

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 664**

October 2016

QUESTIONS PRESENTED

1. Do lawyers violate the Texas Disciplinary Rules of Professional Conduct if they fail to notify an opposing party or its counsel that they are in possession of confidential information taken from the opposing party without the opposing party's knowledge or consent?
2. Do lawyers violate the Texas Disciplinary Rules of Professional Conduct if they fail to notify an opposing party or its counsel that they have inadvertently received confidential information of the opposing party?

STATEMENT OF FACTS

In one situation, Client A takes confidential information from the opposing party, Client A's former employer, without the former employer's knowledge or consent. Client A gives the information to Client A's lawyer, who was uninvolved in and previously unaware of Client A's actions. In a second situation, Client A's lawyer inadvertently receives confidential information belonging to the opposing party outside the normal course of discovery. In each situation, the confidential information is relevant and favorable to Client A's case.

DISCUSSION

In this opinion, "confidential information" refers to any private information, including but not limited to privileged information, obtained from the opposing party or the opposing party's lawyer in an unauthorized manner or as a result of an inadvertent transfer.

The facts of the first situation are similar to those in *In re Meador*, 968 S.W.2d 346 (Tex. 1998), a procedural disqualification case. The term "procedural disqualification" refers to a tribunal's decision to disqualify counsel in a particular proceeding. Although courts refer to the Texas Disciplinary Rules of Professional Conduct as guidelines for deciding questions of procedural disqualification, a violation of the Texas Disciplinary Rules is neither essential to, nor automatically requires, procedural disqualification. *Meador*, 968 S.W.2d at 350-51. In contrast, a Texas lawyer is only subject to professional discipline by the State Bar of Texas if the lawyer violates one or more of the Texas Disciplinary Rules.

In *Meador*, an employee of the defendant, covertly and without authorization, copied privileged information of the defendant-employer and gave the information to the plaintiff and

her counsel. When the theft was discovered, the trial court ordered the plaintiff and her counsel to return the information and not use it in the litigation. However, the trial court refused to disqualify plaintiff's counsel. *Id.*

The defendant sought and obtained mandamus relief from the court of appeals. The court of appeals cited American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 94-382 (1994) for the appropriate standard of conduct. ABA Formal Opinion 94-382, entitled "Unsolicited Receipt of Privileged or Confidential Materials," states a lawyer who receives from an unauthorized source information of an adverse party should, upon realizing its confidential or privileged nature, 1) refrain from further reviewing it; 2) notify the adversary's lawyer of the receipt of the information; and 3) either follow the adversary's instructions regarding the information or refrain from using the information until a court rules on its proper disposition.

The Texas Supreme Court reversed. The Court agreed that ABA Formal Opinion 94-382 "represents the standard to which attorneys should aspire in dealing with an opponent's privileged information," stating that "[t]he ABA's approach reflects the importance of the discovery privileges, and ensures that the harm resulting from an unauthorized disclosure of privileged information will be held to a minimum." *Meador*, 968 S.W.2d at 351. But the Court noted that "no specific Texas disciplinary rule applies to the circumstances of this case," and expressly stopped short of adopting the procedure prescribed by ABA Formal Opinion 94-382 as a disciplinary standard for Texas lawyers. *Id.* at 350-51. The Court further observed that disciplinary standards serve only as guidelines for procedural disqualification, so that a violation of the Texas Disciplinary Rules of Professional Conduct is neither essential to, nor automatically requires, procedural disqualification. *Id.*

The Texas Supreme Court announced six factors to be applied in deciding procedural disqualification motions arising from a lawyer's unauthorized receipt of another party's privileged materials:

- "1) whether the attorney knew or should have known that the material was privileged;
 - 2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
 - 3) the extent to which the attorney reviews and digests the privileged information;
 - 4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;
 - 5) the extent to which movant may be at fault for the unauthorized disclosure;
- [and]

6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.”

Meador, 968 S.W.2d at 351-52.

