document.

When the lawyer receives, from his or her own client, a wrongfully obtained email between adverse counsel and the adverse client, the instruction to return the document to the sender results in the lawyer returning the document to the (wrongdoer) client. Adverse counsel is likely unaware that the document was intercepted and the pathway of communication is compromised. The lawyer should have an ethical obligation to notify adverse counsel.

The Committee further recommends that the instruction to the lawyer who realizes that an electronic document was inadvertently sent or wrongfully obtained be supplemented with the option of deleting the document. Currently, the Rule provides only that the lawyer should return the document to the sender but there are times when it is more appropriate to delete the document.

The Committee recommends limiting the application of the Rule to wrongfully obtained information that "contains lawyer-client communications involving an adverse or third party." The amended Rule would not expressly apply to documents taken from

employers to support discrimination claims, false claims, or the like, unless those documents contain lawyer-client communications involving an adverse or third party.[5]

Further, the Rule would expressly state that if the lawyer has questions as to his or her obligations, the lawyer may promptly bring the matter to the attention of the appropriate court. The lawyer may preserve the document or information (and not return it or delete it) pending review and disposition by the court. The lawyer whose lawyer-client communications are the subject of the document and who is notified that it was intercepted also has an obligation to preserve the document.

The Committee further considered the practice of "mining" for embedded information (metadata) in electronic documents and recommends that, in accordance with the spirit and language of Rule of Professional Conduct 4.4(b), such efforts generally should be prohibited when there is reason to believe the metadata was not intentionally included in the document. Unlike the Model Rule, New Jersey's version of Rule of Professional Conduct 4.4(b) requires the lawyer to stop reading the document when the lawyer realizes that it (or its accompanying embedded data) was inadvertently sent. Hence, a lawyer should not examine the metadata in an electronic document unless the metadata was specifically requested (such as in discovery). If metadata was specifically requested and is present in the electronic document, then its presence is not inadvertent. The Committee recommends that an official comment to the Rule highlight this issue.

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[5] The Committee's recommendation solely concerns lawyers' professional obligations and does not address other potential sanctions that may be imposed when a person wrongfully obtains documents, such as suppression or inadmissibility as evidence in a lawsuit. See, e.g., Tartaglia v. Paine Webber, Inc., 350 N.J. Super. 142 (App. Div. 2002).

The NJSBA submitted a comment expressing concerns about a potential "heightened substantive standard of attorney behavior" for lawyers sending or receiving an electronic document. The Committee does not agree that its recommendations create a heightened substantive standard; its recommendation codifies current law.

Hence, Rule of Professional Conduct 4.4(b) would be amended to state:

(b) A lawyer who receives a document or electronic information and has reasonable cause to believe that the document or information was inadvertently sent shall not read the document or information or, if he or she has begun to do so, shall stop reading [the document,] it. The lawyer shall (1) promptly notify the sender[,] and (2) return the document or information to the sender and, if in electronic form, delete it.

A lawyer who receives a document or electronic information that contains lawyer-client communications involving an adverse or third party and who has reasonable cause to believe that the document or information was wrongfully obtained shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the lawyer whose communications are contained in the document or information and (2) return the document or information to the other lawyer and, if in electronic form, delete it. A lawyer who has been notified about a document containing lawyer-client communications has the obligation to preserve the document.

If the lawyer who receives documents that were inadvertently sent or wrongfully obtained has questions as to his or her obligations under this subsection, the lawyer may promptly bring the matter to the attention of the appropriate court. The lawyer may preserve the document or information (and not return it or delete it) pending review and disposition by the court.

Official Comment:

A lawyer receiving a document electronically should not examine any accompanying metadata unless the metadata was specifically requested.