IOWA ETHICS OPINION

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INTERCEPTION OF CONFIDENTIAL OR ATTORNEY-CLIENT COMMUNICATION: THE DUTY TO STOP, NOTIFY, RETURN AND, IN THE CASE OF WRONGFUL INTERCEPTION, TO WITHDRAW REPRESENTATION.

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Ethics and Practice Guidelines Committee[1]

IOWA ETHICS OP. 15-02

Preface

In Iowa Ethics Op. 15-01 we addressed a lawyer's duty when communicating with the client via electronic means such as e-mail and the obligation to warn the client about the possibility that confidential communication could be intercepted. In this opinion we discuss what happens when an interception has occurred. As explained below, we depart from the position of the American Bar Association in ABA Formal Op. 11-460 and instead adopt a requirement of stop, notify, return and, in the case of wrongful interception to withdraw regarding the situation where a lawyer has received another lawyer's confidential attorney client communication.

Introduction

The Committee has been asked to advise regarding a lawyer's duty when the lawyer receives, without consent, another lawyer's confidential attorney client communication with a client. Electronic communication has given rise to greater opportunities for third parties to intercept or otherwise come in possession of a lawyer's communication with their client.

We start with the basic assumption that the receiving lawyer was not directly or indirectly complicit in the surreptitious interception of the communication, for to do so

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would clearly violate Iowa Rule of Professional Conduct 32:1.2 (d) "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent,..." Instead, this opinion is based upon the assumption that the receiving lawyer is the honest recipient of forbidden fruit gathered by the client either (a) unintentionally and serendipitously, (b) intentionally by claim of right or (c) wrongfully without claim of right.

A. Unintentional, Serendipitous Acquisition.

Clients sometimes obtain confidential or attorney-client protected communication unintentionally or by accident. Rule 32:4.4(b) provides that:

> "Rule 32: 4.4 Respect for Rights of Third Persons
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> > "(b)A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

However the rule is silent whether the recipient should stop reading or otherwise using the document or information and return the document to the sender. The ABA, in its Annotated Model Rules of Professional Conduct at pg. 433 notes that, unless required by rule of court or statute,

> "Under Rule 4.4(b) the lawyer need not stop reading, return the document, nor comply with the sender's instructions."

This significantly departs from the previous positions taken by the ABA which would require a recipient to stop reading or otherwise using the document, notify the sender of its receipt, and return to the same to the sender. The concept of stop, notify and return was central to ABA Formal Ethics Op. 92-368 (1992)(superseded) and 94-382 (1994)(superseded). Both opinions were withdrawn after the adoption of ABA Model Rule 4.4(b) by ABA Formal Ethics Op. 06-440 (2006) and ABA Formal Ethics Op. 05-437 (2005) (holding that a lawyer's only ethical obligation under Rule 4.4(b) is to promptly notify sender. This remains the ABA's position, see, ABA Formal Op. No. 11-640) (2011).

This Committee gives due respect to the ABA Standing Committee on Ethics and Professional Responsibility in matters involving the interpretation and implementation of the Model Rules which support the Iowa Rules of Professional Conduct. However the Iowa legal profession is regulated by the Iowa Supreme Court and we must accordingly look to all of the Iowa Supreme Court's rules and orders as well as Iowa statutes when giving our guidance. In doing so we find we must respectfully decline to follow or

otherwise adopt the ABA's position. Instead, we find the ABA's prior position of "stop, notify and return" to be consistent with other rules of the Iowa Supreme Court.

Iowa Rules of Professional Conduct, Preamble [14] advises that "The Iowa Rules of Professional Conduct are rules of reason." In interpreting the rules we must take care to not view a rule clinically and in isolation of all other rules related to the subject. We believe our position to be consistent with the matrix of Iowa rules relating to unauthorized disclosure of confidential or privileged information.

I.R.Civ. P. 1.503(5)(b) defines the clawback procedure to be used when a lawyer discovers that protected material has inadvertently been disclosed to an opponent. I.R.E 1.5.502 ensures that the confidential or privileged nature of the disclosed information is not lost by operation of the evidentiary doctrine of waiver. It is significant that knowledge of disclosure is essential for both rules to operate. Significantly, Iowa Rule Prof'l C. 32:4.4(b) requires the recipient to give notification of the disclosure to the sending lawyer. But I.R.Civ. P. 1.503(5)(b) adds an additional requirement. It requires that:

> "... After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved."

