

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-374 (Revised)
Issued: November 1995

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, Rule 4.4 specifically addresses the handling of documents that were mistakenly sent to the lawyer. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question 1: If a lawyer received materials that were not intended for the receiving lawyer, should the lawyer be disciplined if the lawyer attempts to use the documents pursuant to a good faith claim that any privilege or protection that would otherwise have obtained has been waived.

Answer: No. While such conduct is discouraged (see Answer to Question 2), a lawyer should not be disciplined if the lawyer is making a good faith legal argument on behalf of the lawyer's client.

References: KRPC Rules 3.1, 3.4(c). See also Maine Op. 146 (1994). Cf. D.C. Op. 256 (1995); Maryland Op. 89-53; Ohio Op. 93-11.

Question 2: If a lawyer received materials under circumstances in which it is clear that they were not intended for the receiving lawyer, should the lawyer refrain from examining the materials, notify the sender, and abide by the instructions of the sender regarding the disposition of the materials.

Answer: Yes.

References: ABA Formal Op. 92-368 (1992); DC Op. 256 (1995).

OPINION

The Board revisited the issues in KBA E-374 at the request of the Louisville Bar Association (LBA). After receiving the views of the LBA the Board affirms the substance of E-374, but changes the order in which the questions are presented, and emphasized the limits of and risks associated with the assertion of a claim of "waiver" of privilege.

The Committee and the Board are in agreement with the view expressed in ABA Formal Opinion 92-368 (1992) that when a lawyer receives materials under circumstances in which it is clear that they were not intended for the receiving lawyer, the lawyer should refrain from

examining the materials, notify the sender, and abide by the senders instructions regarding the disposition of the materials. See ABA Formal Op. 92-368; D.C. Op. 256 (1995).

The controversial question appears to be whether a lawyer should be disciplined for attempting to use such materials pursuant to a claim of “waiver” of privilege. Whether or not the sending lawyer’s inadvertence and possible violation of Rule 1.6 can waive a privilege presents a question of law. See KBA E-297 (1984) (the Committee does not decide questions of law). The question of what labels, headings or other notices are sufficient to preclude a claim of waiver is also a question of law. Whether or not there is such a thing as “inadvertent waiver” is a hotly debated question. The legal authorities are divided, and the Committee is not aware of any “controlling” caselaw in Kentucky. For a thorough discussion of the law in each federal circuit see Roberta Harding, Waiver: A Comprehensive Analysis of the Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege, 42 Cath. U.L. Rev. 465 (1993). See also ABA Litigation News (August/September 1995) pp. 1, 7.

A lawyer’s duty of loyalty runs to the lawyer’s client and not to his opponent’s lawyer. Compare D.C. Op. 256 (1995)(D.C. law recognizes the concept of inadvertent waiver, and lawyer may attempt to use materials if lawyer read the materials before realizing it was inadvertently produced - duty to represent client zealously and diligently discussed.) Lawyers are strongly urged to return such materials unread, but if the caselaw permits a lawyer is entitled to argue a good faith claim of “waiver” before the court in which an action is pending. See KRPCs 3.1 and 3.4(c) (... “open refusal [to follow a rule] based on an assertion that no valid obligation exists.”) Maine Op. See also Resolution Trust Corp. v. First American Bank, 10 ABA/BNA Law.Man.Prof.Con. 365 (W. D. Mich. 1994); Kusch v. Ballard, 10 ABA/BNA Law.Man.Prof.Con. 366 (Fla.App. 1994) (refusing to disqualify counsel on the facts of the case, and alluding to the possibility [unlikely perhaps] that a lawyer might deliberately “fax” something to opposing counsel to set that lawyer up for disqualification).

However, the Committee and the Board caution counsel that any claim or “inadvertent waiver” is made at the risk of exclusion of evidence and disqualification. The concept of “inadvertent waiver” of attorney-client privilege has been rejected by many courts on the grounds that waiver is thought to require the voluntary relinquishment of a known right, and that only the client can waive the privilege.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.