

**ROUNDTABLE DISCUSSION  
PROFESSIONALISM PROBLEM  
OCTOBER 3, 2006**

Larry Lawyer represents Sammy Seller in a negotiation to sell his business to Betty Buyer, a former employee of the business, for \$12,000,000.00. Betty Buyer is represented by Alice Attorney. Larry Lawyer and Alice Attorney have successfully negotiated several purchases of businesses in the past and have a good working relationship. The parties agreed to have a joint business valuation done by True Value, Inc. The valuation was performed six months ago and the value was \$12,000,000.00.

**Situation 1:**

Unbeknownst to anyone, including his own lawyer, Sammy Seller contracted to have his own business valuation done in addition to the joint valuation. During the final drafting of the documents to purchase the business, Sammy Seller sends an email to Larry Lawyer stating, "I feel really good about the sale price of the business at \$12,000,000.00 because I had another valuation done on my own and it appraised at \$5,000,000.00. Let's keep this information to ourselves." Larry intends to send an email responding to his client, but gets distracted and inadvertently sends it to his opposing counsel, Alice Attorney. Upon realizing his mistake, Larry calls Alice Attorney to tell her not to read the email. Unfortunately for Larry Lawyer, he got directed to voicemail. By the time Larry Lawyer was able to reach Alice Attorney, she had already read the email and learned of the lesser appraised value. Larry tells Alice that he understands, but requests that Alice not disclose the lower value to her client, stating, "Appraisals are so subjective, and we have already had a joint appraisal done for this sale. Everyone is in agreement to the value. We are all ready to have it wrapped up."

**Situation 2:**

As part of Larry Lawyer's usual business practice he often recommends that his clients have an independent business valuation done to point out any defects in the joint appraisal. Therefore, Sammy Seller and Larry Lawyer contract to have their own appraisal done. The appraisal values the business at \$5,000,000.00. Sammy Seller sends an email to Larry Lawyer stating, "Larry – The appraiser you hired just emailed me the attached business valuation report for review. This could be problematic for us in this negotiation. We should just stick with the original jointly obtained appraised value." Attached to the email is a copy of the valuation report.

Larry Lawyer was in a meeting when the email was sent to him by Sammy Seller. When he opens it, he realizes that Sammy Seller inadvertently sent the email to Alice Attorney as well. Larry Lawyer immediately calls Alice Attorney and says, "Alice, you received an email from my client that was not intended for you. Please do not open it." Alice responds by saying that she had just gotten into her office and received and read the email from his client. Larry Lawyer asked, "Did you also open the attachment?" She replies that she did not and she deleted it from her system. However, she did tell Betty Buyer

that something might be incorrect with the value of the business and told her to keep her eyes open.

Two days before the documents related to the sale are to be signed, Betty Buyer calls Alice Attorney to say she is no longer willing to buy the business for \$12,000,000.00. She reports that she has obtained a copy of the second appraisal done on the business that values it at \$5,000,000.00. Alice Attorney asks where she got the appraisal and she responds that she was concerned about the purchase of the business after the email Sammy Seller had accidentally sent to Alice Attorney. So, she asked Sammy Seller to meet her for lunch, and when he got up to use the restroom she picked up his Blackberry, located the email with the document attached and forwarded it to her email at home. On the front page of the valuation report it stated a value of \$5,000,000.00.

Betty Buyer faxes a copy of the report to Alice Attorney. Alice reviews the valuation report without notifying Larry Lawyer that she has a copy or that there may be a problem with the sale. She wants to understand the differences in the report to see if there is some way to salvage the sale. In reading the report she discovers that the lower valuation is due in large part to a latent defect in the principle product sold by the company that was discovered after the completion of the joint valuation. She angrily picks up the phone, calls Larry Lawyer, and says, "Did you read this second valuation?"

#### **Questions for Discussion:**

##### **Situation 1:**

- 1. Did Alice violate any rules of ethics by reading the email?**
- 2. Was it unprofessional of her to read the email??**
- 3. Should she have called him after receiving the email to let him know she had read it?**
- 4. Did Larry violate any rules of ethics or principles of professionalism when he asked Alice not to disclose the email with her client?**
- 5. What is Alice's duty with regard to the information she learned in the email?**

##### **Situation 2:**

- 1. If you were Alice, would you have opened the attachment to the email? Do rules of ethics or professionalism prevent Alice from opening the email?**
- 2. Did Alice violate a duty to her client by deleting the email when she received it?**
- 3. What should Alice have done when she learned that her client obtained the appraisal from Sammy's Blackberry? Should she have reviewed the appraisal?**
- 4. At what point should Alice have informed Larry that she and/or her client had a copy of the appraisal?**
- 5. If Larry had reviewed the second appraisal, was he obligated to inform Alice of the latent defect?**

**RULE PACKET—PROFESSIONALISM PROBLEM  
OCTOBER 2006**

**0.1 Preamble: A Lawyer's Responsibilities**

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[12] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

**Rule 1.6: Confidentiality of Information**

(a) A lawyer shall not reveal information acquired during the professional relationship with 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).

