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Handling — or Un-Handling — Your Adversary's Privileged Documents

Do you advise the other party? The court? Do you just throw the documents out? Or maybe circumstances allow for review?

The potential benefits of reviewing an adversary's obviously-privileged documents in the course of a litigation typically will not be worth the associated risks — disqualification from that litigation and potential disciplinary sanctions associated with ethical violations.

In the course of a litigation, have you ever come into the possession of your adversary's obviously-privileged documents, either from your client during your factual investigation or in the course of discovery? Conversely, have you ever received a document production from opposing counsel only to discover that the opposing party somehow came into possession of and produced your client's privileged documents?

Are you obligated to notify your adversary that you have come into possession of your adversary's privileged communications? If there is an obligation to notify, what are the potential consequences for failure to do so? Dismissal of the case? Disciplinary sanctions? Disqualification?

The following hypothetical frames

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the issue. Lawyer A represents the plaintiff in a race discrimination case brought against her former employer, XYZ Company. The plaintiff had been XYZ's director of human resources. In that role, her responsibilities included the management of all human resources issues. As part of that responsibility, she frequently communicated with outside counsel on behalf of XYZ, sending and receiving numerous e-mails and other communications which sought or conveyed legal advice to XYZ.

Due to excessive lateness and absenteeism, XYZ terminated the plaintiff and gave her two days to return all company materials, including any and all documents and copies thereof, as well as her laptop computer. Unbeknownst to XYZ, however, instead of limiting her activity to cleaning personal items off of the computer's hard drive, the plaintiff printed volumes of documents belonging to XYZ, including numerous e-mails and memoranda between herself and other XYZ employees, on behalf of XYZ and XYZ's outside counsel.

After filing suit against XYZ (including claims for wrongful termination and race discrimination) and in response to Lawyer A's request that she

provide him with all documentary evidence that relates to her claims, the plaintiff gave Lawyer A all of the documents that she printed from XYZ's computer after her termination, including all of the attorney-client communications, many of which were marked as such on the face of the documents. Lawyer A then reviewed those documents and discovered that many of the documents were obviously-privileged communications.

Lawyer A believed, however, that many of the documents were relevant as they pertained to a prior race discrimination lawsuit, and Lawyer A thinks he has found the smoking gun that will help the plaintiff win her case. Also among the documents are other obviously-privileged communications that have no apparent relation to the plaintiff's claims, including communications with outside counsel regarding XYZ's employee handbook.

Because the documents are responsive to XYZ's document requests and, in any event, Lawyer A intends to use these documents in his case against XYZ, he produces each and every document to XYZ's outside litigation counsel, Lawyer B. Upon receiving the document production, Lawyer B reviews the documents and discovers the attorney-client and work product privileged documents. Lawyer B advises XYZ of his finding.

The general counsel of XYZ is furious and directs Lawyer B to take whatever actions are available to retrieve the documents and all copies, to have the plaintiff's case dismissed, and to determine what actions can be taken against

Lawyer A.

Ethical Rules and Violations

What were Lawyer A's obligations, if any, when he discovered that his client had given him privileged documents that belonged to XYZ? And what can Lawyer B do to secure the return of those documents and ensure that Lawyer A's review of those documents will not result in a disadvantage to his client?

The attorney-client privilege protects from disclosure confidential communications between an attorney and a client where the client is seeking or the attorney is communicating legal advice. And it is well-established that the attorney-client privilege attaches to corporations.

Further, the authority to waive a corporation's attorney-client privilege rests solely with the corporation's management and is normally exercised by its officers and directors. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985). Those waiving the attorney-client privilege on behalf of the corporation must do so in a manner consistent with his or her fiduciary duty to act in the best interest of that corporation.

Did Lawyer A violate any ethical rules or obligations? If so, what should Lawyer A have done differently to comply with his ethical obligations when he realized that his client provided him with privileged documents?

Opinion 680 from the New Jersey Advisory Committee on Professional Ethics provides some guidance. In that case, during the lunch recess of a document review, a client went into the briefcase of opposing counsel and reviewed and copied several documents. Upon advising his lawyer of his actions, the lawyer refused to review the documents and sought an opinion from the committee as to the appropriate course of action with regard to the copied documents and the representation.

After stating that the client's review of the adversary's documents was, at the very least, an invasion of privacy, the committee held that, pursuant to New Jersey Rule of Professional Conduct 8.4(a), which prohibits an

attorney from doing indirectly that which is prohibited directly, a "lawyer cannot be involved in the subsequent review of evidence obtained improperly by the client."

Furthermore, the committee held that allowing a client's improper actions in the context of litigation to benefit that client in that litigation constitutes "conduct that is prejudicial to the administration of justice" in violation of RPC 8.4(d).

Opinion 680 addresses an extreme situation where the client essentially stole documents. In our hypothetical, the plaintiff initially received the privileged communications lawfully, but failed to return them when she separated from employment. Nonetheless, Opinion 680 suggests that Lawyer A likely violated RPC 8.4 by reviewing and producing the obviously-privileged documents that he knew, or should have known, were improperly retained by his client.

