ETHICAL ISSUES IN EMPLOYMENT LITIGATION

- Joint Defense and Representation
- Inadvertent Disclosure and Improper Acquisition of Privileged Material
- Ethical Issues in Settlement Negotiations

American Bar Association
Labor and Employment Law Section
1999 Annual Meeting

Mark S. Dichter

Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19107
(215) 963-5291

© Morgan, Lewis & Bockius LLP 1999
# TABLE OF CONTENTS

## I. JOINT DEFENSE AND REPRESENTATION

- A. Elements for asserting the Joint Defense Privilege .............................................. 1
- B. Joint Defense Agreements .................................................................................. 1
- C. Joint Defense--When is it Advisable? ................................................................. 3
- D. Special Concerns in Sexual Harassment Actions ................................................. 4
- E. Work Product Doctrine ....................................................................................... 4
- F. Privilege in Joint Representation ........................................................................ 5
- G. Other Practical and Ethical Considerations of Joint Representation ................... 7
- H. The Relationship Between Attorney and Corporate Client After Joint Representation .................................................. 7

## II. INADVERTENT DISCLOSURE AND IMPROPER ACQUISITION OF PRIVILEGED MATERIAL

- A. Inadvertent Disclosure and Waiver of Attorney Client Privilege ......................... 8
- B. ABA Ethics Opinion 92-368: “Inadvertent Disclosure of Confidential Materials” ......................................................................................................................... 10
- C. ABA Ethics Opinion 94-382: “Unsolicited Receipt of Privileged or Confidential Materials” ......................................................................................................................... 12
- D. Improper Acquisition of Documents--Stolen Documents .................................... 13
- E. Improper Acquisition of Documents--Tape Recording .......................................... 13

## III. ETHICAL ISSUES IN SETTLEMENT NEGOTIATIONS ......................................... 14
# TABLE OF AUTHORITIES

## FEDERAL CASES

<table>
<thead>
<tr>
<th>Citation</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>In re Allen, 106 F.3d 582 (4th Cir. 1997), cert. denied, 118 S. Ct. 689 1998</td>
<td></td>
<td>6</td>
</tr>
<tr>
<td>In re Bairnco Corp. Security Litigation, 148 F.R.D. 91 (S.D.N.Y. 1993)</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Barrett Industrial Trucks, Inc. v. Old Republic Insurance Co., 129 F.R.D. 515 (N.D. Ill. 1990)</td>
<td></td>
<td>6</td>
</tr>
<tr>
<td>In re Bevill, Bresler &amp; Schulman Asset Management Corp., 805 F.2d 120 (3d Cir. 1986)</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Brown v. Genesee County, 872 F.2d 169 (6th Cir. 1989)</td>
<td></td>
<td>15</td>
</tr>
<tr>
<td>Castle v. Sangamo Weston, Inc., 744 F.2d 1464 (11th Cir. 1984)</td>
<td></td>
<td>4</td>
</tr>
<tr>
<td>Chapman &amp; Cole v. Itel Container International BVD., 865 F.2d 676 (5th Cir.)</td>
<td></td>
<td>14</td>
</tr>
<tr>
<td>Dana Corp. v. Blue Cross &amp; Blue Shield Mutual, 900 F.2d 882 (6th Cir. 1990)</td>
<td></td>
<td>8</td>
</tr>
<tr>
<td>Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998)</td>
<td></td>
<td>4</td>
</tr>
</tbody>
</table>
In re Grand Jury, 536 F.2d 1009 (3d Cir. 1976) ........................................ 7
Haines v. Ligget Group, Inc., 975 F.2d 81 (3d Cir. 1992) ........................... 1
Parrott v. Wilson, 707 F.2d 1262 (11th Cir 1983) ........................................ 14
In re Sealed Case, 120 F.R.D. 66 (N.D. Ill. 1988) ...................................... 9
In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989) .................................... 9
Slotkin v. Citizens Casualty Co., 614 F.2d 301 (2d Cir. 1979), cert. denied, 449 U.S. 981 (1980) ................................................................. 15
Thomas v. Municipal Ct. of Antelope Valley Judicial District, 878 F.2d 285 (9th Cir. 1989) ................................................................. 8


United States v. Bay State Ambulance, 874 F.2d 20 (1st Cir. 1989) ................. 1

United States v. Shaffer Equipment Co., 11 F.3d 450 (4th Cir. 1993) ............... 17


Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991) .............................................................. 5


Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264 (10th Cir. 1998) ....... 4

STATE CASES


Lipin v. Bender, 644 N.E.2d 1300 (N.Y. 1994) ........................................... 13

Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962) ................................ 16

