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The Curious Case of the Purloined Document

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The past 20 years brought increasing clarity to what had been a confusing area: how to handle inadvertently produced privileged documents. There are now professional and procedural rules, court decisions and accompanying Oregon and ABA ethics opinions to guide lawyers through the sensitive considerations involved.[1] These rules, however, are tailored to *inadvertently* produced information—such as a privileged document that slips through in a document production or a misdirected email.[2] An opponent's privileged documents that may have been obtained improperly by either a client or a third-party and are *intentionally* offered to a lawyer, by contrast, present both different and difficult issues.[3] Mishandling an opponent's privileged documents in these latter contexts can trigger potential sanctions that include disqualification and exclusion of the material involved as well as regulatory discipline.[4] In this article, we'll first examine settings where an opponent's privileged documents are obtained improperly by the lawyer's client and then offered to the lawyer. We'll then survey situations where a third-party, such as a former employee, offers the lawyer an opponent's privileged documents.[5] With both, we'll use the term "documents" to apply to both traditional paper documents and their electronic equivalents.[6]

Clients

Clients sometimes assume they are doing their lawyer a favor by covertly taking or copying an opponent's privileged documents without authorization. In most instances, however, the clients have likely created problems for both themselves and their lawyers.

For the client, the conduct may trigger potential criminal or civil liability (or both).[7] Depending on the circumstances, the client's potential liability may range from "simple" theft or conversion to more sophisticated electronic privacy or trade secrets claims.[8] Unless the lawyer is familiar the legal areas involved, the lawyer is well-advised to associate a specialist to accurately gauge the client's exposure.[9]

Accurately determining the client's potential legal liability for taking the documents involved (whether originals or copies and whether physical or electronic) will also better inform the lawyer's options under a pair of Oregon State Bar ethics opinions: Formal Opinion 2011-186 (rev 2015) and 2005-105 (rev 2016). The former counsels that the confidentiality rule—RPC 1.6—generally prohibits notifying the owner of the client's removal of the documents involved when doing so would implicate the lawyer's client in a potential crime. The latter states the longstanding rule that a lawyer is generally prohibited from

accepting evidence of a crime. In other words, the lawyer is ordinarily prohibited from revealing the client's conduct and is also prohibited from receiving the documents involved.

Formal Opinion 2011-186 also offers a starker practical reason for the lawyer not to accept the documents: the lawyer may be put at risk of criminal liability for receiving stolen documents or tampering with evidence.[10] For the same reason, lawyers in this uncomfortable position need to be appropriately cautious when advising about the client's own handling of the documents going forward. Lawyers are generally permitted under RPC 1.2(c) to advise a client about the legal implications of potential conduct, but are not permitted to "assist" a client in carrying out a crime.[11]

If the lawyer has already taken possession of the documents involved without having realized either what the client was providing or the potential implications, the lawyer's options are more fraught. Rather than a single approach applicable to all situations, lawyers in this uncomfortable position more likely find themselves confronted with a non-exclusive list[12] of imperfect solutions:

- As noted, Formal Opinion 2011-186 concludes that if the client's conduct in obtaining the documents constituted a crime, Oregon RPC 1.6 precludes notifying the opponent (through counsel)

because doing so would implicate the lawyer's client in that crime. A client can waive RPC 1.6 with "informed consent," but notifying and returning the documents inherently poses risk to the client that may require close analysis by a criminal defense lawyer as discussed above. Having the lawyer return the documents "anonymously" poses many of the same practical problems.

