

## FORMAL OPINION NO. 2005-150

### Competence and Diligence: Inadvertent Disclosure of Privileged Information

#### Facts:

Lawyer *A* inadvertently includes a privileged document in a set of documents provided to Lawyer *B* in response to a discovery request. Lawyer *A* discovers the mistake, calls Lawyer *B*, and asks Lawyer *B* to return the privileged document without examining it further.

#### Question:

Must Lawyer *B* return the document?

#### Conclusion:

No, qualified.

#### Discussion:

Oregon RPC 4.4(b) provides:

(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.

It may be helpful to begin with what the rule does not say. It does not distinguish between litigation and nonlitigation situations, it is not limited to documents containing information protected by Oregon RPC 1.6, and it is not limited to documents sent by another lawyer.<sup>1</sup> Moreover, the rule applies whether or not the recipient lawyer reads the document before learning that it was inadvertently sent.

By its express terms, Oregon RPC 4.4(b) does not require the recipient of the document to return the original nor does it prohibit the recipient from openly claiming and litigating the right to retain the document if there is a nonfrivolous basis on which to do so. The purpose of the rule is to permit the sender to take protective measures; whether the recipient lawyer is required to return the documents or take other

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<sup>1</sup> Although Oregon RPC 4.4(b) requires notice to the "sender," we assume that, pursuant to Oregon RPC 4.2, notice should be given to the sender's counsel if the recipient knows that the sender has counsel.

measures is a matter of law beyond the scope of the Oregon RPC, as is the question of whether the privileged status of such documents has been waived. ABA Model Rule 4.4(b) comment [2].<sup>2</sup> Cf. ABA Formal Op Nos 94-382, 92-368. Cf. *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or 336, 838 P2d 1069 (1992) (waiver by disclosure in response to discovery request; no evidence of mistake, inadvertence, or lack of client authorization); *GPL Treatment, Ltd. v. Louisiana-Pacific Corp.*, 133 Or App 633, 638–639, 894 P2d 470 (1995), *aff'd on other grounds*, 323 Or 116 (1996) (no error in trial court's exclusion of evidence on determination of no waiver by inadvertent disclosure, no awareness by sender of recipient's intent to offer as evidence until offered at trial).

If applicable court rules or substantive law require a lawyer to return documents or to cease reading documents as soon as the lawyer realizes that they were inadvertently produced, a lawyer who does not do so would be subject to discipline or disqualification on other grounds. See, e.g., Oregon RPC 3.3(a)(5) (lawyer shall not “knowingly . . . engage in other illegal conduct”); Oregon RPC 3.4(c) (lawyer shall not “knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists”); Oregon RPC 8.4(a)(4) (prohibiting “conduct that is prejudicial to the administration of justice”); *Richards v. Jain*, 168 F Supp2d 1195 (WD Wa 2001) (disqualifying counsel for retaining and using privileged materials).

**Approved by Board of Governors, August 2005.**

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<sup>2</sup> The comment to the ABA Model Rule also suggests that a lawyer's decision whether to return an inadvertently sent document unread is a matter of professional judgment ordinarily reserved to the lawyer in accordance with Oregon RPC 1.2 and 1.4.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §6.9 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§120, 105, 110 (2003); and ABA Model Rule 4.4.