CARLTON FIELDS

When Terminated Employees Steal: Cases of Purloined Company Documents

August 11, 2020

An employee is terminated, her laptop and phone seized. As she is escorted from the premises, Human Resources instructs her, in no uncertain terms, about company information: All internal company emails and other business documents belong to the company and not to her, and she is to turn over such material in her possession, which, of course, she claims to have done. Yet, when the securities fraud lawsuit is filed two months later, the allegations of corporate misconduct seem surprisingly well pleaded. Indeed, the company realizes that the complaint is replete with exact quotes from multiple company documents, some of which the fired employee was copied on and many of which are privileged.

Such scenarios are commonplace — self-help discovery; the knowing review of stolen, potentially privileged material; the refusal to return documents when demanded by the owner. The company becomes the victim of what attorney misconduct literature politely calls *purloined documents* — "confidential documents that are provided to the lawyer outside normal channels of discovery or investigation by persons who are not authorized to turn over the documents." Simon's N.Y. Rules of Prof'l Conduct § 4.4:16. As Roy Simon, a New York expert in professional ethics, has explained, "[u]sing purloined documents is like fencing stolen goods." *Id.* § 4.4:6.3.

So what is the company's relief? In this situation, the actions of both the client and her counsel would likely warrant some degree of sanctioning. But, when an attorney receives purloined documents from someone other than his or her client (and assuming the client has no other involvement in the documents' possession or use), the client will not be held responsible for counsel's misconduct. That is not to say, of course, that the client will not be harmed by the attorney's alleged misconduct. *See Matter of Beiny,* 129 A.D.2d 126, 143–44 (N.Y. App. Div.1st Dep't 1987) (noting that counsel's "complete and deliberate disregard" for the discovery process and "total insensitivity'' to the protection of privileged materials warranted disqualification).

As it relates to professional misconduct, if an attorney were to aid his or her client in either stealing or reviewing the purloined documents, then ABA Model Rule of Professional Conduct 4.4 ("Respect for Rights of Third Persons") would seem to imply professional sanctions. Although Rule 4.4(b) is restricted to documents "inadvertently sent" to the attorney, Rule 4.4(a) generally instructs that an attorney shall not "use methods of obtaining evidence that violate the legal rights" of a third person. *See* Simon's N.Y. Rules of Prof'l Conduct § 4.4:6.3. Likewise, New York State Rule of Professional Conduct 8.4 may be implicated. It lists grounds of attorney misconduct, including that an attorney may not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." It is unsettled whether the Model Rules provide a black-letter rule of professional conduct instructing how an attorney should proceed once in possession of purloined documents and, more generally, if any rule governs whether an attorney's possession or review of purloined documents is unethical. *See* Simon's N.Y. Rules of Prof'l Conduct §§ 4.4:16, 4.4:6.3.

The federal and state courts venued in New York State, however, unequivocally hold that courts have the authority to sanction the parties before it. *See Herrera v. Clipper Grp., L.P.,* No. 97-CIV-560 (SAS), 1998 WL 229499, at *1 (S.D.N.Y.1998) (confirming that "[i]t has long been recognized that courts have inherent equitable authority over their own process, to prevent abuses, oppression, and injustices") (internal quotation marks omitted).

For example, the possession or use of purloined documents, and particularly those that are privileged, have repeatedly been held to constitute unethical behavior that warrants a sanction. The governing rule of conduct is that an attorney who thinks he or she may be in the unauthorized possession of privileged documents should isolate the material and not review it until authorized to do so by a judge. *See, e.g.*, *Lipin v. Bender,* 193 A.D.2d 424, 427–28 (N.Y. App. Div. 1st Dep't 1993), *aff'd*, 84 N.Y.2d 562 (N.Y.1994) (explaining that plaintiffs counsel, who knew documents had been wrongly obtained by his client, should have "readily returned the documents or sought further direction from the court," rather than take advantage of the improper conduct).