State ex rel. Nebraska State Bar Association v. Addison, 412 N.W.2d 855 (Neb. 1987) ............................................................. 17
Ethical Issues in Employment Litigation

Toledo Bar Association v. Fell, 364 N.E.2d 872 (Ohio 1977) ....................... 15, 16


DOCKETED CASES


MODEL RULES AND ETHICS OPINIONS


ABA Model Rules of Professional Conduct Rule 1.6 (1995) ................. 12, 16

ABA Model Rules of Professional Conduct Rule 3.3 (1995) ................. 15, 16


(May 12 1998) ................................................................................. 13


I. JOINT DEFENSE AND REPRESENTATION

Special considerations arise when an attorney represents both an employer and its employees in employment litigation. Among these concerns is the ability to protect communications during the course of the joint representation and the potential that the interests of the employer and the employee may be adverse or become adverse in the future. This section outlines the joint defense privilege, the importance of obtaining joint defense agreements, and the ethical issues involved in such a joint representation.

A. Elements for Asserting the Joint Defense Privilege

Simply stated, the joint defense privilege protects communications that are part of an on-going and joint effort to set up a common defense strategy. In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 126 (3d Cir. 1986). The privilege protects communications to counsel made by one defendant in the presence of a co-defendant, and to communications made between defendants jointly represented by the same attorney. In order to assert the privilege, the following elements must be met:

1) the communications were made in the course of a joint defense effort;
2) the communications were designed to further the effort; and
3) the privilege has not been waived.


B. Joint Defense Agreements

If joint representation is pursued, counsel should give serious consideration to obtaining a joint defense agreement. Although a written agreement is not a strict prerequisite to the applicability of the privilege, SIG Swiss Indus. Co. v. Fres-Co. Sys., USA, Inc., No. 91-0699, 1993 WL 82286 (E.D. Pa. Mar. 17, 1993), the party seeking to establish the applicability of the privilege bears the burden of proving its applicability. See Haines, 975 F.2d at 94; Sec. Investor Protection Corp. v. Stratton Oakmont, Inc., 213 B.R. 433 (S.D.N.Y. 1997) (holding that party seeking to invoke joint defense privilege had the burden of establishing the existence of a joint defense and the non-waiver of the privilege); United States v. Weissman, No. S1 94 CR. 760 CSH 1996 WL 737042 (S.D.N.Y. Dec. 26, 1996) (same). The existence of an agreement setting forth the parties’ common understanding would bolster the argument that communications between the parties were made “in the course of a joint defense effort.” Cf. In re Bevill, Bresler & Schulman, 805 F.2d at 126 (rejecting claim of joint defense privilege where claimant “produced no evidence the parties had agreed to pursue a joint defense strategy”).

A joint defense agreement should contain the following provisions:
The agreement covers all participating clients, attorneys, their employees and agents, and that the parties share a mutuality of interest in a common legal enterprise directed toward devising a common legal strategy.

Counsel wish to pursue ethically the separate but common interests of their clients without waiving any protections of the attorney-client privilege and the work product doctrine. Accordingly, any information or materials (e.g., witness interview memoranda) which otherwise would be protected from disclosure to third parties will remain confidential despite being made available to cooperating counsel and their clients. It would be appropriate to specify what law governs the attorney-client privilege and the work product doctrine.

The parties will take appropriate steps to protect the information that is pooled, and shared privileged information will not be disclosed to outsiders without the prior consent of all parties.

Although the parties agree to pool information, no party is obliged to share all information in its possession.

The parties’ signature to the agreement should represent a certification that counsel has explained the agreement to each of his or her clients and that the client agrees to abide by the understandings reflected therein.

Negotiations with adverse parties cannot be barred, but the agreement can provide that a party who enters into an agreement with an adversary will so notify the remaining co-parties.

Parties expressly should be barred from using shared information in a manner adverse to any co-party.

Should a party withdraw from the cooperative group, communications between that party and the other members (as well as any work product shared by or with the withdrawing party) will not be deemed to have lost any applicable protection. The parties may agree that a party withdrawing from the agreement must return all materials obtained as a result of the agreement. The agreement also should provide that counsel is free to continue to represent the remaining group.

Specific performance or injunction are the appropriate remedies to compel performance.
All amendments or modifications to the agreement need to be made in writing and signed by the parties.

Nothing is intended to interfere with the lawyer's obligation to ethically and properly represent each of his or her clients.

Statutes of limitations will be tolled as to claims that could be asserted by one party against another.

