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Handout 3: Transactions with Persons Other Than Clients

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TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS Rule 4.2

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Definitional Cross-References

"Fraudulent" See Rule 1.0(d)

"Knowingly" See Rule 1.0(f)

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS Rule 4.2

**RULE 4.2: COMMUNICATION WITH PERSON
REPRESENTED BY COUNSEL**

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

Rule 4.2

ABA MODEL RULES

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, di-

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS Rule 4.3

rects or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Definitional Cross-References

"Knows" See Rule 1.0(f)

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS Rule 4.3

**RULE 4.3: DEALING WITH
UNREPRESENTED PERSON**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Definitional Cross-References

"Knows" *See* Rule 1.0(f)

"Reasonable" *See* Rule 1.0(h)

"Reasonably should know" *See* Rule 1.0(j)

**RULE 4.4: RESPECT FOR
RIGHTS OF THIRD PERSONS**

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS Rule 4.4

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or deleting electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

Rule 4.4

ABA MODEL RULES

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Definitional Cross-References

"Knows" *See* Rule 1.0(f)

"Reasonably should know" *See* Rule 1.0(j)

"Substantial" *See* Rule 1.0(l)

MAINTAINING THE INTEGRITY OF THE PROFESSION Rule 8.3

**RULE 8.3: REPORTING
PROFESSIONAL MISCONDUCT**

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated

violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

Definitional Cross-References

"Knows" See Rule 1.0(f)

"Substantial" See Rule 1.0(l)

MAINTAINING THE INTEGRITY OF THE PROFESSION Rule 8.4

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly

manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Definitional Cross-References

"Fraud" See Rule 1.0(d)

"Knowingly" See Rule 1.0(f)

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 11-461 Advising Clients Regarding Direct Contacts with Represented Persons

August 4, 2011

Parties to a legal matter have the right to communicate directly with each other. A lawyer may advise a client of that right and may assist the client regarding the substance of any proposed communication. The lawyer's assistance need not be prompted by a request from the client. Such assistance may not, however, result in overreaching by the lawyer.¹

A lawyer may not communicate with a person the lawyer knows is represented by counsel, unless that person's counsel has consented to the communication or the communication is authorized by law or court order. ABA Model Rule 4.2 (sometimes called the "no contact" rule). Further, a lawyer may not use an intermediary, i.e., an agent or another, to communicate directly with a represented person in violation of the "no contact" rule.²

It sometimes is desirable for parties to a litigation or transactional matter to communicate directly with each other even though they are represented by counsel. Two examples may be where the parties wish to cement a settlement or break an impasse in settlement negotiations. In this opinion, the Committee explores the limits within which it is ethically proper under the Model Rules of Professional Conduct for a lawyer to assist a client regarding communications the client has a right to have with a person the lawyer knows is represented by counsel. Even though parties to a matter are represented by counsel, they have the right to communicate directly with each other.³ In addition, a client may require the lawyer's assistance and a lawyer may be reasonably expected to advise or assist the client regarding communications the client desires to have with a represented person. A client may ask the lawyer for advice on whether the client may lawfully communicate directly with a represented person without their lawyer's consent or their lawyer being present. The comments to Rules 4.2 and 8.4(a) state that such advice is proper.⁴ Even if the client has not asked for the advice, the lawyer may take the initiative and advise the client that it may be desirable at a particular time for the client to communicate directly with the other party.

For example, a lawyer represents a client in a marital dissolution. The client's husband also is represented by counsel. The parties and their lawyers have reached an impasse in their negotiations over various issues. The client may ask her lawyer if she may communicate directly with her husband to see if an agreement can be reached on some contested issues. Alternatively, the lawyer might independently

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

² Rule 8.4(a). The Rule states: "[i]t is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-395 (1995) ("Since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject of the representation, she [under Rule 8.4(a)] may not circumvent the Rule by sending an investigator to do on her behalf that which she is herself forbidden to do."); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 408 (ABA 7th ed. 2011) ("A lawyer may not, however, "mastermind" a client's communication with a represented person.").

³ See *Holdren v. General Motors Corp.*, 13 F.Supp.2d 1192, 1195 (D. Kan. 1998) ("there is nothing in the disciplinary rules which restrict a client's right to act independently in initiating communications with the other side, or which requires that lawyers prevent or attempt to discourage such conduct." (citing New York City Bar Association Formal Opinion No.1991-2, at 5-6)); *Dorsey v. Home Depot U.S.A., Inc.*, 271 F.Supp.2d 726, 730 (D.Md.2003) ("Nothing in the law prohibits litigants or potential litigants from speaking among and between themselves, as opposed to attorneys for such parties attempting direct communications with represented parties."); *Northwest Bypass v. U.S. Army Corps of Engineers*, 488 F.Supp.2d 22, 28-29 (D.N.H. 2007) (not improper for represented party to communicate directly with represented opponent).

