

Cases of Purloined Company Documents: When Terminated Employees Steal

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The employee is terminated, and her laptop and phone seized. On being escorted from the premises, human resources admonishes that all internal company email and other business documents belong to the company, not her, to which she indignantly insists that she does not possess any such documents. When the former employee files suit against the company two months later, the allegations of corporate misconduct are supported by exact quotes from multiple company documents, including both those on which she has been copied and others to which she has no legitimate access, such as privileged communications between the company and counsel.

Such scenarios have been commonplace, including for insurance companies and securities firms. The company has been the victim of what the literature on attorney misconduct politely references as “purloined documents” — confidential documents that are provided to the terminated employee’s lawyer outside “normal channels” of discovery or investigation by persons who are not authorized to turn over the documents.

What Is the Company’s Relief?

The authorities are split as to whether there is a black letter rule of professional conduct that designates an attorney’s possession or review of purloined documents as unethical. Courts, however, are generally less equivocal. In New York, for example, the possession or use of purloined documents in general, and attorney-client privileged documents in particular, has repeatedly been held to be unprofessional behavior that warrants a sanction.

The sanction, however, is not necessarily dismissal of the complaint. Not all thefts are equal. Dismissal is less likely if the stolen documents, though “confidential” (as most businesses claim their documents to be), would certainly have been subject to disclosure during the normal course of discovery. It is a different situation to steal documents that were protected from disclosure by the attorney-client privilege or the work product doctrine and that therefore provided the employee with information that she would not have otherwise obtained and could not be “unlearned.”

Such privileged document theft poses a greater danger to the integrity of the courts and the litigation system, and complaints in these cases often are dismissed. However, there is limited prejudice to the truth-finding function if the purloined documents would have been disclosed anyway. Accordingly, with admonishments, and perhaps financial sanctions, courts have often permitted the use of purloined but discoverable documents or admitted them with restrictions.

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

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