C. **Joint Representation--When is it Advisable?**

Rule 1.7 of the ABA Model Rules of Professional Conduct provides in pertinent part:

a. A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

   (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

   (2) each client consents after consultation.

b. A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

   (1) the lawyer reasonably believes the representation will not be adversely affected; and

   (2) the client consents after full disclosure and consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

D. **Special Concerns in Sexual Harassment Actions**

The United States Supreme Court’s decisions in Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), and Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998), have clarified the issue of when employers are liable for sexual harassment by supervisors and, therefore, have implications for joint representation in the sexual harassment context.

In both Faragher and Burlington, the Supreme Court stated that if a supervisor’s harassment culminates in a “tangible employment action,” the employer is vicariously liable, even
if the employer does not have notice or knowledge of the misconduct. However, where the
harassment does not affect a specific and tangible term or condition of employment, employers
may escape liability by satisfying a two-prong affirmative defense. First, the employer must show
that it exercised reasonable care to both “prevent and correct” sexual harassment. Second, the
employer must show that the victimized employee unreasonably failed to take advantage of any
complaint procedure.1 See Ellerth, 118 S. Ct. at 2270; Faragher, 118 S. Ct. at 2292-93.

Given that these cases permit an employer to avoid liability by demonstrating that
it exercised reasonable care to correct sexual harassment, an employer may not want to join in a
representation of a supervisor it had to discipline or even terminate as part of its sexual
harassment policy.

If the facts demonstrate that the harassment culminated in a “tangible employment
action”-- creating vicarious liability -- or alternatively, if the facts demonstrate that no actual
sexual harassment occurred, the defendant employer may have less concern about a joint
representation with the defendant employee.

E. Work Product Doctrine

Joint representation also presents special issues under the attorney work product
docline. Although one court has suggested that the work product doctrine, unlike the attorney-
client privilege, may not waived by disclosing the attorney’s work product to a third party, see
Castle v. Sangamo Weston, Inc., 744 F.2d 1464, 1466-67 (11th Cir. 1984) (attorney work
product immunity was not waived when party disclosed work product to EEOC during
preparation for trial of an age discrimination case), at least one other court has suggested that the
work product doctrine could be waived if the disclosure permitted an adversary to gain access to
Any joint representation agreement, therefore, should contain a provision which states that the
confidentiality of work product information is maintained, even if one party withdraws from the
agreement.

F. Privilege in Joint Representation

An attorney who jointly represents an employer and its current or former
employees must be careful to avoid waiving the privilege by disclosing one client’s confidential
information to the other client. It is well settled that the attorney-client privilege is both narrowly
construed and is easily lost. Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d

1/ Two circuit courts have applied the vicarious liability standards enunciated in Ellerth and
Faragher to race discrimination claims under Title VII. See Williams v. Wal-Mart Stores,
Inc., No. 97-10685, 1998 WL 654810 (5th Cir. Sept. 24, 1998); Wright-Simmons v. City
of Oklahoma City, 155 F.3d 1264 (10th Cir. 1998).
Ethical Issues in Employment Litigation

1414, 1423 (3d Cir. 1991). Because the privilege is designed to ""protect[ ] only those disclosures . . . necessary to obtain informed legal advice . . . which might not have been made absent the privilege,"" Id. at 1423-24 (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)), the ""voluntary disclosure to a third party of purportedly privileged communications"" ordinarily results in a waiver of the privilege. Id. at 1424; See also In re Grand Jury Matter, 147 F.R.D. 82, 84 (E.D. Pa. 1992) (""[V]oluntary disclosure to a third party of purportedly privileged communications has long been considered inconsistent with the privilege").

The threshold issue to be addressed is whether an attorney's disclosure of the employer-client's confidences to a current or former employee constitutes a "disclosure to a third party." With respect to current employees, Upjohn Co. v. United States, 449 U.S. 383 (1981), provides the controlling law. In Upjohn, the Court rejected the narrow "control group" test, under which the privilege inquiry had turned on an employee's status within the corporation and, instead, adopted a flexible, multi-factor analysis, which is to be applied on a case-by-case basis. See Baxter Travenol Labs. v. Lemay, 89 F.R.D. 410, 414 (S.D. Ohio 1981) (observing that the Upjohn Court expressly declined to delineate firm strictures). In holding that the subject communications between corporate counsel for Upjohn and current Upjohn employees were privileged, the Court focused upon the following five factors: (1) the communications were made at the direction of corporate superiors in order to secure legal advice from counsel; (2) the information was not available from upper echelon management; (3) the communications concerned matters within the scope of the employees' duties; (4) the employees were aware that they were being questioned so that the corporation could obtain legal advice; and (5) the company kept the communications confidential. Id. at 394. However, the Upjohn Court expressly declined to consider whether communications between Upjohn's corporate counsel and the company's former employees were protected by the attorney-client privilege. Id. at 395 n.3.

