Ethics; Technological Competency, What You Need to Know

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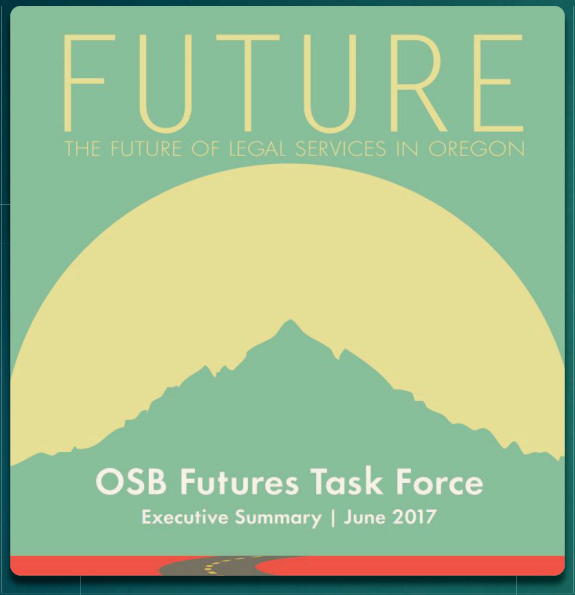
"[T]he sort of pontifical pap that is fed to intelligent and secretly bored youngsters just starting their professional lives…Equipped with these virtues, a man could sit for years and years in an empty office, starving with quiet dignity."

Hays, City Lawyer 32 (1942)

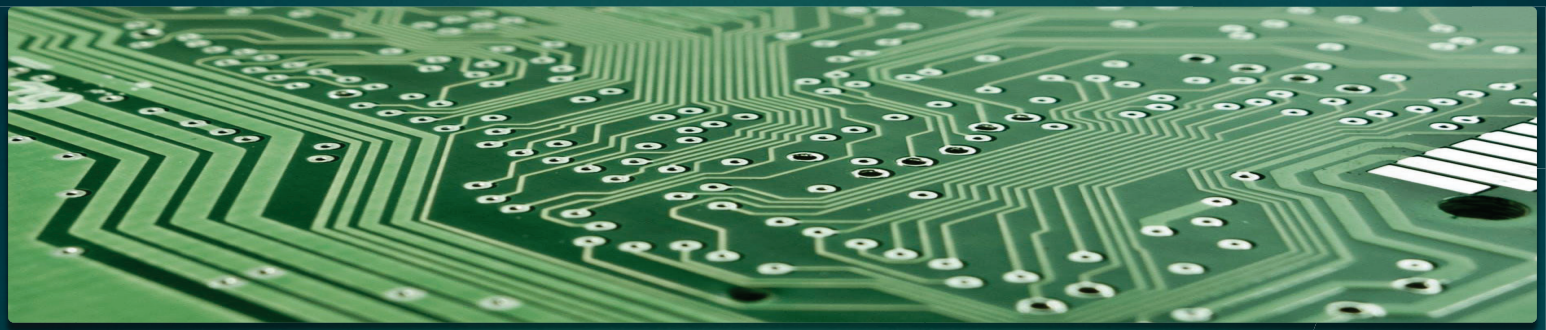
A.



The legal profession is nothing if not conservative. Lawyers are schooled in precedent, consistency, and risk avoidance. Yet, as noted in the ABA Futures Commission Report on the Future of Legal Services, "The justice system is overdue for fresh thinking about formidable challenges. The legal profession's efforts to address those challenges have been hindered by resistance to technological changes and other innovations.

OSB Futures Task Force Executive Summary, June 2017 http://www.osbar.org/_docs/resources/taskforces/futures/FuturesTF_Summary.pdf

Commission on the Future of Legal Services, Report on the Future of Legal Services in the United States, 11 (American Bar Association 2016), available at http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf



Navigating the ethical minefield of technology can be equally daunting to both the technophobe and the technophile. Many technophobes are more experienced lawyers. While they may have a firm grasp of the ethical rules, they fear the misapplication of poorly understood technology to those rules. As a result, they avoid new technology, compounding the problem and leaving themselves susceptible to an ethical violation when they are eventually forced to use a new technology. Conversely, many technophiles are less experienced lawyers. While newer lawyers may understand the letter of the ethical rules, they lack the insight that comes with years of seeing how the rules are applied in practice and which rules present the greatest danger of violation. Compounding the problem is the technological hubris that often goes hand-in-hand with technological proficiency. One way people become proficient with technology is simply immersing themselves in the technology prior to gaining a full understanding of its limitations. Technophiles often employ a heuristic approach, sometimes even learning more from failures than successes. While such an approach can dramatically flatten the technological learning curve for technologies such as video game and operating systems, such an approach can prove to be professional suicide when it comes to technologies like document security and e-discovery.

