

MINUTES

COMMITTEE: Ethics Committee

DATE: January 24, 2008

3. CHAPTER 5, RULE 15: WHETHER RULE IS ENGAGED WHEN LAWYER FAILS TO CLAIM PRIVILEGE INITIALLY BUT DOES SO AFTER DOCUMENT PRODUCED

Lawyer 1 is conducting litigation in which there are voluminous documents, upwards of 17,000. In May 2007 counsel on the other side, Lawyer 2, listed and produced electronically documents A and B, both of which were partially redacted. On December 10, 2007 Lawyer 2 notified Lawyer 1 that documents A and B were inadvertently disclosed in the May 2007 list, since the documents contained information that Lawyer 2 considered to be privileged. Lawyer 2 requested that Lawyer 1 return documents A and B and, in place of those documents, provided Lawyer 1 with documents C and D, which were the same documents as A and B, but were more extensively redacted to remove materials that Lawyer 2 considered to be privileged.

Lawyer 1 asked whether under these circumstances she has any duties arising as a result of Chapter 5, Rule 15.

The Committee noted that Rule 15 refers to a document that “belongs to or is intended for an opposing party and was not intended for the lawyer to see...” In these circumstances it can only be said that the documents became documents that were not intended for the lawyer to see after Lawyer 2 reviewed the documents, redacted portions of them, approved them for release to Lawyer 1, sent them to Lawyer 1 and then changed his mind about releasing them in the form in which they had originally been provided.

It was the Committee’s view that the purpose of Rule 15 is to correct some slip or error made on the part of a lawyer or another person in safeguarding or transmitting documents. It is not designed, as here, to protect lawyers from mistakes of judgment they may make in reviewing documents to determine whether they are disclosable. Lawyer 2 may be able to obtain the return of the documents through court processes, but Rule 15 does not compel Lawyer 1 to return them.