When the rules are read together it becomes apparent that Iowa R. Prof'l C. 32:4.4(b) requires notice of disclosure to opposing counsel and I.R. Civ. P. 1.503(5)(b) requires the receiving party to stop using the information and return the same to the sender. The concept of stop, notify and return is embodied in both rules.

Conclusion: Inadvertent disclosure – Stop, Notify and Return

Once it has become apparent that one has received privileged attorney-client communication or documents, the lawyer should immediately stop reading or using the same, notify opposing counsel of the receipt and disclosure and return the document to or otherwise comply with instruction of counsel. In those situations where a legitimate claim to possession and use could be made, receiving counsel should comply with the requirements of I.R. Civ. P. 503(5)(b) if litigation is pending or institute an action for declaratory judgment to adjudicate the right of possession.

B. Interception by Claim of Right.

In some situations one may claim a right to possess and use a third party's communication with their counsel. It frequently occurs that an employee will communicate with counsel using an employer's computer in violation of rules prohibiting non-business use. An employer could claim that because the communication was conducted via employer-provided communication systems, in violation of work rules, there was no expectation of privacy and the digital communication belongs to the employer. In another situation, law enforcement may provide telephonic communication for prisoners with or without notification that the communications are recorded. When this occurs the lawyer who receives the communication must determine whether the requirement of stop, notify and return applies.

Iowa R. Prof'l C. 4.4(b) and I.R.Civ. P. 1.503(5)(b) refer to the disclosure as inadvertent. The ABA has taken the position that in these situations Rule 4.4(b) does not apply. ABA Formal Op.11-460 (2011), applying ABA formal Op. 06-440 (2006) has taken the positon that:

> "Rule 4.4(b) does not obligate a lawyer to notify opposing counsel that the lawyer has received privileged or otherwise confidential materials of the adverse party from someone who was not authorized to provide the materials, if the materials were not provide as "the result of the sender's inadvertence."

The ABA over-stresses the term "inadvertence". Iowa Supreme Court Rule 33.1(1) recognizes:

> "A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful and efficient manner."

Keeping and using opposing counsel's confidential attorney client communication with their client is the very antithesis of fairness, justice and professional integrity. The rules are "rules of reason". It defies reason to believe that one has a duty to stop, notify and return documents, which were accidently or inadvertently disclosed but not when the same information has been intentionally purloined, even under some color of right.

Conclusion: Interception Under Color of Right – Stop, Notify and Return

We reject ABA Formal Op. 11-460 (2011) and ABA Formal Op. 06-440 (2006) and instead adopt the position of "stop, notify and return" as described above for those situations where attorney-client or otherwise confidential communication or documents

to or from opposing counsel have been received by color of right. By doing so all parties know of the disclosure and have an opportunity to adjudicate the claim of right.

(C) Wrongful Interception.

By far the most complicated situation occurs when a client intentionally, with no claim of right, intercepts confidential communication between a party and their lawyer. The analysis becomes complicated by the fact that in obtaining the information the client may have committed a criminal offense. Consequently disclosing the existence of information and details concerning its possession may expose one's client to criminal jeopardy. In this situation, the receiving lawyer is now on the horns of a dilemma: does one comply with the 'stop, notify and reply' protocol and expose the client to potential criminal liability, or does the lawyer simply remain silent and possibly be exposed to criminal liability as an accomplice or accessory after the fact, or withdraw from representation without full or partial disclosure?

While this situation is recognized in Iowa R. Prof'l C. 32:4.4 (b), it gives no guidance. Comment [2] simply states:

> "Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person."

In this situation, receiving counsel's decision-making algorithm comprises two parts. First, the lawyer must determine if a duty is imposed by statute, rule or court order requiring counsel to disclose the possession of the document. Secondly, counsel must determine if the duty is overridden by Iowa R. Prof'l C. 32: 1.6 protecting client confidentiality.

