

Some Gifts Are Too Good To Be True: The Inadvertent Disclosure of Privileged Documents

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Absent an applicable exception, a lawyer who finds herself called upon to reveal privileged information must decline to do so. “In the absence of evidence to the contrary, an inference may be drawn that a lawyer who voluntarily turns over privileged material during discovery acts within the scope of the lawyer’s authority from the client and with the client’s consent.” *Goldsborough v Eagle Crest Partners, LTD.*, 314 Or 336, 342, 838 P2d 1069 (1992).

This month, Oregon Rule of Professional Conduct (Oregon RPC) 4.4(b) becomes effective, and provides that:

(b) 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.

Although there is no counterpart in the former Oregon Disciplinary Rules, this new black letter law can be viewed as a more formal statement of at least part of OSB Legal Ethics Op No 1998-150. At the risk of some oversimplification, the opinion generally held that an attorney who receives what appears to be a privileged and inadvertently disclosed document must stop reading the document once she realizes what she has and must either return it or openly litigate the right to keep it.

If the right to keep the document is to be litigated, the matter will be one for the court to decide. OEC 104(1) provides that:

Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court.

Factors for the court to use in considering whether a waiver has occurred include, but are not necessarily limited to, whether or not the disclosure of the privileged communications was inadvertent, whether any attempt was made to remedy any error promptly and whether the preservation of the privilege will occasion unfairness to the opponent. *Goldsborough v Eagle Crest Partners, LTD*, 314 Or 336, 343, 838 P2d 1069 (1992). *Cf. Sizemore v City of Madras*, 2004 WL 1318883 (D Or 2004) (“[T]he disclosure of information resulting in the waiver of the attorney-client privilege constitutes waiver only as to communications about the matter actually disclosed” (Internal citations omitted)).

Recently a U.S. District Court judge in New Jersey disqualified the plaintiff’s lawyers in a matter because the attorneys received privileged communications that had been inexplicably disclosed. *Maldonado v New Jersey*, 2004 WL 2904898 (D NJ 2004). The privileged material at issue was a letter consisting of defense strategy that, according to the judge, appeared on its face to be covered by attorney-client privilege. *Id.* at 18.

Plaintiff claimed that the letter simply appeared in his workplace mailbox and he turned it over to his attorney; that attorney placed the letter in his file. Plaintiff subsequently retained new counsel who filed a complaint in October 2003 that contained a quote from the privileged communication

Defendants claimed they were not aware of the plaintiff's possession of the letter until a meeting on April 5, 2004 and that their April 19, 2004 demand for return of the letter was therefore timely—a position with which the judge agreed.

The judge decided that the case did not involve an “inadvertent” disclosure of a document since the letter had “inexplicably” ended up in the plaintiff's hands; rather it was an unintentional disclosure. *Id.* at 20. The defendants had claimed that the plaintiff had stolen the letter, but there was no evidence to support this contention. *Id.* at 12. The court decided that the privilege had not been waived since the disclosure was involuntary and the defendants had taken reasonable precautions, although not perfect, to ensure the document's security. *Id.* at 6.

What is most significant about the case is the remedy chosen by the judge. In considering the defendants' motion to disqualify the plaintiff's attorneys, the judge applied the factors set out under *Richards v Jain*, 168 F Supp 2d 1195, 1205 (WD Wash 2001):

- (1) whether the attorney knew or should have known that the material was privileged;
- (2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
- (3) the extent to which the attorney reviews and digests the privileged information;
- (4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;
- (5) the extent to which the movant may be at fault for the unauthorized disclosure;
- (6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.

After a careful analysis of the facts along with the above factors, the judge did not feel that simply instructing the plaintiff's attorneys to not use the privileged information was sufficient. The judge held that the plaintiff's attorneys should have followed the duty to “cease, notify and return” the privileged document. Since they did not do so, and the counsels' possession of the letter created a substantial taint on any future proceedings, the court felt that the only manner with which to mitigate the prejudicial effects of plaintiff's counsels' possession of the privileged material was through disqualification.

The moral of the story? Some “gifts” are too good to be true. In addition to the inability to retain or use the inadvertently or involuntarily disclosed materials, the party may lose her counsel of choice and the counsel may lose the chance to work on a great case for a great fee.