⁴ See Rule 4.2 cmt. 4 ("A lawyer may not make a communication prohibited by this Rule through the acts of another. See also Rule 8.4(a) cmt. 1 ("Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.").

suggest that the possibility of resolving outstanding issues would be enhanced if the client communicates directly with her husband. The client also might benefit from the lawyer's advice on how she should conduct such settlement negotiations, the topics or issues to be covered, and the goals or objectives to be reached. The client also could ask the lawyer to prepare a marital settlement agreement with the goal of having her husband execute the agreement during her meeting with him.

The language of Rule 4.2 Comment [4] raises the primary question addressed in this opinion, to what extent may the lawyer advise and assist the client in communicating directly with the represented husband without violating Rule 4.2 through the acts of another, i.e., the client.⁵ However, there is tension between Comment [1] to Rule 4.2 and Rule 8.4(a). In ABA Formal Op. 92-362 (1992), this Committee opined that, without violating Rules 4.2 and 8.4 (a), a lawyer may ethically advise the client to communicate directly with a represented adversary to determine if the adverse party's lawyer had informed them that a settlement offer was pending.⁶ The inquiring lawyer in the opinion represented the plaintiff in a civil case in which the defendant also was represented by counsel. Previously, the plaintiff's lawyer made a settlement offer to opposing counsel. Plaintiff's lawyer had received no response, and the case was set for trial in two weeks. Plaintiff's lawyer suspected that opposing counsel had not informed the defendant of the offer. In that opinion, the Committee concluded that, although the plaintiff's lawyer could not communicate the settlement offer directly to the defendant without violating Rule 4.2, the plaintiff's lawyer had an ethical duty under Rules 1.1, 1.2(a), and 1.4(b) to advise the client that the lawyer believed his settlement offer had not been communicated by defendant's counsel to the defendant and that the plaintiff had the right to speak directly with the defendant to determine whether the settlement offer had been communicated.

ABA Formal Op. 92-362 acknowledged tension between the lawyer's decision to advise the client of the right to communicate directly with a represented adversary and Rule 8.4(a)'s prohibition against the lawyer's doing indirectly what the lawyer cannot do directly. Nevertheless, the Committee concluded that "where the purpose of the communication is to ascertain whether a settlement offer has been communicated to the other party, Rule 8.4(a) should not be read to preclude the lawyer's fulfilling the lawyer's duty, reasonably expected by the client, fully and fairly to advise the client of the lawyer's best professional judgment as to the exercise of the client's rights in furtherance of the representation."⁷ The Committee expressly indicated that it was not addressing what the lawyer might tell the client to say to the other party and where the line might be crossed before running afoul of Rule 8.4(a). The Committee was careful to note that if the client was only going to find out if the other party had been told of the offer, there would be no violation of the rules. Several bar ethics committees likewise have concluded that it is not a violation of the professional conduct rules for a lawyer to suggest or recommend that the client communicate directly with a represented person.⁸

The decision to communicate directly with a represented person may be the client's idea or the lawyer's. Some decisions and opinions suggest that counsel may be violating the rules prohibiting communication with a represented party by encouraging or failing to discourage a client speaking directly

⁵ We conclude that a lawyer's client is "another" for purposes of Rule 8.4(a). In re Marietta, 569 P.2d 921 (Kan.1977) (lawyer sanctioned for preparing release and advising client to pass it on to represented adverse party); S.F. Bar Informal Opinion 1985-1 (1985) ("it would be inappropriate ... for [a] lawyer to use the client as an indirect means of communicating with the adverse party" in settlement negotiations).

⁶ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-362 (1992) (Contact With Opposing Party Regarding Settlement Offer), in *FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998* (ABA 2000) at 85, 88.

⁷ *Id.* at 89.

⁸ See, e.g., Massachusetts Bar Op. 11-03 (2011) (not violation of Rules 4.2 and 8.4(a) for lawyer to advise client to urge another person to release attachment on client's property, even though other person is represented by counsel); Oregon Eth. Op. Op. 2005-147 (1997) (Direct Communication Between Represented Parties) ("Allowing the parties themselves to discuss the issues and possible avenues for settlement does not conflict with the policy behind the rule [prohibiting a lawyer from causing another to communicate on the subject of the representation]."); California Comm. on Prof'l Resp. and Conduct Formal

Op. 1993-131 (1993) (lawyer may confer with client as to strategy to be pursued in, goals to be achieved by, and general nature of communication client intends to initiate with opposing party as long as communication itself originates with, and is directed by, client and not the lawyer); Michigan Eth. Op. CI-920 (1983) (in domestic relation case, it is permissible for lawyer to give client draft settlement proposal even when lawyer knows client may discuss document with spouse who is represented by counsel); San Francisco Bar Assoc. Informal Op. 1985-1 (1985) (lawyer may allow or encourage his client to attempt to resolve dispute by communicating directly with opposing party, so long as client is not directly or indirectly acting as agent of lawyer).

to the other party.⁹ The “no contact” rules applied in these opinions, however, differ from the Model Rules in that they do not contain the relevant language in Rule 4.2 Comment [4] that “a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.” As the Committee observed in Formal Op. 92-362, other rules may require that, in some situations, a lawyer advise the client to consider communicating directly with her represented adversary about a matter related to the representation. Rule 1.1 requires that “[a] lawyer shall provide competent representation to a client.” Rule 1.4(a)(2) requires the lawyer to consult with the client as to the means by which the client’s objectives are to be accomplished.¹⁰ These fundamental ethical principles, coupled with the comments to Rules 4.2 and 8.4(a), suggest that the assistance a lawyer may give to a client extends beyond advising her of her right to communicate with her adversary.