Similarly, if a client is involved in obtaining or otherwise misusing purloined documents, the client will be sanctioned as well. *Id.* at 425–26, 428 (admonishing client for her own "willful misbehavior" in taking purloined documents, which she knew to be privileged, off a table at a discovery hearing, and reviewing, copying, and providing them to her attorney).

Sanctions for this theft vary in severity, whether against the client, the lawyer, or both. Not all thefts are equal. In cases involving stolen documents, the issue before the court is not whether stealing documents is or is not unethical — it clearly is. Rather, the issue is "the appropriate sanction to impose on a party that has wrongfully obtained evidence." *Fayemi v. Hambrecht & Quist, Inc.,* 174 F.RD. 319, 325 (S.D.N.Y.1997) (stating that a court should weigh the severity of the wrongdoing and the prejudice to the adversary).

While dismissal of the complaint is an option, it "is the most drastic sanction contemplated by the CPLR [New York Civil Practice Law and Rules] for failure to comply with discovery and should be imposed only when the conduct of the offending party was willful, contumacious, or in bad faith." *Mateo v. T & H Enters.,* 60 A.D.3d 411, 412 (N.Y. App. Div. 4th Dep't 2009). For that reason, dismissal of the complaint is less likely if the stolen documents, though "confidential" (as most businesses claim their documents to be), would have been subject to disclosure during the normal course of discovery. *Herrera,* 1998 WL 229499, at *5 (finding that, though plaintiff knowingly tried to evade the court's discovery rules by "copying thousands of pages of documents belonging to defendants, at least some of which were clearly confidential," she "could have properly obtained the clear majority of the documents through the discovery process"; thus, she was "not precluded from using ... any nonprivileged information she obtained from defendants").

True, there is arguably limited prejudice to the truth-finding function if the purloined documents would have been disclosed anyway. Perhaps with that in mind, courts have often permitted the use of purloined but discoverable documents, but with restrictions on using the documents, admonishments, or the assessment of financial sanctions. *See PurePower Boot Camp v. Warrior Fitness Boot Camp,* 587 F. Supp. 2d 548, 568, 571 (S.D.N.Y. 2008) (collecting cases admitting purloined documents, excluding them, or admitting them with restrictions). The facts and circumstances surrounding the culpability of the client and the client's attorney will be taken into account by the court when determining which punishment to lay upon the offenders.

The theft of privileged or protected documents is more serious. Privileges exist to protect fundamental principles, like the attorney-client relationship. Where the privilege is lost due to theft, a court will sanction the party accordingly. *Lipin,* 193 A.D.2d at 427–28 (affirming trial court's dismissal of complaint pursuant to CPLR 3103 where plaintiffs action of knowingly copying defendant's documents, which were "on their face clearly attorney's work product," was "egregious" and "compounded" by counsel's own misconduct). In those situations, the employee (and, likely, counsel) were provided with information that the employee otherwise would not have obtained and that cannot be "unlearned." *Fayemi,* 174 F.R.D. at 326.

Regardless of whether the documents are privileged or protected, document theft poses a serious danger to the integrity of the courts and the litigation system as a whole. *See* Lipin, 193 A.D.2d at 428 (finding that "regardless of whether the documents were privileged, the highly improper manner in which they were obtained, combined with their subsequent use by plaintiffs counsel to defendants' detriment, constitute[d] a sufficient basis" for sanctioning). As the *Fayemi* court explained:

> Pursuant to [the court's] inherent authority, a court must be able to sanction a party that seeks to introduce improperly obtained evidence; otherwise the court, by allowing

> the wrongdoer to utilize the information in litigation before it, becomes complicit in the misconduct.

Fayemi, 174 F.R.D. at 324.

The court opined that parties, as well as others, should be deterred from committing similar acts in the future. *Id.* at 325.

To some degree, theft pays (or at least is not seriously sanctioned) if limited to nonprivileged material. The moral for companies is to redouble their efforts to keep departing personnel from absconding with confidential documents, rather than relying on the courts to protect their confidentiality.

Republished with permission from the ABA Section of Litigation Securities Litigation Committee.

Authored By

Natalie A. Napierala

Related Practices

Labor & Employment
Securities Litigation and Enforcement