Errant E-Mail: Inadvertant Disclosure of Confidential Material Poses Dilemma

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 inadvertent, high-tech disclosure of confidential information has garnered increasing attention recently. The problem is not difficult to conceptualize in our world of instant communication through e-mail and faxes.

Assume you are embroiled in a complex commercial litigation when you receive an e-mail from adversary counsel that is sent apparently in error. While the message bears your e-mail address, the text suggests it is addressed to your adversary’s client or co-counsel.

Moreover, the e-mail contains a frank and candid discussion of the strengths and weaknesses of your adversary's case, including a discussion of the credibility of a key non-party witness, not hitherto disclosed whose testimony would be favorable to your client.

The errant e-mail is a virtual template to your adversary’s case, a battle plan and “smoking gun” that could enable you to win your client’s case decisively. While there are no disclaimers or confidentiality warnings on the e-mail, it appears evident from the start that it was not intended for your eyes. What are your ethical duties?

Zealous Advocacy

The question highlights a tension between an attorney’s duty of zealous advocacy on behalf of the client, as embodied in the Lawyer’s Code of Professional Responsibility and the duties of courtesy and professionalism to adversaries set forth in Cannons 7 and 9 of the code.

Professor Monroe Freedman, in a short but influential article, has argued that an inadvertently disclosed fax should be exploited for the benefit of the recipient’s clients. He suggests that the “current vogue for professionalism” should not cause us to “sacrifice our clients’ interests to protect opposing counsel from embarrassment or a malpractice action.”

Indeed, several state bar associations have opined that the beneficiary of inadvertently produced confidential materials should be able, with some qualifications, to exploit the materials to the benefit of their clients.

Moreover, Mr. Freedman queries, what about those situations in which adversary counsel has waived the privilege or confidentiality protection as a matter of substantive law? Should principles of courtesy and professionalism override an adversary’s waiver of these privileges?

These tensions were addressed, albeit in a low-tech setting, in SEC v. Cassano, in which the Securities and Exchange Commission’s Division of Enforcement inadvertently produced to its adversaries an internal staff prosecution memorandum as part of a massive document production. The memorandum, which was over 100 pages in length, analyzed controlling law and discussed the strengths and weaknesses of the commission’s case.

Realizing they had struck gold, defense counsel, at the document inspection, singled out the internal memorandum from a mountain of papers and requested that a photocopy be made immediately. The SEC paralegal attending the document production telephoned a senior attorney in the Division of Enforcement, who approved the copying without reviewing the document, which had been identified to her only by Bates stamp numbers.

Weeks later, upon realizing the sensitive nature of the document disclosure, the SEC petitioned the district court for a protective order, which was denied because the government’s lack of care constituted a waiver of any applicable privilege.
After the specific document was called to the attention of counsel, “[a] deliberate decision was made to produce it without looking at it,” thereby waiving any privilege. Thus, an attorney who fails to take reasonable precautions to prevent inadvertent disclosure may find that any applicable privilege is waived as a matter of substantive law.

The ABA Position

The American Bar Association, in two formal ethics opinions and a recent amendment to its Model Rules of Professional Conduct, has resolved the inadvertent disclosure dilemma in favor of professionalism and confidentiality concerns.

In ABA Formal Opinion 92-368, the Committee on Ethics and Professional Responsibility wrote: “A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer, and abide the instructions of the lawyer who sent them.”

The ABA opinion was based on principles of substantive law, which evinced “an unwillingness to permit mere inadvertence to constitute a waiver,” and considerations of reciprocity. As the ABA Committee observed: “While a lawyer today may be the beneficiary of the opposing lawyer’s misstep, tomorrow the shoe could be on the other foot.”

The ABA Ethics Committee revisited the issue two years later, and reached a similar conclusion in Formal Opinion 94-382, writing that a lawyer who receives unsolicited materials “which are obviously privileged and/or confidential” should notify adverse counsel upon receipt and follow that attorney’s instruction.

In 2002, the ABA amended its Model Rules of Professional Conduct to include a provision obligating a lawyer who knowingly receives an inadvertently sent confidential missive promptly to notify the sender.

ABA Model Rule 4.4 (b) provides: “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.”

The Rule’s Commentary explains that the lawyer’s duty of advocacy on behalf of the client “does not imply that a lawyer may disregard the rights of third persons.”

New York Rule

New York is one of the few states that eschews the ABA Model Rules in favor of a modified version of the Code of Professional Responsibility, which the ABA introduced in 1970.22

Unlike the ABA Model Rules, the New York Code does not explicitly oblige an attorney to notify the sender upon receipt of an inadvertently sent confidential document. Interestingly, the code does address a lawyer’s obligation upon receipt of funds or other property belonging to another. DR 9-102 (c) obligates an attorney to “promptly notify a client or third person of the receipt of funds, securities or other properties in which the client or third person has an interest.”91

However, the code does not define what is meant by “other properties,” and it does not appear that this rule was intended to apply to the type of intellectual property or attorney work-product likely to be found in an errant fax or e-mail.22

The New York County Lawyers’ Association

An attorney receiving an inadvertent disclosure is well advised to consider whether the sender took reasonable precautions to protect the confidentiality of the material.

Committee on Professional Ethics recently opined that a lawyer who knowingly receives inadvertently disclosed confidential information should notify the sender and abide by that lawyer’s instructions.

NYCLA Opinion 730 distinguishes between situations in which the confidentiality of a document is asserted on its cover, in which case prompt notice should be given to the adversary, and, on the other hand, a “mysterious memorandum,” from which the first page, along with any assertion of privilege or confidentiality, is missing.

Under the first scenario, the privileged nature of the document is asserted upon its face, and accordingly should be respected.

Under the second, the origin of the “mysterious memorandum” is in doubt and the recipient has no obligation to notify its sender.

Accordingly, the NYCLA Ethics Committee concluded that: “If a lawyer receives information which the lawyer knows or believes was not intended for the lawyer and contains secrets, confidences or other privileged matter, the lawyer, upon recognition of same, shall, without further review or other use thereof, notify the sender and (insofar as it shall have been in written or other tangible form) abide by sender’s instructions regarding return or destruction of the information.”

In addition to the rationale in the ABA Opinions, the NYCLA Committee reasoned that lawyers should respect each others’ confidences and privileges.

Conclusion

The inadvertent production of privileged or other confidential materials can place the recipient in a professional dilemma in which considerations of zealous advocacy vie with a growing trend toward ethics and professionalism, most notably embodied in the ABA Model Rules.

Since the substantive law of waiver is highly fact-specific, an attorney receiving an inadvertent disclosure is well advised to consider whether the sender took reasonable precautions to protect the confidentiality of the material.

As pointed out in NYCLA Ethics Opinion No. 730, the ethical course of action can depend upon whether or not it is readily apparent that the inadvertent disclosure includes material about which the sender seeks to assert a privilege.

(1) 22 NYCRR §1200.32 [DR 7-101].
(2) See DR 7-106 (c) (5) (directing attorney to comply “with known local customs of courtesy or practice”); EC 7-38 (same).
(4) DR 7-101 (a) (1), 22 NYCRR §1200.32 (a) (1).
(5) EC 7-1.
(6) Freedman, supra.
(7) Id.
(9) 189 F.R.D 83 (SDNY 1999).
(11) DR 9-102 (c) (1), 22 NYCRR §1200.46. DR 9-102(a) provides that a lawyer is a fiduciary with respect to funds or other property belonging to another person.
(12) Research has uncovered no authority applying DR 9-102 (c) to the errant fax situation in New York