Rule 8.4(a)’s prohibition against a lawyer’s violating the rules through the acts of another raises questions about what a lawyer may or may not say to the lawyer’s client, or what the lawyer may do to assist the client in communicating directly with the represented opponent. These issues were explicitly left unaddressed in Formal Op. 92-362. When Formal Opinion 92-362 was issued, the comments to Rules 4.2 and 8.4 did not contain the current language that expressly permits the lawyer to advise the client regarding communications the client is legally entitled to make and actions the client is legally entitled to take. There is very little authority that provides guidance in any context regarding the scope of assistance and advice a lawyer may give a client under the comments to Rules 4.2 and 8.4. Some authority states that because of Rule 8.4(a)’s prohibition against violating or attempting to violate the Rules of Professional Conduct through the acts of another, a lawyer may not “script” or “mastermind” a client’s communication with a represented person and may violate Rule 4.2 by preparing legal documents for the client to have a represented person sign without the assistance of their counsel.¹¹ What constitutes “scripting” or “masterminding” the communication is not clear, but such a standard, if too stringently applied, would unduly inhibit permissible and proper advice to the client regarding the content of the communication, greatly restricting the assistance the lawyer may appropriately give to a client.¹² Relying on language similar to Comment [4] of Model Rule 4.2, the *Restatement (Third) of The Law Governing Lawyers* (2000) (“the *Restatement*”) explains:

The lawyer for a client intending to make such a communication may advise the client regarding legal aspects of the communication, such as whether an intended communication is libelous or would otherwise create risk for the client. Prohibiting such advice would unduly restrict the client’s autonomy, the client’s interest in obtaining important legal advice, and the client’s ability to communicate fully with the lawyer.”¹³

⁹ See, e.g., *Miano v. AC & R Advertising, Inc.*, 148 F.R.D. 68, 82 (S.D.N.Y. 1993) (“where a client directly asks his or her attorney whether he should approach a represented adversary, the attorney may not ethically recommend or endorse such action”); N.Y. City Ethics Op. 2002-3 (2002) (if client “conceives of the idea” of communicating with represented adversary, lawyer may advise client about it but must avoid helping client to either elicit confidential information or encourage other party to proceed without counsel); Massachusetts Bar Op. 82-8 (1982) (lawyer who has prepared settlement agreement on client’s behalf should discourage client from specifically discussing settlement with other party or directly sending letter that addresses settlement without consent of that party’s lawyer).

¹⁰ See ABA Formal Op. 92-362, FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 88.

¹¹ See, e.g., *Holdgren v. General Motors Corp.*, 13 F.Supp.2d 1192, 1193-96 (D.Kan. 1998) (lawyer in age discrimination case violated rules of professional conduct “through the acts of another” by encouraging client to obtain affidavits from coworkers, advising him of difference between “out of court statements” and signed affidavits for trial purposes, and advising him how to draft affidavit); *In re Pyle*, 91 P.3d 1222, 1228-29 (Kan. 2004) (lawyer “circumvented the constraints” of Rule 4.2 by, at client’s request, preparing affidavit for her to deliver to represented defendant in personal injury case); California Comm. on Prof’l Resp. and Conduct Formal Op. 1993-131 (“An attorney is also prohibited from scripting the questions to be asked or statements to be made in the communications or otherwise using the client as a conduit for conveying to the represented opposing party words or thoughts originating with the attorney.”); Massachusetts Bar Op. 11-03 (“We believe, however, that the lawyer would cross the line if she prepared a release of the attachment and presented it to the sister for execution without the knowledge and express permission of the sister’s lawyer.”).

¹² See n.11.

¹³ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt (k) (2000). See also John Leubsdorf, *Communicating With Another Lawyer’s Client: The Lawyer’s Veto and the Client’s Interests*, 127 U. PA. L. REV. 683, 697 (1979) (“An extension of the [no-contact] rule to communications between clients is hard to reconcile with its ostensible purposes. Whatever dangers flow from the confrontation of professional guile with lay innocence are absent

Restatement § 99 Illustration 6 clarifies this point with the following scenario. A lawyer represents a client who has a dispute with a contractor. On her own, the client drafts a letter outlining her position in the dispute and shows a copy to her lawyer. Viewing the draft as inappropriate, the lawyer redrafts the letter and recommends that the client send it out as redrafted. The client does so. The *Restatement* concludes that the lawyer's assistance to the client was not an improper communication with a represented person.

