

FORMAL OPINION NO. 2011-186

Receipt of Documents Sent without Authority

Facts:

Lawyer in an adversary proceeding receives documents from a third party that may have been stolen or otherwise taken without authorization from opposing party.¹

Questions:

1. Must Lawyer notify the opposing party of the receipt of the documents?
2. Must Lawyer return the documents to the opposing party?

Conclusions:

1. No, qualified.
2. No, qualified.

Discussion:

Oregon RPC 4.4(b) provides that “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.”²

¹ For purposes of this opinion, it is assumed that Lawyer did not advise Client to, or otherwise participate in, obtaining the documents. *See* Oregon RPC 1.2(c) (a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent) and Oregon RPC 8.4(2)(4) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice).

² For purposes of the rule, *document* includes e-mail or other electronic communications subject to being read or put into readable form. ABA Model Rule 4.4(b), Comment [2].

By its express terms then, Oregon RPC 4.4(b) does not require Lawyer to take or refrain from taking any particular actions with respect to documents that were sent purposely, albeit without authority.³ However, other rules may limit Lawyer's options or direct Lawyer's actions.

First, the circumstances in which the documents were obtained by the sender may involve criminal conduct. If so, Oregon RPC 1.6⁴ prohibits Lawyer from disclosing the receipt of the documents, as explained in OSB Formal Ethics Op No 2005-105:

A lawyer who comes into possession of information linking a client to a crime ordinarily is barred by the lawyer's duty of confidentiality from voluntarily disclosing that information to others. See, e.g., ORS 9.460(3) and Oregon RPC 1.6, discussed in OSB Formal Ethics Op No 2005-34.

This is true even if the documents came from a source other than Lawyer's own client, as the disclosure could nevertheless work to the detriment of the client in the matter.

OSB Formal Ethics Op No 2005-105 also warns that Oregon RPC 8.4(a)(4), prohibiting conduct prejudicial to the administration of justice, prevents a lawyer from accepting "evidence of a crime" unless the lawyer makes the evidence available to the prosecution. Further, to the extent that receiving stolen documents constitutes tampering with evidence, the lawyer may also be exposed to criminal liability.

Second, the documents may be entitled to protection under substantive law of privilege or otherwise. *See Burt Hill, Inc.*, 2010 US Dist Lexis 7492 at 2–4, n 6. The scope and application of those substantive

³ Following the promulgation of ABA Model Rule 4.4(b), the ABA withdrew its Formal Opinion 94-382 which suggested that documents sent by anyone without authorization were, from the opposing party's perspective, an "inadvertent disclosure." ABA Formal Op. No. 06-440 disavows the prior opinion and expressly holds that where the delivery of the materials is not the result of the sender's inadvertence, Rule 4.4(b) does not apply.

⁴ Oregon RPC 1.6(a): "A lawyer shall not reveal information relating to the representation of 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)."

law protections are not questions of professional responsibility. However, a lawyer who reviews, retains, or attempts to use privileged documents may be subject to disqualification or other sanctions under applicable court rules or substantive law.⁵

Approved by Board of Governors, November 2011.

⁵ *Richards v. Jain*, 168 F Supp2d 1195 (WD Wa 2001) (disqualifying counsel for retaining and using privileged materials); *In re Shell Oil Refinery*, 143 FRD 105 (ED La) (lawyer may not use confidential documents supplied to him by opponent's employee), *amended and reconsidered on other grounds*, 144 FRD 73 (ED La 1992); *Maldonado v. New Jersey*, 225 FRD 120 (DNJ 2004) (plaintiff's counsel who reviewed privileged letter, received from unknown source, and without permission incorporated it by reference in amendment to complaint disqualified); Smallman, *The Purloined Communications Exception to Inadvertent Waiver; Publication and Preservation of Lawyer-Client Privilege*, 32 TORT & INS LJ 715. *See also* OSB Formal Ethics Op No 2005-150.