

ABA Provides Guidance for Ethical and Legal Duties When Employer's Lawyer Obtains Employee's E-mails With the Employee's Lawyer

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American Bar Association Formal Opinion 11-460: Duty When Lawyer Receives Copies of a Third Party's E-mail Communications With Counsel (August 4, 2011)

Brief Summary

The American Bar Association (ABA) issued a formal opinion that provides guidance to corporate and outside corporate counsel who represent an employer that obtain e-mails between an employee and the employee's lawyer from the employee's workplace computer. The ABA Model Rules of Professional Conduct contain no independent mandate for disclosure but both the model rules and external law may impose duties of disclosure or confidentiality, depending on the jurisdiction and the circumstances.

Complete Summary

The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 11-460, addressing the duties of a lawyer who represents an employer that obtains e-mails between an employee and the employee's lawyer from the employee's workplace computer. The formal opinion concluded that the ABA Model Rules of Professional Conduct contain no independent mandate for disclosure, but both the model rules and external law may impose duties of disclosure or confidentiality, depending on the jurisdiction and the circumstances.

The formal opinion reaffirmed the principle from prior ABA formal opinions (06-440 and 06-442) that model rule

4.4(b), which provides for prompt notification of documents “inadvertently sent,” does not apply by its terms in other contexts, including here where the employer is posited to have copied the documents from an employee’s workplace computer. In so doing, the formal opinion acknowledges that certain jurisdictions (most notably the New Jersey, and its Supreme Court’s decision in *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010)), have concluded that the local equivalent of model rule 4.4(b) or its underlying principles do in fact require disclosure in this or analogous contexts.

The formal opinion further expressly recognizes that a court’s supervisory authority, rules of civil procedure and discovery, or statutory or case law in a particular jurisdiction also may require notice or return of the e-mails and that a failure to abide by those requirements may, in turn, give rise to sanctions or an attorney disciplinary violation. The formal opinion points out that if the lawyer’s legal duty of notice is unclear, then the very fact of possession of the e-mails may be the employer’s own “client confidential information” that the employer’s lawyer may be required to protect from disclosure unless the lawyer reasonably believes disclosure is necessary to comply with the law, pursuant to model rule 1.6 (pertaining to protection and authorized disclosure of client confidential information). The formal opinion also cautions that in many instances the decision as to how to handle the e-mails must or should be made with a well-informed employer client, who can evaluate and decide among various options, including court review, disclosure or nondisclosure.

Significance of Opinion

The formal opinion provides useful guidance with respect to a lawyer’s ethical obligations when an employer-client has copied an employee’s potentially privileged e-mails from a work computer. The underlying law concerning notice and return varies among the state and federal jurisdictions and may be very fact-specific. If a jurisdiction adopts the ABA’s view that the model rules contain no independent duty of notice and return (and not all jurisdictions do accept that view even for their state’s parallel rules, as manifest by the New Jersey Supreme Court’s *Stengart* decision), then as a practical matter the underlying substantive law regarding notice and return in any jurisdiction ultimately will drive whether there may be any concomitant ethical duty. The formal opinion also provides an important reminder that in certain circumstances the lawyer will have important ethical duties to the employer-client that must be taken into account as well.

For further information about the cases discussed in the formal opinion please see Hinshaw’s Lawyers’ Lawyer Newsletter - [August 2011](#), [February 2010](#) and [April 2008](#).

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