

FORMAL OPINION NO 2005-150

[REVISED 2015]

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 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) 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 notify the sender and permit him or her to take adequate protective measures, such as seeking return of the documents through a court order. ABA Model RPC 4.4(b) cmt [2]. The obligation of a lawyer to do

anything beyond notify the sender, such as return the document, is a legal matter beyond the scope of the Oregon Rules of Professional Conduct (RPCs). ABA Model RPC 4.4(b) cmt [2]; *see Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or 336, 343, 838 P2d 1069 (1992) (establishing that the determination of waiver of privilege by inadvertent disclosure is a preliminary issue to be determined by the court under OEC 104). Comment [3] to ABA Model RPC 4.4(b), which Oregon RPC 4.4(b) follows, also suggests that a lawyer's decision on whether to return, destroy, or delete an inadvertently sent document unread is a matter of professional judgment ordinarily reserved to the lawyer.

Oregon RPC 4.4(b) does not distinguish between litigation and nonlitigation situations. Further, Oregon RPC 4.4(b) is not limited to documents containing information protected by Oregon RPC 1.6, and it is not limited to documents sent by another lawyer. Indeed, Oregon RPC 4.4(b) also applies to an electronic document's metadata that may be hidden within the document. *See* OSB Formal Ethics Op No 2011-187 (rev 2015). Moreover, the rule applies whether or not the recipient lawyer reads the document before learning that it was inadvertently sent.

However, if applicable court rules, stipulations or court orders, 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 Supp 2d 1195 (WD Wa 2001) (disqualifying counsel for retaining and using privileged materials). Further, when the delivery of privileged documents is the result of other circumstances

aside from the sender's inadvertence, Oregon RPC 4.4(b) does not apply. See OSB Formal Ethics Op No 2011-186 (rev 2015); ABA Formal Ethics Op No 06-440.

Approved by Board of Governors, April 2015.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 6.3-2 (waiver by production) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 120, 105, 110 (2000) (supplemented periodically); and ABA Model RPC 4.4.