As discussed previously, Iowa law imposes a duty on counsel to stop, notify and return privileged documents obtained inadvertently or intentionally by a color of right. We see no reason why the duty should not extend to privileged documents wrongfully obtained. The issue is not how the documents were obtained but whether the duty to disclose them is somehow overridden by the receiving lawyer's fiduciary duty of loyalty and confidentiality to the client.

A lawyer's fiduciary duty to a client is not without limits. Iowa R. Prof'l. C. 32:1.2(d) requires that:

> "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

Comment [10] gives further guidance:

> [10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See rule 32:1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See rule 32:4.1.

Iowa R. Prof'l C. 32:4.1 gives further guidance:

> In the course of representing a client a lawyer shall not knowingly:
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> (a) make a false statement of material fact or law to a third person; or
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> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 32:1.6.

Comment [3] applies the rule to the following situation:

> [3] Under rule 32:1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in rule 32:1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by rule 32:1.6.

While client confidentiality is the hallmark of the attorney-client relationship, it too is not without limits. Iowa R. Prof'l C. 32: 1.6(a) mandates

> "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c)."

However there are certain situations where the client has forfeited the protection by its wrongful acts. The rule recognizes seven exceptions. Important to our analysis is the following:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
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> > (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.

This is the so-called "crime-fraud exception" to the obligation of confidentiality. If, after performing a due diligence analysis, the lawyer determines that the crime-fraud exception applies, counsel must now address two additional issues: How to best comply with the duty to stop, notify and return while minimizing the adverse impact to the client and whether the lawyer can continue representing the client. The client must be made aware of the seriousness and consequences of its conduct. If the client authorizes the disclosure and return of the documents and agrees to refrain from further wrongful conduct, the matter of withdrawal can be avoided. If not, counsel must proceed to determine whether withdrawal is required under the above rules and how best to accomplish the return of the wrongfully obtained documents. In making the determination, counsel should be mindful that Iowa R. Prof'l C. 1.16 (a) (1) requires counsel to withdraw when continued representation will result in a violation of the rules of professional conduct or other law. Iowa R. Prof'l C. 1.16(b) (3) requires withdrawal when the client has used the lawyer's services to perpetrate a crime or fraud. Likewise Iowa R. Prof'l C. 1.16(b) (4) requires withdrawal when the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. In certain situations, failing to withdraw could subject counsel to a claim of aiding and abetting or otherwise being complicit in the client's wrongful act. Iowa R. Prof'l. C. 1.6(b) Comment [7] gives guidance:

> [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in rule 32:1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a

serious abuse of the client-lawyer relationship by the client forfeits the protection of this rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See rule 32:1.2(d). See also rule 32:1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and rule 32:1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

Conclusion: Wrongful Interception: Stop, Confer, Notify, Return and Withdraw

We adopt the position of "stop, notify, return and withdraw" as described above for those situations where attorney-client or otherwise confidential communication or documents to or from opposing counsel have been wrongfully obtained by or on behalf of the client. What to disclose, and how to disclose it, is best left to the discretion of the lawyer to be exercised after conducting due diligence regarding the so-called "crime-fraud" exception to the attorney-client confidentiality, after warning and notification and warning to the client.

OPINION

Where counsel obtains confidential or attorney-client privileged communication between a client and lawyer inadvertently disclosed, or obtained under some cover of right, counsel should stop reading or otherwise using the documents or information, immediately notify the lawyer whose communications have been intercepted and either return the documents to the lawyer or follow the lawyer's directions regarding the same, or apply to the court for directions on the continued possession and use of the documents and information.

Where counsel obtains confidential or attorney-client privileged communication between a client and lawyer which were wrongfully obtained by the lawyer's client or someone acting on the client's behalf, receiving counsel should advise the client of the consequences of their conduct and counsel's duty to stop reading or otherwise using the documents or information, to notify the lawyer whose communications have been intercepted, and to return the documents to the lawyer. If the client refuses to allow counsel to rectify the wrongful disclosure, counsel should proceed to conduct due diligence to determine if the crime-fraud exception to attorney-client confidentiality mandates disclosure and if so return the documents to the lawyer involved or file the same under seal with the court without explanation, and withdraw from further representation of the client.