Courts are deeply split on whether an attorney's communications with a former employee are shielded from discovery by his or her former employer's attorney-client privilege. In one appellate decision, the Ninth Circuit held that a corporation's attorney-client privilege does protect communications between corporate counsel and former employees. See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 658 F.2d 1355, 1361 & n.7 (9th Cir. 1981), cert. denied, 455 U.S. 990 (1982). More specifically, in Petroleum Products, the Ninth Circuit refused to permit the plaintiffs' attorneys to discover what transpired in deposition orientation sessions between corporate counsel and a former employee regardless of whether corporate counsel acted as counsel for the former employees at their depositions. In reaching its holding, the court reasoned, as follows: Although Upjohn was specifically limited to current employees, the same rationale applies to the ex-employees (and current employees) involved in this case. Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties. Again, the attorney-client privilege is served by the certainty that conversations between the attorney and client will remain privileged after the employee leaves. Id. at 1361 n.7 (citations omitted) (decision later affirmed in Admiral Ins. Co. v. United States Dist. Ct., 881 F.2d 1486, 1493 (9th Cir. 1989)).
Agreeing with the Ninth Circuit, a number of other courts have held that communications between corporate counsel and former employees of the corporation may be privileged. See In re Allen, 106 F.3d 582, 605 (4th Cir. 1997) (holding that the analysis in Upjohn applies equally to former employees), cert. denied, 118 S. Ct. 689 (1998); Stablus v. Haynsworth, Baldwin, Johnson & Greaves, Civ. A. No. 91-6184, 1992 WL 68563, at *2 (E.D. Pa. Mar. 31, 1992) (McGirr Kelly, J.) (“The attorney-client privilege in the corporate context extends to former employees where the purpose of the conversation . . . is to secure legal advice for the company.”); See also, e.g., Al-Turki v. Fenn, No. 90 Civ. 4470, 1995 WL 231278, at *2 (S.D.N.Y. Apr. 18, 1995) (expressly following Petroleum Products and holding that communications between corporate counsel and former employees are privileged); Valassis v. Samelson, 143 F.R.D. 118, 124 (E.D. Mich. 1992) (same); Command Transp., Inc. v. Y.S. Line (USA) Corp., 116 F.R.D. 94, 97 (D. Mass. 1987) (“[t]he communications concerned actions taken by [the] former employee . . . about which she is the most knowledgeable person,” and therefore were privileged); Porter v. Arco Metals Co., 642 F. Supp. 1116 (D. Mont. 1986) (communications between corporate counsel and former employees with responsibility over the matter in question are privileged). Cf. University Patents, Inc. v. Kligman, 737 F. Supp. 325, 328 (E.D. Pa. 1990) (observing, without deciding, that communications with former employees may be protected if the employees held a "confidential position . . . or their conduct is the subject of the litigation in question”).

On the other hand, some courts have held that communications between corporate counsel and the company's former employees fall outside the scope of the corporation's attorney-client privilege. See, e.g., Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co., 129 F.R.D. 515, 517-18 (N.D. Ill. 1990) (communication not protected by attorney-client privilege even though former employee was a key fact witness for company); Clark Equip. Co. v. Lift Parts Mfg. Co., No. 82 C 4585, 1985 WL 2917, at *5 (N.D. Ill. Oct. 1, 1985) (holding that "post-employment communications with former employees are not within the scope of the attorney-client privilege"). If, as these courts have held, a former employee is not the "client," then the disclosure of privileged information to such an employee is a mere disclosure to a third party, which could result in the privilege being waived. See In re Grand Jury Matter, 147 F.R.D. at 84.

G. Other Practical and Ethical Considerations of Joint Representation

Other practical and ethical considerations can arise during the course of as well as after the joint representation of an employer and an employee. There is a risk that the corporation will appear, to a jury or others, to be allied with a wrongdoer. The lawyer loses the ability to advise the company on employment issues relating to that individual. If conflict becomes apparent late in the game, the lawyer may be disqualified altogether. See, e.g., Wheat v. United States, 486 U.S. 153, 162 (1988); In re Grand Jury, 536 F.2d 1009 (3d Cir. 1976). There also might be confidentiality concerns regarding information the employee revealed to the employer.
H. The Relationship Between Attorney and Corporate Client After Joint Representation

While an employer defendant and its employee co-defendant may be jointly represented in one case, circumstances often arise in which the co-defendant employee subsequently brings suit against the employer in a separate action. In considering the extent to which an attorney may represent the employer in a lawsuit brought by the former co-defendant/client employee: the attorney should consider the rule regarding conflicts of interest and former clients. Rule 1.9 of the Model Rules of Professional conduct provides in relevant part:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation; or

(2) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 [pertaining to confidentiality] would permit with respect to a client or when the information has become generally known.


