The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 93-11
Issued December 3, 1993

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: When a lawyer conducts a public records search prior to litigation and through no wrong doing obtains a copy of an inadvertently disclosed memorandum that either on its face or upon closer examination appears to contain information subject to the attorney-client privilege, there is no ethical duty to refrain from reading the memorandum or to refrain from revealing the contents to the client; however, the attorney does have an ethical duty to notify the source and to return a copy of the memorandum upon request.

OPINION: This opinion addresses an attorney's ethical duty upon receiving an inadvertently disclosed memorandum containing confidential and or privileged communication. This opinion focuses narrowly on the question presented below.

> When a lawyer conducts a public records search prior to litigation and through no wrong doing obtains a copy of an inadvertently disclosed memorandum that either on its face or upon closer examination appears to contain information subject to the attorney-client privilege, is there an ethical duty to refrain from reading the memorandum, to notify the source, to return the memorandum upon request, and to refrain from revealing the contents to the client?

The Board begins by noting that it is beyond the Board's authority to advise upon whether inadvertent disclosure of materials to a potential litigation adversary waives attorney-client privilege and work-product doctrine with respect to those materials. That is an issue for judicial determination. See e.g., Ranney-Brown Distributors v. E. T.Barwick Industries, 75 F.R.D. 3 (S.D. Ohio 1977).

Clearly, there is no impropriety in an attorney obtaining information from a public records search. Ethical Consideration 7-15 states "it is not improper . . . for a lawyer to seek from an agency information available to the public without identifying his [her] client."

Ordinarily, communication subject to the attorney-client privilege would not be obtained through conducting a public records search. Under Ohio Public Records Law, Title 1, section 149.43 (A) (1) of the Ohio Revised Code (Baldwin Supp.1992), privileged communications between attorneys and government clients are exempt from disclosure under the statutory exception of "records the release of which is prohibited by state and federal law." See Woodman v. Lakewood, 44 Ohio App. 3d 118, 120, 123 (Ct. App. Cuyahoga County 1988). See also, State ex rel. National Broadcasting Co. v. City of Cleveland, 82 Ohio App. 3d 202, 207 (Ct. App. Cuyahoga County 1992); Allright Parking of Cleveland v. City of Cleveland, No. 57881, unreported, 1991 WL 30252 (Ct. App. Cuyahoga County, Mar. 1, 1991).

Thus, when privileged communication is inadvertently disclosed through public records, the attorney who obtains the material must consider what duties, if any, exist. An initial consideration is whether there is any duty to preserve confidences and secrets with regard to the inadvertently obtained materials. This Board's view is that within the Code, there is no express or implied duty to protect an opposing party's confidences and secrets. Rather, the lawyer's duty under Disciplinary Rule 4-101 is to protect the confidences and secrets of his or her client.

Nevertheless, there is a duty under DR 1-102 (A) (4) not to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Further, there is a responsibility under DR 7-101 (A) (1) to act courteously toward opposing counsel. As stated within DR 7-101 (A) (1), a lawyer's duty to seek the lawful objectives of a client is not violated by "acceding to reasonable requests of opposing counsel which do not prejudice the rights of his [her] client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process." Ethical Consideration 7-38 echoes the call for courteous behavior.

Inadvertent disclosure has been addressed by ethics committees outside Ohio, but not in the context of a public records search. As to the issue of inadvertent disclosure to a lawyer through a client's or witness's interception of privileged materials, several states have declined to advise. See Maryland State Bar Ass'n Op. 85-15 (1984) (A lawyer's use of a memorandum that the client obtained and that was written by the adverse party to her lawyer is a legal issue); State Bar of Arizona, Op. 83-14 (1983) (A law firm's use at trial of an adversary's documents obtained by a witness is controlled by court orders delineating the issues of discovery and evidence). A Philadelphia ethics committee has advised that a lawyer who received from a client a copy of a letter from an

opposing counsel to opposing counsel's client would be prohibited from disclosing it to opposing counsel without consent of client; in addition, the committee expressed concern regarding destruction of the letter. Philadelphia Bar Ass'n, Op. 91-19 (undated).

One state ethics committee has addressed the issue of inadvertent disclosure to a lawyer from an unidentified source. See Maryland State Bar Ass'n, Op. 89-53 (1989). The Maryland ethics committee advised that when a lawyer receives copies of documents belonging to an opposing party from an unidentified source, there is no need to reveal it to the court or to the opposing party, but the attorney should keep copies to avoid destruction of evidence, and if original documents are received the lawyer must attempt to return them to the rightful owner. Id.

Recently, the ABA addressed inadvertent disclosure in the context of a lawyer sending privileged information to an opposing counsel. See ABA, Formal Op. 92-368 (1992). The ABA committee advised that "[a] lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.") Id. This Board is not persuaded by ABA Formal Opinion 92-368 (1992) which interprets the Model Rules and does not address the issue of inadvertent disclosure in the context of a public records search.

Although not controlling in this jurisdiction, the Tenth Circuit recently ruled that a lawyer who was inadvertently faxed an internal federal-agency memorandum need not return the memo to the agency as there was waiver of the work-product privilege once the memo was transmitted. NLRB v Monfort Inc., Nos. 90-9518, etc., (10th Cir. Sept. 10, 1993). In Monfort, the magistrate stated "[y]ou cannot seal the bag from which the cat has already escaped." Id.

As to the present inquiry, this Board finds little comfort in admonishing lawyers to refrain from examining materials received from another lawyer or from any other source since in most instances it is only upon examination that a lawyer could determine that the materials contain privileged information. Further, the Board finds no violation of the DR 4-101 rule of confidentiality resulting from reading information obtained through a public records search. Nevertheless, upon receipt of a memorandum that either on its face or upon closer examination appears to contain information subject to the attorney-client privilege, the Board's view is that notification of the opposing counsel is required, for to do otherwise is dishonest and misleading and would violate DR 1-102(A) (4).

As to whether an attorney should return a memorandum inadvertently disclosed through public records, the Board's view is that the attorney may keep the copy of the memorandum, but, out of courtesy and fairness under DR 7-101 (A) (1) the attorney should also provide opposing counsel with a copy if requested. Once confidential material has been examined even briefly, the information cannot be purged from the mind of the attorney who inadvertently receives it. Thus, unless required by court order, the Board sees no merit in returning inadvertently disclosed material under the facts presented. Rather than pretending that the return of inadvertently disclosed material would purge the material from the mind of the receiving lawyer, it is better for both sides to acknowledge that the information was disclosed. Finally, under the facts presented, the Board finds no persuasive reason within the Code to suggest that such information inadvertently disclosed through public records should be withheld from a lawyer's client.

In conclusion, this Board advises that when a lawyer conducts a public records search prior to litigation and through no wrongdoing obtains a copy of an inadvertently disclosed memorandum that either on its face or upon closer examination appears to contain information subject to the attorney-client privilege, there is no ethical duty to refrain from reading the memorandum or to refrain from revealing the contents to the client; however, the attorney does have an ethical duty to notify the source and to return a copy of the memorandum upon request.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.