The lawyer also may draft a document for the client to deliver to the represented adversary although authority restricts the lawyer's assistance to situations where the client originates the communication, stating that it is improper for the lawyer to originate or direct the proposed communication.¹⁴ Section 99 of the *Restatement* does not explicitly address this question, although Comment (k) and Illustration 6 are based on the client having originated a proposed communication with a represented adversary. The line between permissible advice and impermissible assistance may not always be clear. This Committee does not think that line should be drawn based on who initiates the first draft of a communication with a represented adversary. Such an approach favors only those clients who have the sophistication to ask the lawyer to draft a document for the client to give to a represented adversary. In addition, allowing the lawyer to assist only if the client originates the substance of the communication leaves the unsophisticated client without the benefit of the lawyer's advice in formulating communications that the rules allow the client to have with a represented person. Instead, the line must be drawn on the basis of whether the lawyer's assistance is an attempt to circumvent the basic purpose of Rule 4.2, to prevent a client from making uninformed or otherwise irrational decisions as a result of undue pressure from opposing counsel.

This Committee believes that, without violating Rules 4.2 or 8.4(a), a lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who—the lawyer or the client—conceives of the idea of having the communication.

This Committee favors the approach taken by *Restatement* § 99 Comment (k). Under that approach, the lawyer may advise the client about the content of the communications that the client proposes to have with the represented person. For example, the lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary. Such advice enables the client to communicate her points more articulately and accurately or to prevent the client from disadvantaging herself. The client also could request that the lawyer draft the basic terms of a proposed settlement agreement that she wishes to have with her adverse spouse, or to draft a formal agreement ready for execution. Rules 4.2 and 8.4(a) may permit the lawyer to fulfill the client's request without violating the lawyer's ethical obligations. However, in advising the client, counsel must be careful not to violate the underlying purpose of Rule 4.2, as explained in Rule 4.2 Comment [1]:

This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.¹⁵

when two nonlawyers communicate.... Perhaps we have again come across the desire to keep disputes safely in the control of lawyers."); James G. Sweeney, *Attorneys' Arrogance: Warning Unheeded*, N.Y.L.J., June 17, 1991, at 2 col. 3 ("To deny or deter the client from the opportunity of entering into the gauging process of what value is to him in a particular dispute by denying him an opportunity to sit at the bargaining table with his adversary works against the very fundamental idea of the self and of human autonomy.").

¹⁴ See, e.g., California Comm. on Prof'l Resp. and Conduct Formal Op. 1993-131 ("When the content of the communication to be had with the opposing party originates with or is directed by the attorney, it is prohibited by rule 2-100.").

¹⁵ See ABA Formal Opinion 95-396 (1995), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (ABA 2000) at 330, 334 ("The anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests."). See also *Niesig v. Team I*, 558 N.E.2d 1030, 1032 (N.Y. 1990) ("By preventing lawyers from deliberately dodging adversary counsel to reach-and-exploit the client alone, [the rule prohibiting communicating with a person represented by counsel] safeguards against clients making

Prime examples of overreaching include assisting the client in securing from the represented person an enforceable obligation, disclosure of confidential information, or admissions against interest without the opportunity to seek the advice of counsel. To prevent such overreaching, a lawyer must, at a minimum, advise her client to encourage the other party to consult with counsel before entering into obligations, making admissions or disclosing confidential information. If counsel has drafted a proposed agreement for the client to deliver to her represented adversary for execution, counsel should include in such agreement conspicuous language on the signature page that warns the other party to consult with his lawyer before signing the agreement.¹⁶

improvident settlements, ill-advised disclosures and unwarranted concessions."); *State v. Gilliam*, 748 So.2d 622, 638 (La. Ct. App. 1999), *writ denied*, 769 So.2d 1215 (La. 2000) (rule intended to "prevent disclosure of attorney-client communications and to protect a party from 'liability-creating statements' elicited by a skilled interrogator"); *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 764 N.E.2d 825, 830 (Mass. 2000) (rule preserves counsel's "mediating rule" and protects clients from overreaching by other lawyers); *Polycast Tech Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990) (rule prevents lawyers from eliciting "unwise statements" from opponents, protects privileged information, and facilitates settlements by allowing lawyers to conduct negotiations); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS*, § 11.6.2, at 611 (1986) ("The prohibition is founded upon the possibility of treachery that might result if lawyers were free to exploit the presumably vulnerable position of a represented but unadvised party"); EC 7-18 ("The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel.").

¹⁶ This opinion does not address situations in which a lawyer advises a client with respect to using an investigator or agent to gather facts from a represented person. These situations may involve a variety of factors, not considered in this opinion, relevant to the presence or absence of overreaching.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 11-460

August 4, 2011

Duty when Lawyer Receives Copies of a Third Party's E-mail Communications with Counsel

When an employer's lawyer receives copies of an employee's private communications with counsel, which the employer located in the employee's business e-mail file or on the employee's workplace computer or other device, neither Rule 4.4(b) nor any other Rule requires the employer's lawyer to notify opposing counsel of the receipt of the communications. However, court decisions, civil procedure rules, or other law may impose such a notification duty, which a lawyer may then be subject to discipline for violating. If the law governing potential disclosure is unclear, Rule 1.6(b)(6) allows the employer's lawyer to disclose that the employer has retrieved the employee's attorney-client e-mail communications to the extent the lawyer reasonably believes it is necessary to do so to comply with the relevant law. If no law can reasonably be read as establishing a notification obligation, however, then the decision whether to give notice must be made by the employer-client, and the employer's lawyer must explain the implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision.

