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December 2025 *Multnomah Lawyer Ethics Focus*

Not So Fast!
Clients Offering Opponents' Privileged Materials

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Clients sometimes think they are doing their lawyers a favor by offering them a litigation opponent's privileged materials. The client may have come into possession of the materials in various ways. In some instances, such as *Furnish v. Merlo*, 1994 WL 574137 (D. Or. Aug. 29, 1994) (unpublished), the client made copies of paper documents. In others, such as *Wickersham v. Eastside Distilling, Inc.*, 713 F. Supp.3d 1013 (D. Or. 2024), the client kept confidential emails after leaving an employer. Regardless of how the client obtained the materials, having a client offer an opponent's privileged documents presents a deceptively complex set of issues for the lawyer. The "default" position should not be to simply accept them. Mishandling an opponent's privileged materials can open the door to a range of sanctions—including disqualification.

In this column, we'll first survey this nuanced area through the prism of two very useful Oregon State Bar ethics opinions and then turn to the potential risks if a lawyer simply accepts and uses an opponent's privileged material. For discussion purposes, we'll use the term "privileged material" broadly to encompass electronic and paper documents that may be covered by privilege, work product, or embraced within the overarching precept of lawyer confidentiality.

Before we do, however, two qualifiers are in order.

First, although some parallels can be drawn to inadvertent production that occurs during discovery, RPC 4.4(b), which addresses notification on receipt of what reasonably appears to be inadvertently produced confidential information, is specific to that context. Today, therefore, we'll focus on situations where a client is offering the lawyer an opponent's privileged material directly.

Second, while lawyers on rare occasions receive an opponent's privileged material from non-clients, the issues are sharper with clients due to the duty of confidentiality to our own clients. For present purposes, therefore, we'll discuss situations where clients rather than non-clients are holding the opponent's privileged materials.

Difficult Problem, Imperfect Solutions

Oregon State Bar Formal Opinions 2011-186 (rev. 2015) and 2005-105 (rev. 2016) frame both the difficult problem and the imperfect solutions. The former addresses receipt of another party's privileged documents sent without authority and the latter discusses lawyer receipt of evidence of a client's crime.

Formal Opinion 2011-186 quickly gets to the nub of the problem: the client may have either taken the privileged material or not given it back. The former may expose the client—at least theoretically—to criminal prosecution and

the latter may involve potential civil liability if, for example, the confidential material is covered by an employment or nondisclosure agreement. Formal Opinion 2011-186 draws on Formal Opinion 2005-105 to make two principal points. First, in keeping with the duty of confidentiality under RPC 1.6, a lawyer cannot generally disclose that a client has taken (or not returned) the confidential material because that may expose the client to criminal or other sanctions. Second, because lawyers are prohibited by RPC 1.2(c) from assisting a client in furthering a crime, lawyers generally cannot accept stolen documents (or advise a client to destroy evidence).

Unless a lawyer is already conversant with—depending on the circumstances—the law ranging from "simple" theft to more sophisticated electronic privacy statutes, a lawyer in this uncomfortable spot is usually well-advised to associate a specialist (inside or outside their firm) to more accurately gauge the client's exposure. That kind of specialized advice will also better inform the options available to the client in terms of potentially returning the confidential material involved and help navigate the interface between potential client criminal exposure and the need to respond accurately to discovery—including potential Fifth Amendment issues during the client's deposition. If there is a credible argument that privilege never attached or had already been waived,

the lawyer could file documents under seal for in camera review—but that would likely reveal the client's identity and require client consent under RPC 1.6. Moreover, the Supreme Court in *In re Lackey*, 333 Or. 215, 37 P.3d 172 (2002), held that there is no general "whistleblower" exception to privilege in the Oregon Evidence Code.

Risks

The risks of mishandling an opponent's privileged information are many and are not mutually exclusive. Because the risks are most pronounced if a lawyer takes possession of the privileged material and uses it without first going to the court, we'll focus on that scenario.

While rare, regulatory discipline cannot be excluded. RPC 4.4(a) prohibits a lawyer from improperly invading an opponent's privilege—phrased somewhat elliptically as "knowingly us[ing] methods of obtaining evidence that violate the legal rights of such a person." Although disciplinary charges against the lawyers in *Furnish* for accepting and using privileged material their client had taken from an opponent were eventually dismissed at the Oregon Supreme Court, the law was not then as well formed in that regard as it is now. Formal Opinions 2011-186 and 2005-105 also make the point that lawyers do not get a "free pass" from

criminal laws governing, for example, receipt of stolen property and evidence tampering.

More frequently, the issues play out in the court proceedings involved. Court sanctions can range from the return (and exclusion) of the privileged material involved to disqualification for engaging in prohibited conduct. In *Wickersham*, the court considered both exclusion and disqualification before concluding that exclusion was sufficient under the circumstances.

ABOUT THE AUTHOR

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