

BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE

**FORMAL ETHICS OPINION 2004-F-150**

Guidance is provided concerning the ethical obligations of attorneys who receive confidential documents of adverse parties which were inadvertently sent or disclosed.

It has come to the attention of the Board of Professional Responsibility that many Tennessee attorneys have been presented with an ethical dilemma which arises as a result of a lawyer's receipt of an adversary's confidential documents under circumstances which make it clear that the materials were not intended for the receiving lawyer. Such documents may be subject to the attorney-client, work product or other privilege, and are otherwise confidential. The issue presented includes situations where the sending or disclosing lawyer has notified the receiving lawyer of the inadvertent release or forwarding and has requested return of the confidential documents, and situations where the sending or disclosing lawyer has no knowledge that confidential materials were inadvertently sent or disclosed. Further, this opinion is applicable in situations where the receiving lawyer has reviewed the materials before being notified by the sending lawyer, and in situations where the sending or disclosing lawyer has notified the receiving lawyer of the error before the materials are reviewed.

There is no provision of the Tennessee Rules of Professional Conduct (or of the prior Code of Professional Responsibility) which is clearly dispositive of the issue presented. Further, reported Tennessee cases are silent on the subject. We have addressed this question previously in Tennessee Advisory Ethics Opinion 92-A-478 in March of 1992, but are constrained to modify the holding of Tennessee Advisory Ethics Opinion 92-A-478 in light of newer developments on this subject. In Advisory Opinion 92-A-478, a party to an action inadvertently sent a faxed letter containing confidential attorney-client communications to the lawyer for the adverse party, whereupon the receiving lawyer briefly reviewed the letter and notified the sending party of his receipt of same. The party who inadvertently sent the fax contended that the letter was misdirected and that the information contained in the letter was privileged and intended only for his lawyer.

Our conclusion within this prior Advisory Ethics Opinion was that the inquiring (receiving) attorney had an ethical obligation to take no further action that would tend to interfere with the confidentiality between the sending party and his attorney, and that the receiving lawyer should take no further action to review, digest, duplicate or copy the letter which was mistakenly directed to him. We reasoned that the letter should have been sealed and returned to the sending

party or to the sending party's attorney, but, the receiving lawyer was directed to prepare a memorandum to his client of the events, circumstances and his recollection of the facts as gleaned from the misdirected letter.

In November of 1992, the American Bar Association (ABA) issued Formal Ethics Opinion No. 92-368 on this specific issue. The ABA concluded that a receiving lawyer who receives materials which 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 reviewing the materials, notify the sending lawyer and abide by such lawyer's instructions regarding disposition of the confidential documents. While the ABA realized that there was no satisfactory answer to the question posed by the literal letter of the ABA Model Rules, nonetheless, the ABA considered the concept of confidentiality as embodied within Model Rule 1.6 -- which "rests upon the 'full, free and frank' exchange between lawyer and client, shielded from the intrusive eyes and ears of adverse parties, the media and the public" -- to be so fundamental to the attorney-client relationship that a more important principle than confidentiality would have to be identified in order to support a different result. No more important principle was found by the ABA in its Formal Opinion 92-368, and we find no more important principle than protection of attorney-client confidentiality herein. Moreover, the ABA correctly reasoned in this regard that zealous or competent representation is not necessarily furthered by permitting the receiving lawyer to maximize the advantage to his own client which would be gained by a careful analysis of the inadvertently sent or disclosed materials.

In a second formal opinion issued on a very analogous issue, the ABA concluded in Formal Opinion 94-382 (July 5, 1994) that where a receiving lawyer receives on an unauthorized basis, materials of an adverse party which are known to be confidential or privileged, the receiving lawyer should either refrain from reviewing the materials or should limit his or her review of such documents only to determine how appropriately to proceed. This second ABA Formal Opinion on the subject goes on to state that the receiving lawyer in all instances should notify the adversary party's lawyer that he or she is in possession of such materials and should either follow adversary counsel's instructions with respect to the disposition of such materials or refrain from using them until the receiving lawyer obtains a definitive ruling on the proper disposition of them from a court with appropriate jurisdiction.

The Board of Professional Responsibility hereby adopts the holdings and rationale of ABA Formal Opinions 92-368 and 94-382, and notes also that persuasive authority from other states supports this conclusion. The Florida Bar's Commission on Ethics and Professional Responsibility, in Opinion 93-3 (Feb. 1, 1994), has opined on this subject that "[a]n attorney who receives confidential documents of an adversary as a result of an inadvertent release is ethically obligated to promptly notify the sender of the attorney's receipt of the documents." In Abamar Housing v. Lisa Daly Lady Decor, 698 So. 2d 276, 279-280 (Fla. App. 3 Dist. 1997) the Florida

Court of Appeal relied on Florida Bar Ethics Opinion 93-3 and ABA Formal Opinion 92-368 in directing the return of documents to the party which inadvertently disclosed them. Similarly, the Texas Supreme Court in In Re Meador, 968 S.W. 2d 346, 351 (Tex. 1998) clearly set forth that ABA Formal Opinion 94-382 represented "the standard to which attorneys should aspire in dealing with an opponent's privileged information." Further, in a case involving an appeal of sanctions imposed against the defendant's attorney for a failure to return documents which were inadvertently produced by the plaintiff, the California Court of Appeal reversed the award of sanctions due to the absence of any controlling California precedent, but adopted prospectively the analysis and holding of ABA Formal Opinion 92-368 as the standard where this dilemma is presented for future cases. State Compensation Ins. Fund v. WPS, Inc., 82 Cal.Rptr. 2d 799, 807-808 (Cal. App. 2 Dist. 1999).

In reaching this conclusion, we specifically adopt the following reasoning of the California Court of Appeal in State Compensation Ins. Fund, 82 Cal. Rptr. at 808, as follows:

..."[t]he conclusion we reach is fundamentally based on the importance which the attorney-client privilege holds in the jurisprudence of this state. Without it, full disclosure by clients to their counsel would not occur, with the result that the ends of justice would not be properly served. We believe a client should not enter the attorney-client relationship fearful that an inadvertent error by its counsel could result in the waiver of privileged information or the retention of the privileged information by an adversary who might abuse and disseminate the information with impunity. In addition, it has long been recognized that "[a]n attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice..." (citations omitted).

This Ethics Opinion only addresses the ethical obligations of attorneys in Tennessee, and does not address issues of whether a disclosure was in fact inadvertent, whether an inadvertent disclosure implicitly waives the attorney-client or other privileges, or whether disqualification should be ordered or sanctions imposed in particular cases. These are questions of fact and law to be decided by the courts of this state.

Tennessee Advisory Ethics Opinion 92-A-478 is modified to the extent it is inconsistent with the opinion expressed herein.

This 17<sup>th</sup> day of September, 2004.

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