In determining whether subsequent representation of a company is proper, courts widely embrace the substantial relationship analysis. The "substantial relationship" analysis focuses on three elements: the nature and scope of the prior representation; the nature of the present lawsuit by the former client; and whether in the course of the prior representation, the client may have disclosed to his or her attorney confidences which could be relevant to the present action and which could be detrimental to the former client in the current action. See Dana Corp. v. Blue Cross & Blue Shield Mut., 900 F.2d 882, 889 (6th Cir. 1990) (applying such analysis in holding that it was not improper for a firm which had represented Blue Cross’s national organization in a trademark case to bring suit against a regional affiliate in a RICO action); Kaselaan & D’Angelo Assocs., Inc. v. D’Angelo, 144 F.R.D. 235 (D.N.J. 1992) (disqualifying counsel for employee in action against employer because counsel had previously represented employer in “substantially related matters” and had knowledge of information regarding employer that could be used to employer’s detriment); Thomas v. Municipal Ct. of Antelope Valley Judicial Dist., 878 F.2d 285, 288-89 (9th Cir. 1989) (justifying disqualification of attorney on conflict of interest grounds because attorney who was defending husband in assault action against wife had represented wife in previous action to set aside her prior marriage); Harris v. Agrivest Ltd. Partnership II, 818 F. Supp. 1035, 1041 (E.D. Mich. 1993); Commonwealth Ins. Co. v. Graphix Hot Line, Inc., 808 F. Supp. 1200, 1204 (E.D. Pa. 1992).
II. INADVERTENT DISCLOSURE AND IMPROPER ACQUISITION OF PRIVILEGED MATERIAL

The inadvertent disclosure and improper acquisition of privileged material raise ethical concerns about the work product doctrine and the waiver of attorney client privilege.

A. Inadvertent Disclosure and Waiver of Attorney Client Privilege

Courts appear to use two types of approaches to evaluate inadvertent disclosures of privileged information. These approaches are the “bright line test” and the “balancing test.”

Some courts applying a bright line test have concluded that the mere inadvertent disclosure of privileged information does not constitute a waiver of the privilege. See, e.g., Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936 (S.D. Fla. 1991) (concluding that privilege cannot be waived without negligence by the client); Helman v. Murray Steaks, Inc., 728 F. Supp. 1099, 1104 (D. Del. 1990) (opining that “it would fly in the face of the essential purpose of the attorney-client privilege to allow a truly inadvertent disclosure of a privileged communication by counsel to waive the client’s privilege”); In re Sealed Case, 120 F.R.D. 66 (N.D. Ill. 1988); Mendenhall v. Barber-Green Co., 531 F. Supp. 951 (N.D. Ill. 1982). Other courts applying a bright line test have concluded that any disclosure of privileged material constitutes a waiver of the privilege. See, e.g., In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989) (holding absent extraordinary circumstances, inadvertent disclosure would always waive the attorney-client privilege); International Digital Systems Corp. v. Digital Equipment Corp., 120 F.R.D. 445 (D. Mass. 1988); Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 549 (D.D.C. 1970) (stating that when confidentiality is breached through “inadvertent disclosure,” the court should not look to the intention of the disclosing party).

The majority of courts apply some kind of balancing test to determine whether there has been a waiver by inadvertent disclosure of information. See e.g., Advanced Medical, Inc. v. Arden Medical Servs., Inc., No. Civ. A. 87-3059, 1988 WL 76128 at *2 (E.D. Pa. July 18, 1988) (holding that generally the inadvertent production of documents does constitute waiver of the attorney-client privilege, but in situations such as expedited discovery or massive document exchanges, a limited inadvertent disclosure will not necessarily result in a waiver); McGreevy v. CSS Industries, Inc., No. Civ. A. 95-CV-8063, 1996 WL 412813 (E.D. Pa. 1996) (concluding that privilege was waived when plaintiff’s attorney inadvertently produced a letter detailing litigation strategy in a small batch of documents and was unaware of disclosure until notified by defendant); Rotelli v. 7-UP Bottling Co., No. Civ. A. 93-6957, 1995 WL 234171 (E.D. Pa. April 19, 1995) (finding that privilege was not waived where extensive precautions had been taken to avoid inadvertent disclosure, only a few of many documents had been disclosed, documents where shown but not produced to opposing counsel, and error was rectified quickly); FDIC v. Marine Midland Rey Credit Corp., 138 F.R.D. 479 (E.D. Va. 1991) (holding that privilege was waived when party failed to take reasonable steps to prevent disclosure); Hartman v. El Paso Natural Gas Co., 107 N.M. 679, 763 P.2d 1144 (1988); Lois Sportswear U.S.A., Inc. v. Levi Strauss & Co.,
On March 10, 1999, in Formal Opinion 99-413, the ABA Standing Committee on Ethics and Professional Responsibility joined the clear majority of jurisdictions in concluding that a lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct.