This opinion addresses a lawyer's ethical duty upon receiving copies of e-mails between a third party and the third party's lawyer.¹ We explore this question in the context of the following hypothetical scenario.

After an employee files a lawsuit against her employer, the employer copies the contents of her workplace computer for possible use in defending the lawsuit, and provides copies to its outside counsel. Upon review, the employer's counsel sees that some of the employee's e-mails bear the legend "Attorney-Client Confidential Communication." Must the employer's counsel notify the employee's lawyer that the employer has accessed this correspondence?²

When an employer's lawyer receives copies of an employee's private communications with counsel, which the employer located in the employee's business e-mail file or on the employee's workplace computer or other device, the question arises whether the employer's lawyer must notify opposing counsel pursuant to Rule 4.4(b). This Rule 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."

Rule 4.4(b) does not expressly address this situation, because e-mails between an employee and his or her counsel are not "inadvertently sent" by either of them. A "document [is] inadvertently sent" to someone when it is accidentally transmitted to an unintended recipient, as occurs when an e-mail or letter is misaddressed or when a document is accidentally attached to an e-mail or accidentally included among other documents produced in discovery. But a document is not "inadvertently sent" when it is retrieved by a third person from a public or private place where it is stored or left.

The question remains whether Rule 4.4(b) implicitly addresses this situation. In several cases, courts have found that Rule 4.4(b) or its underlying principle requires disclosure in analogous situations, such as when "confidential documents are sent intentionally and without permission." *Chamberlain Group, Inc. v. Lear Corp.*, 270 F.R.D. 392, 398 (N.D. Ill. 2010).³ In *Stengart v. Loving Care Agency, Inc.*,

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

² For a discussion of the employee's lawyer's obligation to take reasonable steps to prevent a situation such as this from arising, see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011) (Duty to Protect the Confidentiality of E-mail Communications With One's Client).

³ See also *Webb v. CBS Broadcasting, Inc.*, No. 08 C 6241, 2011 WL 1743338, at *12-13 (N.D. Ill. May 6, 2011); *Burt Hill, Inc. v. Hassan*, No. Civ.A. 09-1285, 2010 WL 419433, at *3-5 (W.D. Pa. Jan. 29, 2010); *Allen v. Int'l Truck & Engine*, No. 1:02-CV-0902-RLY-TAB, 2006 WL 2578896, at *11-12 (S.D. Ind. Sept. 6, 2006). But see *Mt. Hawley Ins. Co. v. Felman Production, Inc.*, 271 F.R.D. 125, 130-31 (S.D. W. Va. 2010) (lawyer receiving inadvertently sent materials not required to notify another party or that party's

990 A.2d 650, 665 (N.J. 2010), the court found that the employer's lawyer in an employment litigation violated the state's version of Rule 4.4(b)⁴ by failing to notify the employee's counsel that the employer had downloaded and intended to use copies of pre-suit e-mail messages exchanged between the employee and her lawyers.⁵

Since Rule 4.4(b) was added to the Model Rules, this Committee twice has declined to interpret it or other rules to require notice to opposing counsel other than in the situation that Rule 4.4(b) expressly addresses.⁶ In ABA Formal Op. 06-442 (2006), we considered whether a lawyer could properly review and use information embedded in electronic documents (i.e., metadata) received from opposing counsel or an adverse party. We concluded, contrary to some other bar association ethics committees, that the Rule did not apply. We reasoned that "the recent addition of Rule 4.4(b) identifying the sole requirement of providing notice to the sender of the receipt of inadvertently sent information [was] evidence of the intention to set no other specific restrictions on the receiving lawyer's conduct."⁷ Likewise, in ABA Formal Op. 06-440, this Committee found that Rule 4.4(b) does not obligate a lawyer to notify opposing counsel that the lawyer has received privileged or otherwise confidential materials of the adverse party from someone who was not authorized to provide the materials, if the materials were not provided as "the

lawyer of receipt as matter of compliance with ethics rules).

⁴ The New Jersey rule provided: "[a] lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender." New Jersey Rule of Professional Conduct 4.4(b) (2004).

⁵ The *Stengart* court found that the employee "had an objectively reasonable expectation of privacy" in the e-mails based on the fact that the employee "could reasonably expect that e-mail communications with her lawyer through her personal account would remain private, and that sending and receiving them via a company laptop did not eliminate the attorney-client privilege that protected them." 990 A.2d at 655. In contrast, other decisions arising in different factual situations have found that the attorney-client privilege did not protect client-lawyer communications downloaded by an employer from a computer used by its employees. These other decisions have not suggested that the employer's lawyer had a notification duty when the employer provided copies of the employee's attorney-client communications to the employer's lawyer. See, e.g., *Long v. Marubeni Am. Corp.*, No. 05-CIV-639(GEL)(KNF), 2006 WL 2998671, at *4 (S.D.N.Y. Oct. 19, 2006); *Kaufman v. SunGard Inv. Sys.*, No. 05-CV-1236 (JLL), 2006 WL 1307882, at *3 (D.N.J. May 9, 2006); *Scott v. Beth Israel Medical Center, Inc.*, 847 N.Y.S.2d 436, 444 (Sup. Ct. 2007).

