

FORMAL OPINION NO 2011-186

[REVISED 2015]

Receipt of Documents Sent without Authority

Facts:

Lawyer in an adversary proceeding receives documents or electronically stored information 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 or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”

By its express terms, Oregon RPC 4.4(b) only applies in instances when documents or electronically stored information is sent to Lawyer inadvertently. In instances when the delivery of materials is not the result of the sender’s inadvertence, Oregon RPC 4.4(b) does not apply. *See*

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(a)(4) (a lawyer shall not “engage in conduct that is prejudicial to the administration of justice”).

ABA Formal Ethics Op No 06-440. 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. *See* OSB Formal Ethics Op No 2005-150 (rev 2015). Other rules, however, 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 1.6² 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*, for example, 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 or civil liability. Comment [m] of the *Restatement (Third) of the Law Governing Lawyers* section 60 (2000) (supplemented periodically) specifically notes "[w]here deceitful or illegal means were used to obtain the information, the receiving lawyer and that lawyer's client may be liable, among other remedies, for damages for harm caused or for injunctive relief against use or disclosure."

² 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)."

Second, the documents may be entitled to protection under substantive law of privilege or otherwise. *See Burt Hill, Inc. v. Hassan*, 2010 WL 419433 at *1–5 & n 6, 2010 US Dist Lexis 7492 at *2–4 & n 6 (2010). The scope and application of those substantive-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.³

Approved by Board of Governors, April 2015.

³ *Richards v. Jain*, 168 F Supp 2d 1195 (WD Wa 2001) (disqualifying counsel for retaining and using privileged materials); *In re Shell Oil Refinery*, 143 FRD 105 (ED La 1992), *amended and reconsidered on other grounds*, 144 FRD 73 (ED La 1992) (lawyer may not use confidential documents supplied to him by opponent’s employee); *Maldonado v. New Jersey*, 225 FRD 120 (D NJ 2004) (plaintiff’s counsel who reviewed privileged letter, received from unknown source, and without permission incorporated it by reference in amendment to complaint disqualified); David S. Smallman, *The Purloined Communications Exception to Inadvertent Waiver; Internet Publication and Preservation of Attorney-Client Privilege*, 32 Tort & Ins LJ 715 (1997). *See also* OSB Formal Ethics Op No 2005-150 (rev 2015).

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 6.2-1 (confidentiality), § 6.3-2 (waiver by production), § 8.6-6 (inadvertently sent documents) (OSB Legal Pubs 2015); Florida Ethics Op No 07-1 (2007); DC Bar Ethics Op No 318 (2002); Virginia Ethics Op No 1141 (1988); Helen Hirschbiel, *Bar Counsel: Ill-Gotten Gains: Rules for Privileged or Purloined Documents*, OSB Bulletin (July 2012); and Mark J. Fucile, *Smoking Gun: Receiving Property Stolen by a Client*, Multnomah Lawyer (Dec 2012).