104 F.R.D. 103 (S.D.N.Y. 1985), aff'd, 799 F.2d 867 (2d Cir. 1986). Generally, these cases apply five factors when determining whether an inadvertent disclosure constitutes a waiver:

1. the reasonableness of the precautions to prevent inadvertent disclosure;
2. the time taken to rectify the error;
3. the scope of the discovery;
4. the extent of the disclosure; and
5. the overreaching issue of fairness and justice to the parties.


The frequent use of e-mail also raises concerns about the inadvertent disclosure of privileged or confidential material. In particular, the ease with which an e-mail message can be misaddressed and sent to hundreds and thousands of third parties creates real concerns about the waiver of attorney-client privilege and work product privilege. However, the factors applied by courts in determining whether waiver has occurred are assessed on a case-by-case basis and the same basic analysis should apply to a disclosure by e-mail or by some other form of communication.

B. ABA Ethics Opinion 92-368: “Inadvertent Disclosure of Confidential Materials”

In American Bar Association Formal Ethics Opinion 92-368, entitled “Inadvertent Disclosure of Confidential Materials,” the ABA addressed situations in which a lawyer receives confidential material that is clearly not intended for him or her. The ABA opined 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.” ABA Comm. On Ethics and Professional Responsibility, Formal Op. 92-368 (1992).

One interpretation of Opinion 92-368 is that it addresses accidental transmission, such as a missent fax or a misdirected envelope: “[T]he availability of xerography and the proliferation of facsimile machines and electronic mail make it technologically ever more likely...”

2/ On March 10, 1999, in Formal Opinion 99-413, the ABA Standing Committee on Ethics and Professional Responsibility joined the clear majority of jurisdictions in concluding that a lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct.
that through inadvertence, privileged or confidential materials will be produced to opposing counsel by no more than the pushing of the wrong speed dial number on a facsimile machine.” Id. Missent faxes and letters are, indeed, circumstances “where it is clear [the documents] were not intended for the receiving lawyer.” “Inadvertent” inclusion of a document in a formal document production, however, may be distinguishable. Indeed, the Opinion itself refers, with apparent approval, to the fact that the most courts approach inadvertent disclosure in the production context under the five-factor test.

Some courts have followed this opinion. In a New York Bar opinion attached as an Appendix to the decision in Kondakjian v. Port Authority of New York and New Jersey, No. 94-CIV-8013, 1996 WL 139782 (S.D.N.Y. Mar. 28, 1996), the bar association specifically drew a distinction between inadvertent disclosure by fax, and inadvertent disclosure through a formal document production. It is important, however, to restrict the proposed obligations to situations where disclosure is truly inadvertent. Disclosure should not be considered inadvertent when an attorney makes a conscious decision to disclose a document and later changes his or her mind. Id. at *6. This, of course, leaves open the question of what steps should be taken, if after reviewing the documents, the attorney later learns that they are privileged. Although the opinion is at times unclear on this point, it does specifically state that the ethics rule was not meant to change the existing legal rules as to when the attorney-client privilege would be waived. Where a document is produced pursuant to a document production, the receiving attorney should notify the sending attorney, which will provide “sending attorneys an opportunity to seek whatever protections are afforded under the laws of their particular jurisdictions.” Id. at *8 (emphasis added).

In American Express v. Accu-Weather, Inc., Nos. 91 Civ. 6485 and 92 Civ. 705, 1996 WL 346388 (S.D.N.Y. June 25, 1996), the district court relied upon ABA Opinion 92-368 in concluding that the attorney who received and read an inadvertently disclosed document had committed an ethical breach. In that case, the disclosing attorney inadvertently had included a privileged document in a package of documents that was sent to opposing counsel. Id. at *1. The attorney contacted opposing counsel by fax and telephone and requested that the package not be opened. Id. See also Milford Power Ltd. Partnership v. New England Power Co., 896 F. Supp. 53, 57 (D. Mass. 1995) (citing to ABA Opinion 92-368 in holding that inadvertent disclosure of documents did not amount to waiver because the documents were privileged on their face and should not have been examined in the first place); Trilogy Communication, Inc. v. Excom Realty, Inc., 279 N.J. Super. 442, 652 A.2d 1273 (1994) (relying on ABA Opinion 92-368 in holding that privilege had not been waived when the defendant inadvertently included a confidential letter among 5,500 pages of documents produced to the plaintiff).
Other courts have declined to follow ABA Opinion 92-368. The court in In re United Mine Workers of America Employee Benefit Plans Litigation, 156 F.R.D. 507 (D.D.C. 1994) considered Opinion 92-368 to be in conflict with the legal standard for inadvertent disclosure applied in the District of Columbia Circuit, although it considered the principles behind Opinion 92-368 to be laudatory.