ABA Opinion Is Instructive

Although there are no New Jersey RPCs or committee opinions that speak directly to what Lawyer A should have done to comply with his ethical obligations, the American Bar Association's Committee on Ethics and Professional Responsibility, ABA Formal Opinion No. 94-382 on July 5, 1994, titled "Unsolicited Receipt of Privileged or Confidential Materials," is instructive.

In that opinion, the ABA committee explained that a lawyer who receives, on an unauthorized basis, materials of an adverse party that he knows to be privileged or confidential, satisfies his professional responsibilities under the ABA's Model Rules of Professional Conduct by "(a) refraining from reviewing materials which are probably privileged or confidential, any further than is necessary to determine how appropriately to proceed; (b) notifying the adverse party or the party's lawyer that the receiving lawyer possesses such documents; (c) following the instructions of the adverse party's lawyer; or (d) in the case of a dispute, refraining from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court."

The ABA committee based the above procedures on the rationale that

"[i]n almost all cases a party should be able to protect its proprietary interests, as in the case of confidential materials, and its privileges, as in the case of material falling within the attorney-client privilege, despite the unauthorized efforts of others to undermine or sabotage them."

Thus, the ABA committee suggested procedures to "afford the adverse party a reasonable and timely opportunity to resort to judicial remedies to determine legal rights and allow the receiving lawyer, under appropriate circumstances to use relevant material in the prosecution or defense of an action on behalf of his client."

The situations in which a lawyer may be able to use documents obtained outside of the discovery process, according to the opinion, include when the documents should have been produced during discovery, but were not, or when the documents were provided to the lawyer by a third-party acting under the authority of a whistleblower statute. The opinion, however, does not name any situation in which a lawyer can use privileged documents that were improperly obtained by his client.

The opinion also discusses three states that have confronted a similar issue and have held that a receiving lawyer does not have an obligation to disclose to a court or his adverse party that he possesses the adverse party's privileged or confidential documents. However, those opinions were in the context of the lawyer receiving the privileged documents from an unidentified third party, not the represented party himself.

In fact, the opinion from Michigan goes a step further and states that an attorney who comes into the possession of an adversary's privileged documents may not use the documents if "his client in any way procured the removal of the document from the possession of the opposing party."

Assuming that New Jersey would follow the well-reasoned ABA opinion, Lawyer A should have realized the privileged nature of the documents and ceased reviewing them. If the documents were not clearly privileged on their face, Lawyer A, at the least, should have inquired of the plaintiff as to how she

came into possession of these documents.

Lawyer A then should have asked the plaintiff whether XYZ had authorized her to retain copies of its privileged documents. If he had done so, Lawyer A would have determined that he was in possession of XYZ's attorney-client privileged documents that were wrongfully obtained or retained by his client.

Instead of reviewing and presumably reading each and every document protected by XYZ's attorney-client privilege, Lawyer A should have immediately ceased review of the documents when he discovered their privileged nature and informed opposing counsel that he was in possession of privileged documents. Then, Lawyer A either would await Lawyer B's instructions or refrain from reviewing the documents pending the court's determination of whether they must be returned.

In fact, to prevent any further or future accusations of wrongdoing, Lawyer A even could have sealed the documents and sent them to the court for it to hold in camera pending a decision as to whether the documents must

be returned to XYZ.

Disqualification

Once Lawyer B discovered that the plaintiff and Lawyer A were in possession of XYZ's privileged documents, and presumably intended to use those documents against XYZ, what could Lawyer B do to secure the return of the documents and ensure that they, and the information therein, are not used to the disadvantage of XYZ?

The first thing Lawyer B should do is send a letter to Lawyer A demanding the immediate return of all documents, and any copies thereof, that are in Lawyer A and the plaintiff's possession and that are protected by XYZ's attorney-client privilege and any other applicable privilege.

Further, because Lawyer A cannot "unring the bell," XYZ may consider moving for the disqualification of Lawyer A. ABA Opinion 94-382 suggests that disqualification of an attorney who reviews the privileged communications of his adversary can be a proper remedy depending upon the circum-

stances. That opinion states that the mere receipt and initial review of privileged materials may form the basis of a disqualification motion.

In addition, even a lawyer who complies with the procedures outlined in the ABA opinion may be subject to an accusation that he reviewed the materials before giving his adversary an adequate opportunity to seek appropriate protection, and still is potentially subject to disqualification. In that case, the ABA committee made it clear that "[a] court confronted with such allegations on a motion to disqualify may err on the side of caution — by granting the motion — in order to preserve inviolate the attorney-client privilege."

Although probably less helpful, XYZ can also request that the court exclude the introduction of the privileged documents and preclude any mention of the information contained therein. While this may be an effective way to eliminate one of the disadvantages suffered by XYZ, it cannot take away the strategic advantage that Lawyer A gained by reviewing the privileged documents. ■