- Returning the documents to the client presents its own practical problems. The client may no longer have access to the location where the documents were removed, and, therefore is unable to return them. Returning them with the understanding (express or implicit) that that client will destroy the documents—whether originals or copies—warrants careful review by a criminal defense lawyer when the client's acquisition of the documents may have constituted a crime.[13] Regardless, the client should be instructed not to further review the documents.[14]
- If there are issues over whether privilege attached to the documents (for example, whether they are subject to the "crime-fraud" exception) or concerns that the documents will be destroyed if returned, the lawyer could file them under seal with the court

concerned for *in camera* review.[15] This approach assumes client approval to waive confidentiality under RPC 1.6 as noted above to explain the circumstances surrounding the acquisition of the documents. This approach also assumes that the lawyer-recipients move with reasonable dispatch to present the issues involved to the court.[16]

All of these imperfect solutions are also painted against the possibility—if not the probability depending on the circumstances—that the client may be asked under oath at a deposition about whether the client took any documents when, for example, the client left an employer against whom a subsequent lawsuit was filed.[17]

A clear lesson from the case law in this area, however, is that lawyers should not simply make their own determinations that privilege either never attached or was waived and use the documents without first having a court make those determinations. OSB Formal Opinion 2011-186 catalogs several decisions nationally concluding both that the documents may not be used and disqualifying the lawyer-recipients who did not first seek court determinations on privilege.[18] The unremarkable logic of those decisions is that because there is no other way to "erase" the lawyer's knowledge gained improperly, disqualification is an

appropriate sanction.[19] Oregon decisions in this area are generally in accord.[20] In one Oregon federal case, the court put it this way: "It appears to the court that . . . [the recipient lawyers] . . . felt no obligation to any person or institution other than . . . [their client]. In that they are deeply mistaken."[21] As noted earlier, lawyer-recipients who do not handle documents appropriately may also be subject to later disciplinary proceedings.[22] In this regard, Oregon RPC 4.4(a) prohibits lawyers from "knowingly us[ing] methods of obtaining evidence that violate the legal rights of . . . [another] . . . person."[23]

Third-Parties

The dynamics when a non-client offers a lawyer an opponent's privileged documents that reasonably appear to have been improperly obtained present similar, but in some ways separate, issues than when the documents were taken by a client.

They are similar in three principal respects.

First, OSB Formal Opinion 2011-186 concludes that there is no duty to notify the owner of the overture. Formal Opinion 2011-186 reasons that because the confidentiality rule—RPC 1.6—is broader than privilege standing alone, confidentiality constraints may still apply because "disclosure could nevertheless work to the detriment of the client in the matter." [24]

Second, Formal Opinion 2011-186 counsels against taking possession of documents that reasonably appear to have been obtained improperly for the same reasons discussed earlier.[25]

Third, Formal Opinion 2011-186 notes that a lawyer who nonetheless takes possession of documents risks discovery sanctions and potential disqualification if the lawyer simply uses them without first obtaining court approval to do so. This can be a particularly sensitive practical issue because under *In re Lackey*, 333 Or 215, 37 P3d 172 (2002), there is no general "whistle blower" exception to privilege in Oregon and, therefore, a lawyer-recipient would likely be left either arguing that the documents were not privileged in the first place or fell within a recognized exception such as "crime-fraud."[26] The OSB opinion cites a nationally discussed case where the lawyer-recipients did not promptly tender documents to the court involved for *in camera* review to assess privilege and were later sanctioned.[27] As the court in that case put it: "[T]here exists ample authority recognizing that in reviewing Plaintiff's privileged and confidential documents, Defense counsel proceeded at their own and their client's peril."[28]

They are different in two primary ways.

First, because the documents were not obtained by the lawyer's client, they do not present the same stark questions of potentially implicating the client in a crime if revealed. The documents, for example, might have been sent to the lawyer (or the lawyer's client) anonymously.[29] Therefore, issues surrounding potential disclosure usually have less practical risk than when the documents were obtained improperly by the lawyer's client.[30]

Second, assuming the person offering the documents is not represented,[31] the lawyer would need to be appropriately cautious about not providing the person legal advice or otherwise inadvertently creating an attorney-client relationship (with its own potential conflicts) with the third-party.[32]

Summing Up

One of the leading national cases cited in OSB Formal Opinion 2011-186 notes "the adage, 'if something appears too good to be true, it probably is.'"[33] Lawyers offered an opponent's privileged documents that were improperly taken need to proceed with extreme caution in light of the potential risks to both the lawyer and the lawyer's client.