An opinion by the Philadelphia Bar Association suggests a limited view of the scope of ABA Opinion 92-368. See Philadelphia Ethics Op. 94-3 (June 1994) (limiting 92-368 to circumstances where documents on their face are privileged and are sent “under circumstances where it is clear they were not intended for receiving lawyer”; distinguishing case where fax was allegedly missent, but was addressed to receiving lawyer).

C. ABA Ethics Opinion 94-382: “Unsolicited Receipt of Privileged or Confidential Materials”

In this opinion, the ABA considered the obligations of a lawyer when the lawyer is offered or sent, by a person not authorized to offer them, materials of an adverse party that the lawyer knows to be, or appear on their face to be, subject to the attorney-client privilege or otherwise confidential within the meaning of Model Rule 1.6.3 The situation addressed in this

3/ RULE 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

(continued...)

opinion differs from that discussed in ABA Formal Opinion 92-368 because here the sender intended the recipient to receive the material. Despite this difference, the Committee on Ethics and Professional Responsibility reached a similar conclusion. It opined that:

although the Model rules do not offer explicit guidance on this issue, we are persuaded by relevant public policy considerations and case law that a lawyer who, without solicitation, receives materials which are obviously privileged and/or confidential, has a professional obligation to notify the adverse party’s lawyer that she possesses such materials and either follow the instructions of the adversary’s lawyer with respect to the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from the court. ABA Comm. On Ethics and Formal Responsibility, Formal Op. No. 94-382 (1994).

D. Improper Acquisition of Documents--Stolen Documents

Courts have looked unfavorably upon the use of stolen documents in legal proceedings. The sanctions they have imposed upon the wrongful parties include the preclusion of such documents and the dismissal of suits. Courts have considered attorneys’ review of such documents as well as clients’ misappropriation of them in making the sanctions. See Herrera v. Clipper Group, No. 97-CIV-560-561, 1998 WL 229499 (S.D.N.Y. May 6, 1998) (sanctioning plaintiff for improperly copying documents and subverting discovery rules); Fayemi v. Hambrecht & Quist, 174 F.R.D. 319 (S.D.N.Y. 1997) (holding that the preclusion of material would be an appropriate remedy in case where plaintiff copied confidential material from his supervisor’s computer disk); Lipin v. Bender, 644 N.E.2d 1300 (N.Y. 1994) (affirming the dismissal of a complaint in case where plaintiff stole documents from defendant during deposition and her attorney used documents in making settlement offer); Furnish v. Melo, No. 93-1052-AS, 1994 WL 574137 (D. Or. Aug. 29, 1994) (criticizing plaintiff’s attorney for reading documents plaintiff had taken from defendant, her former employer).

E. Improper Acquisition of Documents--Tape Recording

One type of improper acquisition of documents which has received attention in recent years is the surreptitious tape recording of statements. Tape recording raises questions involving ethical concerns and the work product doctrine.

__________________________

3/(...continued)

In general, it is unethical for an attorney to tape record conversations without the consent or knowledge of the other parties. See ABA Formal Op. No. 337 (1974) (basing its opinion largely on the belief that a lawyer should avoid the appearance of professional impropriety); Virginia State Bar Ass’n. Op. 1635 (Feb. 7, 1995); Texas State Bar Professional Ethics Comm. Op. 514 (December 27, 1995); N.Y. Formal Ethics Op. No. 1995-10 (July 6, 1995). Certain jurisdictions have held that such tape recording by attorneys is not necessarily unethical, where it is not prohibited by state law. See Michigan Standing Comm. on Professional and Judicial Ethics, Op. RI-309 (May 12, 1998) (holding that whether a lawyer may ethically record conversations without the consent or prior knowledge of the parties involved is situation specific and not unethical per se); Utah State Bar Ethics Advisory Comm. Op. No. 96-04 (July 3, 1996) (holding that it does not find ABA Opinion 337 to be persuasive in part because of technological advances and in part because of the legality of tapping under Utah law); Oklahoma Bar Ass’n. Legal Ethics Comm. Legal Ethics Op. No. 307) (March 5, 1994).