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

(1) to comply with the Rules of Professional Conduct, the law or court order;

(2) to prevent the commission of a crime by the client;

(3) to prevent reasonably certain death or bodily harm;

(4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(7) to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

(c) The duty of confidentiality described in this Rule encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this Rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

#### **Rule 4.1: Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

#### **Rule 4.4: Respect for Rights of Third Persons**

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a writing relating to the representation of the lawyer's client and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender.

#### **Comment**

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive writings that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a writing was sent inadvertently, then this rule requires the lawyer promptly to notify the sender in order to permit that person to take protective measures. This duty is imputed to all lawyers in a firm. Whether the lawyer who receives the writing is required to take additional steps, such as returning the original writing, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a writing has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. *See* Rule 1.0(o) for the definition of "writing."

[3] Some lawyers may choose to return a writing unread, for example, when the lawyer learns before receiving the writing that it was inadvertently sent to the wrong address. Whether the

lawyer is required to do so is a matter of law. When return of the writing is not required by law, the decision voluntarily to return such a writing is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

## **RPC 252**

July 18, 1997

### **Receipt of Inadvertently Disclosed Materials from Opposing Party**

Editor's Note: To the extent that this opinion is contrary to Rule 4.4, Respect for Rights of Third Persons, paragraph (b) and comments [2] and [3], as revised in 2003 and thereafter, the rule and comment are controlling.

*Opinion rules that a lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.*

#### **Inquiry #1:**

Insurance Company is the liability carrier for Defendant Motorist. Plaintiff is represented by Attorney C. After settlement discussions failed, Attorney C filed suit on behalf of Plaintiff. Insurance Company hired Attorney X to defend the suit. Before responsive pleadings were filed, adjuster for Insurance Company erroneously sent the company's claim file to Attorney C. The claim file was sent by certified mail, return receipt requested, addressed to Attorney C. The cover letter was also addressed to Attorney C. However, the letter's salutation read "Dear Attorney X." A copy of the letter to the defendant from the adjuster was also enclosed with the file. This letter incorrectly informed the defendant that he would be defended by Attorney C. In addition to a photo of Plaintiff's vehicle, Plaintiff's medical records, and Attorney C's demand letter, the file included a "claim diary" that Attorney C read and believes contains *prima facie* evidence of an unfair and deceptive trade practice by Insurance Company.

Attorney C sent a copy of the file to the adjuster and to Attorney X. Attorney X demands the return of the original file. Is Attorney C required to return the original file to Insurance Company?

#### **Opinion #1:**

Yes. Attorney C has a duty of honesty and a duty of courtesy to all persons involved in the legal process. See Rule 1.2(c) and Rule 7.1(a). The original file does not belong to Attorney C or to his client. From the cover letter, it could be readily ascertained that the accompanying materials were subject to the attorney-client privilege or otherwise confidential and were sent to Attorney C inadvertently. Upon realizing that the materials were not intended for his eyes, Attorney C should have (1) refrained from reviewing the file materials, (2) notified the opposing counsel of their receipt, and (3) followed opposing counsel's instructions as to the disposition of such materials. Under these circumstances, the receiving attorney may not use the substance of the materials inadvertently sent to him to the advantage of his client.

**Inquiry #2:**

Was it acceptable for Attorney C to read the cover letter and examine the claim file although Attorney C realized from the salutation on the cover letter that the letter and the attached materials were sent to him erroneously?

**Opinion #2:**

No. A lawyer who is the recipient of an inadvertent disclosure of written materials by an opposing party or opposing counsel is required to discontinue reading the materials as soon as the lawyer realizes that the materials may be subject to the attorney-client privilege of others, or are otherwise confidential communications involving an attorney, and the materials were not intended for his or her eyes. This requirement is consistent with a lawyer's duty of honesty as well as a lawyer's duty to avoid offensive tactics and treat with courtesy and consideration all persons involved in the legal process. Rule 1.2(c) and Rule 7.1(a)(1). It also respects the opposing party's confidentiality. *See* Rule 4.

**Inquiry #3:**

Would the response to inquiry #2 be different if the inadvertently disclosed materials were sent by opposing counsel instead of a representative of the opposing party?

**Opinion #3:**

No.