ABOUT THE AUTHOR

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[1] Oregon RPC 4.4(b) (notice), ABA Model Rule 4.4(b) (notice); OSB Formal Op 2005-150 (rev 2015) (addressing ethical aspects); ABA Formal Op 05-437 (2005) (addressing ethical aspects); Fed R Civ Pro 26(b)(5)(B) (procedure to litigate privilege waiver); *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or 336, 838 P2d 1069 (1992) (standards for waiver through inadvertent production); Fed R Evid 502 (standards for waiver through inadvertent production).

[2] *See* OSB Formal Op 2005-150, *supra*, at 2-3 ("[W]hen 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."); ABA Formal Op 06-440 (2006) at 2 ("It further is our opinion that if the providing of the materials is not the result of the sender's inadvertence, Rule 4.4(b) does not apply[.]")

[3] ABA Formal Opinion 11-460 (2011) addresses issues surrounding employees corresponding with their personal lawyers on employer-issued devices. *Kyko Global Inc. v. Prithvi Information Solutions Ltd.*, No C13-1034 MJP, 2014 WL 2694236 (WD Wash June 13, 2014) (unpublished), in turn, discusses privilege issues involved with abandoned electronic

devices. For a discussion of similar issues involving non-privileged documents, *see* Helen Hierschbiel, *Rules for Privileged or Purloined Documents*, 72, No 6 Or St B Bull 9 (July 2012).

[4] *See, e.g., Richards v. Jain*, 168 F Supp 2d 1195 (WD Wash 2001) (ordering the return of privileged documents improperly obtained by law firm's client and disqualifying law firm); *Furnish v. Merlo*, Civ No 93-1052-AS, 1994 WL 574137 (D Or Aug 29, 1994) (unpublished) (directing law firm to forward privileged documents improperly obtained by law firm's client to court for in camera review); *In re Hartman*, 332 Or 241, 25 P3d 958 (2001) (regulatory proceeding following *Furnish*); *Foss Maritime Co. v. Brandewiede*, 359 P3d 905 (Wash App 2015) (remanding disqualification order for further findings in case involving receipt of opponent's privileged information from former employee).

[5] This article will focus primarily on Oregon authority. There is some variation in approach around the country on the issues involved and, therefore, close attention should be paid to local guidance if litigating this area in another jurisdiction. *See, e.g.,* DC Bar Ethics Op 318 (2002) (analyzing under the rule governing safeguarding property of another, ABA Model Rule 1.15); *see generally* Douglas R. Richmond, *Ethics and Evidence Too Hot to Handle*, 87 Tenn L Rev 869 (2020) (surveying these issues nationally).

[6] Acquisition of an opponent's privileged information standing alone—such as asking a former employee about privileged conversations the former employee had with the employer's attorney when the employee was still working for the employer—is discussed and generally proscribed by OSB Formal Opinion 2005-80 at 3-4 (rev 2016).

[7] *See, e.g., K.F. Jacobsen & Co., Inc. v. Gaylor*, 947 F Supp 2d 1120 (D Or 2013) (discussing potential criminal and civil liability based on unauthorized access and sharing of former employer's information by client of lawyer).

[8] *Id*.

[9] *See generally* Oregon RPC 1.1 (duty of competence); UCJI 45.04 (standard of care for attorney services).

[10] *Id*. at 2. *See* ORS 162.295 (tampering with physical evidence); *see also State v. Martine*, 277 Or App 360, 371 P3d 510 (2016) (discussing the interplay between physical devices and the electronic information they carry under ORS 162.295).

[11] *See also* Oregon RPC 8.4(a)(4) (prohibiting conduct prejudicial to the administration of justice); *see generally* OSB Formal Op 2005-53 (rev 2016) (discussing RPCs 1.2(c) and 8.4(a)(4)).