⁶ One might argue, for example, that the lawyer is prohibited from reading or using the e-mails by any of several other rules. These include Rule 4.4(a), which requires lawyers to refrain from using "methods of obtaining evidence that violate [a third person's] legal rights," and which, according to the accompanying comment, forbids "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." These also include Rule 8.4(c), which forbids "conduct involving dishonesty, fraud, deceit or misrepresentation," and Rule 8.4(d), which forbids "conduct that is prejudicial to the administration of justice."

⁷ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006) (Review and Use of Metadata). Prior to the adoption of Rule 4.4(b) in February 2002, this Committee had issued opinions addressing a lawyer's obligations upon receiving materials of an adverse party on an unauthorized basis when the lawyer knew that the materials were privileged or confidential, and addressing a lawyer's obligations when the opposing party inadvertently disclosed privileged or confidential materials. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-382 (1994) (Unsolicited Receipt of Privileged or Confidential Materials), in *FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998* (ABA 2000) at 233; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992) (Inadvertent Disclosure of Confidential Materials), *id.* at 140. The Committee concluded that the lawyer's obligations implicitly derived from other law and from provisions such as Rule 8.4 (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation" and conduct "prejudicial to the administration of justice") that did not expressly address these situations. *Id.* at 144-49, 234. However, the Committee withdrew both of these opinions following the adoption of Rule 4.4(b). See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-440 (2006) (Unsolicited Receipt of Privileged or Confidential Materials: Withdrawal of Formal Opinion 94-382); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005) (Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368).

result of the sender's inadvertence."⁸ We noted that other law might prevent the receiving lawyer from retaining and using the materials, and that the lawyer might be subject to sanction for doing so, but concluded that this was "a matter of law beyond the scope of Rule 4.4(b)."⁹

To say that Rule 4.4(b) and other rules are inapplicable is not to say that courts cannot or should not impose a disclosure obligation in this context pursuant to their supervisory or other authority. As Comment [2] to Rule 4.4(b) observes, "this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person."¹⁰ Pursuant to their supervisory authority, courts may require lawyers in litigation to notify the opposing counsel when their clients provide an opposing party's attorney-client confidential communications that were retrieved from a computer or other device owned or possessed by the client. Alternatively, the civil procedure rules governing discovery in the litigation may require the employer to notify the employee that it has gained possession of the employee's attorney-client communications. Insofar as courts recognize a legal duty in this situation, as the court in *Stengart* has done, a lawyer may be subject to discipline, not just litigation sanction, for knowingly violating it.¹¹ However, the Model Rules do not independently impose an ethical duty to notify opposing counsel of the receipt of private, potentially privileged e-mail communications between the opposing party and his or her counsel.

When the law governing potential disclosure is unclear, the lawyer need not risk violating a legal or ethical obligation. The fact that the employer-client has obtained copies of the employee's e-mails is "information relating to the representation of [the] client" that must be kept confidential under Rule 1.6(a) unless there is an applicable exception to the confidentiality obligation or the client gives "informed consent" to disclosure. Rule 1.6(b)(6) permits a lawyer to "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to comply with other law or a court order." Rule 1.6(b)(6) allows the employer's lawyer to disclose that the employer has retrieved the employee's attorney-client e-mail communications to the extent he or she reasonably believes it is necessary to do so to comply with the relevant law, even if the legal obligation is not free from doubt. On the other hand, if no law can reasonably be read as establishing a reporting obligation, then the decision whether to give notice must be made by the employer-client. Even when there is no clear notification obligation, it often will be in the employer-client's best interest to give notice and obtain a judicial ruling as to the admissibility of the employee's attorney-client communications before attempting to use them and, if possible, before the employer's lawyer reviews them. This course minimizes the risk of disqualification or other sanction if the court ultimately concludes that the opposing party's communications with counsel are privileged and inadmissible. The employer's lawyer must explain these and other implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision. See Rules 1.0(e) (Terminology, "informed consent"), 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"), and 1.6(a) ("lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [the exceptions under Rule 1.6(b)]").

⁸ *Supra* n. 7.

⁹ *Id.* A recent article suggests that Rule 1.15(d) imposes a notification duty in the analogous situation in which a lawyer comes into possession of physical documents that appear to have been wrongly procured from another party. Brian S. Faughan & Douglas R. Richmond, "Model Rule 1.15: The Elegant Solution to the Problem of Purloined Documents," 26 ABA/BNA LAW. MAN. PROF. CONDUCT 623 (Oct. 13, 2010). Rule 1.15(d) provides, in pertinent part: "Upon receiving ... property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person." The provision arises out of the lawyer's fiduciary duty to safeguard money and property belonging to another and entrusted to the lawyer. Regardless of whether this rule may apply when stolen physical items come into a lawyer's possession, we do not believe it applies when an organizational client gives its lawyer copies of documents that were on a computer in the client's lawful possession for the lawyer's potential use in litigation. What is at stake is not the third party's proprietary interest in the copies of e-mails but the third party's confidentiality interest, which Rule 1.15(d) does not address.