The use of secret tape recordings in preparing materials for litigation also raises concerns about the waiver of the work product privilege. Courts have held the clandestine recording by attorneys is a type of unethical behavior that can waive this privilege. Parrott v. Wilson, 707 F.2d 1262 (11th Cir 1983), cert denied, 464 U.S. 936 (1983); Chapman & Cole v. Itel Container Int’l BVD., 865 F.2d 676 (5th Cir.) cert denied, 493 U.S. 872 (1989) (holding that defense counsel’s failure to reveal clandestine taping of telephone conversation between him and witness implicitly waives the protection of the work product doctrine because it violates the American Bar Association’s Rules of Model Conduct). However, lawyers should be aware that courts have also found that the work product privilege was waived when the lawyers did not make the clandestine recordings themselves. See Ward v. Maritz, 156 F.R.D. 592 (D.N.J. 1994) (holding that the work product doctrine was invalidated when counsel advised client on taping, even if attorney’s conduct did not violate ethical rules); Haigh v. Matshubita Elec. Corp. of America, 676 F. Supp 1332 (E.D. Va. 1987) (stating that when attorney used surreptitiously taped recordings to prepare complaints, work product doctrine was vitiates). Both this case law and the ethics opinions suggest that attorneys need to be very careful about tape recording without knowledge or permission.

III. ETHICAL ISSUES IN SETTLEMENT NEGOTIATIONS

Generally, a lawyer has broad discretion to negotiate a settlement on a client’s behalf and has no obligation to provide opposing counsel with all relevant facts. As the comments to the ABA Model Rules of Professional Conduct (“Model Rules”) state, “[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.” ABA Model Rules of Professional Conduct Rule 4.1 cmt. [1] (1995). 4

4/ Rule 4.1 states, in pertinent part: (continued...)
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 to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.


Rule 3.3, entitled “Candor Toward The Tribunal” states, in pertinent part”

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(continued...)
Ass’n v. Fell, 364 N.E.2d 872 (Ohio 1977). In Toledo Bar, a workers’ compensation attorney, with knowledge that the workers’ compensation commission would deny any claim for permanent total disability benefits upon notice of the death of a claimant, deliberately withheld information concerning his client’s death prior to a hearing on a motion concerning the claim in order to collect a fee. The Supreme Court of Ohio held that this action violated the Code of Professional Responsibility and justified an indefinite suspension from the practice of law. See also, e.g., Eagan v. Jackson, 855 F. Supp. 765, 790 (E.D. Pa. 1994) (holding that an attorney, as an officer of the court, has a duty of candor to the court that extends beyond what is required under Rule 3.3(d)); Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962) (vacating settlement where defendant’s lawyer did not disclose that the defendant’s doctor discovered an aneurysm in the plaintiff, since the defendant had a duty to disclose once the plaintiff sought court approval of the settlement).

In addition, some courts have stated that a lawyer has a duty to both opposing counsel and the tribunal to disclose adverse facts, where the settlement would be materially affected by knowledge of such facts. See Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 510 (E.D. Mich. 1983) (holding that plaintiff’s attorney had absolute duty to inform court and opposing counsel of death of his client prior to entry of settlement; due to plaintiff’s counsel’s failure to inform court and opposing counsel of death, settlement would be set aside). See also, e.g., State ex rel. Nebraska State Bar Ass’n v. Addison, 412 N.W.2d 855 (Neb. 1987) (holding that a lawyer, when negotiating a settlement regarding his client’s hospital bill, has a duty to disclose to the hospital that his client had insurance that could potentially pay the bill).

---

5/(...continued)

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

It is important to note that the requirement for truthfulness under Rule 4.1(b) can come in conflict with another ethical obligation: the duty to preserve client confidences. See Model Rules of Professional Conduct Rule 1.6 (1995). Although most jurisdictions provide an exception to Rule 4.1(b) for confidential information, see Pa. Rules of Professional Conduct Rule 4.1(b) (1988) (stating that a lawyer must not knowingly “fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6”), a minority of jurisdictions require disclosure of information otherwise protected by Rule 1.6. See, e.g., NJ Rules of Professional Conduct Rule 4.1(b) (1998) (duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6); Md. Lawyers’ Rules of Professional Conduct, Rule 4.1; United States v. Shaffer Equip. Co., 11 F.3d 450, 457-58 (4th Cir. 1993) (recognizing that “the lawyer’s duties to maintain the confidences of a client and advocate vigorously are trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit”).