[12] Given the fact-dependent circumstances often involved in these situations, the approaches surveyed are intended to be illustrative rather than exhaustive.

[13] *See also Markstrom v. Guard Publishing Company*, 315 Or App 309, 501 P3d 71 (2021) (discussing spoliation of evidence in the context of destruction of emails). *See also* Oregon RPC 3.4(a) (prohibiting "knowingly and unlawfully obstruct[ing] another party's access to evidence or unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value").

[14] *See Restatement (Third) of the Law Governing Lawyers*, § 60, cmt. m (2000) ("The receiving lawyer must take steps . . . to keep it confidential from the lawyer's own client in the interim."). This *Restatement* comment is cited (albeit on another point) in OSB Formal Opinion 2011-186 (at 2).

[15] *See, e.g., Furnish v. Merlo*, *supra*, 1994 WL 574137 at *11 (imposing this solution). In the interim, the lawyer should prudently segregate and secure any copies within the lawyer's own files. *See* Alec Rothrock, *Handling Electronic Documents Purloined by a Client*, 48, No. 1 Colorado Lawyer 22, 25 (Jan 2019) (discussing protocols for handling documents clients have taken from litigation opponents without permission).

[16] Courts are usually critical when lawyers wait to see if the documents involved can be used at an opportune time. *See, e.g., Furnish v. Merlo*, *supra*, 1994 WL 574137 at *2, *9.

[17] *See, e.g., Richards v. Jain*, *supra*, 168 F Supp 2d at 1199 (client testified at deposition about taking documents).

[18] *Id*. at 3 n.3.

[19] *See, e.g., Richards v. Jain*, *supra*, 168 F Supp 2d at 1209 ("The disclosure of privileged information cannot be undone in these circumstances. Therefore the Court finds that the only remedy to mitigate the effects of . . . [the law firm's] eleven month possession and review of the Disk is disqualification.").

[20] *See, e.g., Furnish v. Merlo*, *supra*, 1994 WL 574137 at *11 (finding lawyer misconduct, directing that the documents involved be submitted to the court for *in camera* review and directing further proceedings on the remedy to be imposed); *K.F. Jacobsen & Co., Inc. v. Gaynor*, No 3:12-CV-2062-AC, 2014 WL 273140 at *1 (D Or Jan 23, 2014) (unpublished) (noting that in earlier Oregon state court action lawyer-recipient was ordered to return documents improperly obtained and was disqualified).

[21] *Furnish v. Merlo*, *supra*, 1994 WL 574137 at *9.

[22] *See, e.g., In re Hartman, supra*, 332 Or 241.

[23] Oregon RPC 4.4(a) is based on its ABA Model Rule counterpart. Alaska Bar Ethics Opinion 2019-1 (2019) notes (at 5) that "legal rights" for purposes of Rule 4.4(a) potentially extends beyond privilege to documents that are protected by a contractual confidentiality agreement.

[24] *Id*. at 2.

[25] *Id*.

[26] OEC 503(4)(a).

[27] *Id*. at 3 (citing *Burt Hill, Inc. v. Hassan*, No Civ A 09-1285, 2010 WL 419433 (WD Pa Jan 29, 2010) (unpublished)).

[28] *Id*. at *4.

[29] In *Burt Hill*, for example, the documents were provided anonymously.

[30] Given the sensitivity that usually accompanies an offer of documents from a third-party, the client should ordinarily still be consulted regarding this development. *See* RPC 1.4 (communication); *see generally* Los Angeles County Bar Op. 531 at 9 (2019) (discussing counseling the lawyer's client on the duties and risks involved).

[31] If the person was represented in the general matter involved, then the "no contact" rule—RPC 4.2—would likely apply.

[32] *See* RPC 4.3 (dealing with unrepresented persons); *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990) (test for attorney-client relationship).

[33] *Burt Hill, Inc. v. Hassan*, *supra*, 2010 WL 419433 at *5.