¹⁰ *Accord* ABA Formal Op. 06-440.

¹¹ See, e.g., Rule 3.4(c) ("A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.").

11-460 Formal Opinion

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 11-459

August 4, 2011

Duty to Protect the Confidentiality of E-mail Communications with One's Client

A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party.¹

Introduction

Lawyers and clients often communicate with each other via e-mail and sometimes communicate via other electronic means such as text messaging. The confidentiality of these communications may be jeopardized in certain circumstances. For example, when the client uses an employer's computer, smartphone or other telecommunications device, or an employer's e-mail account to send or receive e-mails with counsel, the employer may obtain access to the e-mails. Employers often have policies reserving a right of access to employees' e-mail correspondence via the employer's e-mail account, computers or other devices, such as smartphones and tablet devices, from which their employees correspond. Pursuant to internal policy, the employer may be able to obtain an employee's communications from the employer's e-mail server if the employee uses a business e-mail address, or from a workplace computer or other employer-owned telecommunications device on which the e-mail is stored even if the employee has used a separate, personal e-mail account. Employers may take advantage of that opportunity in various contexts, such as when the client is engaged in an employment dispute or when the employer is monitoring employee e-mails as part of its compliance responsibilities or conducting an internal investigation relating to the client's work.² Moreover, other third parties may be able to obtain access to an employee's electronic communications by issuing a subpoena to the employer. Unlike conversations and written communications, e-mail communications may be permanently available once they are created.

The confidentiality of electronic communications between a lawyer and client may be jeopardized in other settings as well. Third parties may have access to attorney-client e-mails when the client receives or sends e-mails via a public computer, such as a library or hotel computer, or via a borrowed computer. Third parties also may be able to access confidential communications when the client uses a computer or other device available to others, such as when a client in a matrimonial dispute uses a home computer to which other family members have access.

In contexts such as these, clients may be unaware of the possibility that a third party may gain access to their personal correspondence and may fail to take necessary precautions. Therefore, the risk that third parties may obtain access to a lawyer's e-mail communications with a client raises the question of what, if any, steps a lawyer must take to prevent such access by third parties from occurring. This opinion addresses this question in the following hypothetical situation.

An employee has a computer assigned for her exclusive use in the course of her employment. The company's written internal policy provides that the company has a right of access to all employees' computers and e-mail files, including those relating to employees' personal matters. Notwithstanding this

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

² Companies conducting internal investigations often secure and examine the e-mail communications and computer files of employees who are thought to have relevant information.

policy, employees sometimes make personal use of their computers, including for the purpose of sending personal e-mail messages from their personal or office e-mail accounts. Recently, the employee retained a lawyer to give advice about a potential claim against her employer. When the lawyer knows or reasonably should know that the employee may use a workplace device or system to communicate with the lawyer, does the lawyer have an ethical duty to warn the employee about the risks this practice entails?

Discussion

Absent an applicable exception, Rule 1.6(a) requires a lawyer to refrain from revealing “information relating to the representation of a client unless the client gives informed consent.” Further, a lawyer must act competently to protect the confidentiality of clients’ information. This duty, which is implicit in the obligation of Rule 1.1 to “provide competent representation to a client,” is recognized in two Comments to Rule 1.6. Comment [16] observes that a lawyer must “act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.” Comment [17] states in part: “When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.... Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.”

This Committee has recognized that these provisions of the Model Rules require lawyers to take reasonable care to protect the confidentiality of client information,³ including information contained in e-mail communications made in the course of a representation. In ABA Op. 99-413 (1999) (“Protecting the Confidentiality of Unencrypted E-Mail”), the Committee concluded that, in general, a lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating Model Rule 1.6(a) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The opinion, nevertheless, cautioned lawyers to consult with their clients and follow their clients’ instructions as to the mode of transmitting highly sensitive information relating to the clients’ representation. It found that particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters.

Clients may not be afforded a “reasonable expectation of privacy” when they use an employer’s computer to send e-mails to their lawyers or receive e-mails from their lawyers. Judicial decisions illustrate the risk that the employer will read these e-mail communications and seek to use them to the employee’s disadvantage. Under varying facts, courts have reached different conclusions about whether an employee’s client-lawyer communications located on a workplace computer or system are privileged, and the law appears to be evolving.⁴ This Committee’s mission does not extend to interpreting the substantive law, and

³ See, e.g., ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451 (2008) (Lawyer’s Obligations When Outsourcing Legal and Nonlegal Support Services) (“the obligation to ‘act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision’” requires a lawyer outsourcing legal work “to recognize and minimize the risk that any outside service provider may inadvertently -- or perhaps even advertently -- reveal client confidential information to adverse parties or to others who are not entitled to access ... [and to] verify that the outside service provider does not also do work for adversaries of their clients on the same or substantially related matters.”).

