

**ETHICS OPINION NUMBER 253
OF THE MISSISSIPPI BAR
RENDERED JUNE 17, 2005
AMENDED APRIL 6, 2013**

CLIENT CONFIDENCES

The Ethics Committee of The Mississippi Bar has been asked to render an opinion on the following issue:

What are an attorney's ethical obligations when the attorney or his client has obtained an attorney-client communication between an opposing party and opposing counsel under conditions where the opposing party may not have intended to waive the attorney client privilege?

In determining a course of action, a number of professional and ethical obligations collide. On the one hand, the Preamble to the Mississippi Rules of Professional Conduct requires that an attorney represent a client zealously. On the other hand, our duty of zealous representation must be executed concurrently with the ethical obligation to "act in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." *Inadvertent Disclosure of Email*, written by Robert C. Port, Hassett Cohen Goldstein & Port, LLP, Atlanta, GA.

Although there is nothing in the Rules of Professional Conduct that directly addresses the attorney-client privilege as it applies to an opposing party, we believe that Rule 8.4(d) places an obligation upon every lawyer to take steps to preserve the attorney-client privilege in order to effect the orderly administration of justice. Furthermore, the "Scope" of the Rules of Professional Conduct notes that the rules are not intended to exhaust the moral and ethical considerations that should govern a lawyer, but are designed to provide a framework for the ethical practice of law. This section also notes that the rules are not intended to govern or affect the judicial application of the attorney-client privilege, but that the client is entitled to expect communications within the scope of the privilege will generally be protected.

ABA Formal Opinion 94-382 addressed a situation similar to the one before this committee. The ABA was asked to render an opinion where a third party provided an attorney-client communication to a lawyer, without being solicited to do so. The ABA opinion declined to state an absolute rule regarding use of the materials, as some

circumstances might call for waiver and others might not. The ABA opinion, however, concluded that the best course of action was for the receiving attorney to advise opposing counsel of the disclosure, and then either return the documents or seek assistance from the court in determining the appropriate course of action under the particular facts at hand:

A lawyer who receives on an unauthorized basis materials of an adverse party that she knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how appropriately to proceed; she should notify her adversary's lawyer that she has such materials and should either follow instructions of the adversary's lawyer with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

Notwithstanding the Rules of Professional Conduct, the Opinions of the ABA, and/or other jurisdiction's ethics opinions, the Lawyer's Creed was adopted by the Board of Bar Commissioners of The Mississippi Bar for governing a lawyer's actions in his association with his fellow professionals and clients. The Creed is the basis upon which every attorney in Mississippi should be bound. The Creed pledges to opposing parties and their counsel fairness, integrity, and civility.

This Committee believes that fundamental decency requires that an attorney in possession of an opposing party's attorney-client communications for which the attorney-client privilege has not been intentionally waived should advise opposing counsel of the fact of its disclosure, regardless of the specific facts surrounding disclosure. We adopt language used by the Utah State Bar in Ethics Advisory Opinion No. 99-01 which says:

This approach has the virtue of separating the factual determination regarding the legal merits regarding waiver from the ethical determination of what an attorney ought to do. It also recognizes that the receiving attorney may not have all of the facts relevant to a legal determination, and it guards against subconscious bias in the receiving attorney's consideration of the facts. Finally, it avoids the appearance of impropriety inherent in allowing a receiving attorney to

make the determination under what circumstances to advise opposing counsel.

Once the fact of disclosure is before both parties, they can then turn to the legal implications of the disclosure and a legal assessment of whether waiver has occurred. In some instances the parties may be able to agree regarding how to handle the disclosure. In other instances, it may be necessary to seek judicial resolution of the legal issues.