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RISK MANAGEMENT ADVISORY

Respond with Caution When Your Client Provides You with Wrongfully Obtained Records

If your client provides you with information or records that appear to be the property of the adverse party or opposing counsel, proceed with caution. The rules of professional conduct of some states, or the courts' interpretations of those rules, might require that you stop reading such records and notify opposing counsel of your receipt of them if they appear to be privileged or illegally obtained. These rules might restrict any use of such materials. If you receive documents from your client that do not belong to your client, ask your client how the documents were obtained. If you have started to read them and realize that they clearly belong to the adverse party or opposing counsel, stop reading them, discuss their provenance with your client, and consult the ethics rules, ethics opinions and judicial decisions in your jurisdiction to ascertain how you are required to proceed.

Some state bar association opinions conclude that lawyers who receive privileged materials unsolicited have no obligation to make a disclosure to a tribunal or an adverse party and may review and use such materials. Maryland Bar Ass'n, Op. 89-53 (1989), Virginia Bar Ass'n Op. 1076 (1988), and Michigan Bar Ass'n, Op. CI-970 (1983). Others, however, opine that a receiving attorney proceeds at his own risk if indicia of a privileged document do exist and there is not a reasonable basis to conclude that the privilege has been waived. DC Bar Ethics Opinion 318. The Missouri Supreme Court, *In re Joel Eisenstein*, No. SC95331 (April 2016), found that an attorney violated Missouri Rules 4-8.4(c) and 4-4.4(a) by using illegally obtained evidence, including the adverse party's payroll documents and the work product of opposing counsel consisting of a list of direct examination questions prepared by opposing counsel for possible use at the trial. Although Missouri's Rule 4.4 only requires prompt notification to the sender of the receipt of materials inadvertently produced, the Rule in other states, such as Tennessee, requires notification for both inadvertent disclosure and unauthorized disclosure. ABA Model Rule 4.4 prohibits a lawyer from using methods of obtaining evidence that violate the legal rights of a person.

Also, Missouri Rule 4-3.4(a) prohibits a lawyer from "unlawfully obstruct[ing] another party's access to evidence or unlawfully . . . conceal[ing] a document or other material having potential evidentiary value," and the court found that this rule was violated when the attorney concealed his possession of the payroll information and direct examination questions until the second day of trial.

The ethics rules of most states do not specifically address the propriety of an attorney's review and use of materials that may have been stolen or otherwise acquired without permission from their rightful owners. Rule 1.15, however, usually includes the requirement that, if a lawyer receives property in which third persons have an interest, the lawyer must notify these persons and promptly deliver the property to them.

In the matter of *In re Grand Jury Proceedings Involving Berkeley & Co.*, 466 F. Supp. 863 (D. Minn. 1979), a former employee allegedly stole corporate documents and turned them over to the government. Initially noting that it had long been assumed that the privilege was deemed waived for all involuntary disclosures of privileged documents, even those that were stolen, the court concluded that the privileged status of documents should not be lost in such circumstance if "the attorney and client take reasonable precautions to ensure confidentiality," which is the approach taken in by the American Law Institute in the Restatement of the Law Governing Lawyers, § 129.

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