Although the Texas Supreme Court has not withdrawn its comment that “attorneys should aspire” to the procedure outlined in ABA Formal Opinion 94-382, the ABA Standing Committee on Ethics and Professional Responsibility withdrew that Opinion in 2006, following the adoption of ABA Model Rule of Professional Conduct 4.4(b). See ABA Formal Opinion 06-440 (2006). ABA Model Rule 4.4(b) now provides:

“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.”

The question now before the Committee is whether Texas lawyers violate the Texas Disciplinary Rules of Professional Conduct by failing to notify opposing counsel upon receipt of an opposing party's confidential information outside the normal course of discovery. As the Texas Supreme Court noted in *Meador*, the Texas Disciplinary Rules do not contain a rule addressing the appropriate standard of conduct when a lawyer receives an opposing party's confidential information obtained in an unauthorized manner. Nor has Texas adopted a version of ABA Model Rule 4.4(b) or any other rule that directly addresses a lawyer's duties upon receipt of inadvertently sent confidential information. As a consequence, a Texas lawyer who fails to provide notice to opposing counsel upon receipt of an opposing party's confidential information outside the normal course of discovery does not necessarily or automatically violate the Texas Disciplinary Rules. The answer is the same whether the information is obtained in an unauthorized manner or inadvertently.

It is possible that under some circumstances the failure to provide notice to opposing counsel, or take other action upon receipt of an opponent's confidential information, might violate one or more of the Texas Disciplinary Rules requiring lawyers to be truthful and to avoid assisting or condoning criminal or fraudulent acts or denigrating the justice system or subverting the litigation process. For example, Rule 1.02(c) prohibits a lawyer from assisting or counseling “a client to engage in conduct that the lawyer knows is criminal or fraudulent.” Rule 3.03(a)(2) prohibits a lawyer from knowingly failing “to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act.” Rule 4.01(b) provides a lawyer shall not knowingly “fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.” Rule 8.04(a)(3) states a lawyer shall not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” In the view of the Committee, however, whether a lawyer's failure to act violates one of these rules will depend on the facts and the applicable law in a given situation. If these Rules do not come into play in a particular situation, the steps a lawyer must take once another party's confidential information is acquired is a matter of general law outside the scope of the Texas Disciplinary Rules of Professional Conduct.

The Committee cautions that a lawyer's conduct upon receipt of another party's confidential information may have material consequences for the client, including the possibility of procedural disqualification. In the *Meador* scenario, for example, one factor that the trial court is to consider in deciding a procedural disqualification motion is the promptness with which the lawyer notified the opposing counsel of the circumstances. A lawyer in receipt of another party's confidential information should therefore discuss with the client the risks and benefits of possible courses of action and any recommendation of the lawyer. See Rule 1.03(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

A lawyer should always endeavor to comply with the requirements of the applicable law and the rules of the governing tribunal. But a failure to comply with general law or court rules is not always a violation of the Texas Disciplinary Rules of Professional Conduct that subjects a lawyer to professional discipline. Because the Texas Disciplinary Rules are silent regarding the duty of a lawyer who receives an opponent's confidential information, a lawyer who thereafter fails to notify the opposing party does not necessarily violate those Rules.

CONCLUSION

The Texas Disciplinary Rules of Professional Conduct do not prescribe a specific course of conduct a lawyer must follow upon the unauthorized or inadvertent receipt of another party's confidential information outside the normal course of discovery. Although the Texas Supreme Court has stated that, upon the unauthorized receipt of such information, a lawyer should aspire to the standard of conduct prescribed by now-withdrawn ABA Formal Opinion 94-382, a Texas lawyer does not necessarily violate the Texas Disciplinary Rules of Professional Conduct by failing to follow that standard, including the requirement that the lawyer give notice of the receipt of such information to the opposing party. In a given situation a lawyer's failure to take action upon the unauthorized or inadvertent receipt of another party's confidential information might violate one or more of the Texas Disciplinary Rules dealing with criminal, fraudulent, dishonest, deceitful and misleading conduct. Whether such a violation occurs will depend on the specific facts of each situation, the applicable law, and the rules of the governing tribunal. In determining the course of action to take in response to the receipt of another party's confidential information, a lawyer should explain to the client the possible responsive actions and the potential consequences of those actions.