⁴ See, e.g., *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 663 (N.J. 2010) (privilege applied to e-mails with counsel using “a personal, password protected e-mail account” that were accessed on a company computer); *Sims v. Lakeside Sch.*, No. C06-1412RSM, 2007 WL 2745367, at *2 (W.D. Wash. Sept. 20, 2007) (privilege applied to web-based e-mails to and from employee’s counsel on hard drive of computer furnished by employer); *National Econ. Research Assocs. v. Evans*, No. 04-2618-BLS2, 21 Mass.L.Rptr. 337, 2006 WL 2440008, at *5 (Mass. Super. Aug. 3, 2006) (privilege applied to “attorney-client communications unintentionally stored in a temporary file on a company-owned computer that were made via a private, password-protected e-mail account accessed through the Internet, not the company’s Intranet”); *Holmes v. Petrovich Development Co.*, 191 Cal.App.4th 1047, 1068-72 (2011) (privilege

therefore we express no view on whether, and in what circumstances, an employee's communications with counsel from the employee's workplace device or system are protected by the attorney-client privilege. Nevertheless, we consider the ethical implications posed by the risks that these communications will be reviewed by others and held admissible in legal proceedings.⁵ Given these risks, a lawyer should ordinarily advise the employee-client about the importance of communicating with the lawyer in a manner that protects the confidentiality of e-mail communications, just as a lawyer should avoid speaking face-to-face with a client about sensitive matters if the conversation might be overheard and should warn the client against discussing their communications with others. In particular, as soon as practical after a client-lawyer relationship is established, a lawyer typically should instruct the employee-client to avoid using a workplace device or system for sensitive or substantive communications, and perhaps for any attorney-client communications, because even seemingly ministerial communications involving matters such as scheduling can have substantive ramifications.

The time at which a lawyer has an ethical obligation under Rules 1.1 and 1.6 to provide advice of this nature will depend on the circumstances. At the very least, in the context of representing an employee, this ethical obligation arises when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means,⁶ using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party. Considerations tending to establish an ethical duty to protect client-lawyer confidentiality by warning the client against using a business device or system for substantive e-mail communications with counsel include, but are not limited to, the following: (1) that the client has engaged in, or has indicated an intent to engage in, e-mail communications with counsel; (2) that the client is employed in a position that would provide access to a workplace device or system; (3) that, given the circumstances, the employer or a third party has the ability to access the e-mail communications; and (4) that, as far as the lawyer knows, the employer's internal policy and the jurisdiction's laws do not clearly protect the privacy of the employee's personal e-mail communications via a business device or system. Unless a lawyer has reason to believe otherwise, a lawyer ordinarily should assume that an employer's internal policy allows for access to the employee's e-mails sent to or from a workplace device or system.

The situation in the above hypothetical is a clear example of where failing to warn the client about the risks of e-mailing communications on the employer's device can harm the client, because the employment dispute would give the employer a significant incentive to access the employee's workplace e-mail and the employer's internal policy would provide a justification for doing so. The obligation arises once the lawyer has reason to believe that there is a significant risk that the client will conduct e-mail communications with the lawyer using a workplace computer or other business device or via the employer's e-mail account. This possibility ordinarily would be known, or reasonably should be known, at the outset of the representation. Given the nature of the representation—an employment dispute—the lawyer is on notice that the employer may search the client's electronic correspondence. Therefore, the lawyer must ascertain, unless the answer is already obvious, whether there is a significant risk that the client will use a business e-mail address for personal communications or whether the employee's position entails using an employer's device. Protective measures would include the lawyer refraining from sending e-mails

inapplicable to communications with counsel using workplace computer); *Scott v. Beth Israel Medical Center, Inc.*, 847 N.Y.S.2d 436, 440-43 (N.Y. Sup. Ct. 2007) (privilege inapplicable to employer's communications with counsel via employer's e-mail system); *Long v. Marubeni Am. Corp.*, No. 05CIV.639(GEL)(KNF), 2006 WL 2998671, at *3-4 (S.D.N.Y. Oct. 19, 2006) (e-mails created or stored in company computers were not privileged, notwithstanding use of private password-protected e-mail accounts); *Kaufman v. SunGard Inv. Sys.*, No. 05-CV-1236 (JLL), 2006 WL 1307882, at *4 (D.N.J. May 10, 2006) (privilege inapplicable to communications with counsel using employer's network).

⁵ For a discussion of a lawyer's duty when receiving a third party's e-mail communications with counsel, see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-460 (2011) (Duty when Lawyer Receives Copies of a Third Party's E-mail Communications with Counsel).

⁶ This opinion principally addresses e-mail communications, which are the most common way in which lawyers communicate electronically with clients, but it is equally applicable to other means of electronic communications.

to the client's workplace, as distinct from personal, e-mail address,⁷ and cautioning the client against using a business e-mail account or using a personal e-mail account on a workplace computer or device at least for substantive e-mails with counsel.

As noted at the outset, the employment scenario is not the only one in which attorney-client electronic communications may be accessed by third parties. A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, to which a third party may gain access. The risk may vary. Whenever a lawyer communicates with a client by e-mail, the lawyer must first consider whether, given the client's situation, there is a significant risk that third parties will have access to the communications. If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client.

⁷ Of course, if the lawyer becomes aware that a client is receiving personal e-mail on a workplace computer or other device owned or controlled by the employer, then a duty arises to caution the client not to do so, and if that caution is not heeded, to cease sending messages even to personal e-mail addresses.

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