Brett J. Trout, The Ethical Lawyer and the Tao of Technology, 48 Creighton L. Rev. 709, 712 (2015)

What must remain constant?

Our fundamental duties of competence, loyalty, confidentiality and integrity.

Competence

- Rule 1.1 Competence
- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- Technological competence can be directly related to whether a lawyer provides competent representation. If you need to be able to deal with something as a matter of bringing the required legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation then yes – you are required to possess or acquire the knowledge and skill necessary to carry out the representation.

- Examples: electronic filing and service

  review and supply of voluminous electronic discovery or transactional documents

  paperless office

  spam filters

  avoiding reply all

Confidentiality

- Rule 1.6 Confidentiality of Information
- (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).

Terms of art

- Rule 1.0
- (f) “Information relating to the representation of a client” denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

Permissive (not mandatory) EXCEPTIONS

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
- (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
- (2) to prevent reasonably certain death or substantial bodily harm;
- (3) to secure legal advice about the lawyer's compliance with these Rules;
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (5) to comply with other law, court order, or as permitted by these Rules; or

Permissive exceptions continued

- (6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

FORMAL OPINION NO 2011-187
[REVISED 2015]
Competency: Disclosure of Metadata

- Facts:

- Lawyer A e-mails to Lawyer B a draft of an Agreement they are negotiating on behalf of their respective clients. Lawyer B is able to use a standard word processing feature to reveal the changes made to an earlier draft ("metadata"). The changes reveal that Lawyer A had made multiple revisions to the draft, and then subsequently deleted some of them.

- Question:

- Does Lawyer A have a duty to remove or protect metadata when transmitting documents electronically?

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- Information relating to the representation of a client may include metadata in a document. Taken together, the requirements of RPC 1.1 [competence] and RPC 1.6(a) [confidentiality] indicate that a lawyer is responsible for acting competently to safeguard information relating to the representation of a client contained in communications with others. Competency in relation to metadata requires a lawyer utilizing electronic media for communication to maintain at least a basic understanding of the technology and the risks of revealing metadata or to obtain and utilize adequate technology support.

- Question:

- May Lawyer B use the metadata information that is readily accessible with standard word processing software?

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- Given the sending lawyer's duty to exercise reasonable care in regards to metadata, the receiving lawyer could reasonably conclude that the metadata was intentionally left in. *See, Goldsborough v. Eagle Crest Partners, Ltd*., 314 Or 336 (1992). In that situation, there is no duty under Oregon RPC 4.4(b) to notify the sender of the presence of metadata.

- Question:

- Must Lawyer B inform Lawyer A that the document contains readily accessible metadata?

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- If, the receiving lawyer knows or reasonably should know that metadata was inadvertently included in the document, Oregon RPC 4.4(b) requires notice to the sender.

- Facts:

- Same facts as above except that shortly after opening the document and displaying the changes, Lawyer B receives an urgent request from Lawyer A asking that the document be deleted without reading it because Lawyer A had mistakenly not removed the metadata.

- Question:
- Must Lawyer B acquiesce to Lawyer A’s request to delete the document without reading it?

- Question:
- Must Lawyer B acquiesce to Lawyer A's request to delete the document without reading it?
- A lawyer may voluntarily choose to return a document unread and that such a decision is a matter of professional judgment reserved to the lawyer. At the same time, Oregon RPC 1.2(a) requires the lawyer to "abide by a client's decisions concerning the objectives of the representation" and to "consult with the client as to the means by which they are to be pursued." Thus, before deciding what to do with an inadvertently sent document, the receiving lawyer should consult with the client about the risks of returning the document versus the risks of retaining and reading the document and its metadata.
- RPC 4.4(b) does not require the receiving lawyer to return the document unread or to comply with a request by the sender to return the document. See, OSB Formal Ethics Op No. 2005-150 (rev 2015). Whether the lawyer is *otherwise* required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of the RPCs, as is the question of whether the privileged status of a document or electronically stored information has been waived."

- Facts:

- Same facts as the first scenario except that Lawyer B has software designed to thwart the metadata removal tools of common word processing software and wishes to use it to see if there is any helpful metadata in the Agreement.

- Question:
- May Lawyer B use special software to reveal the metadata in the document?

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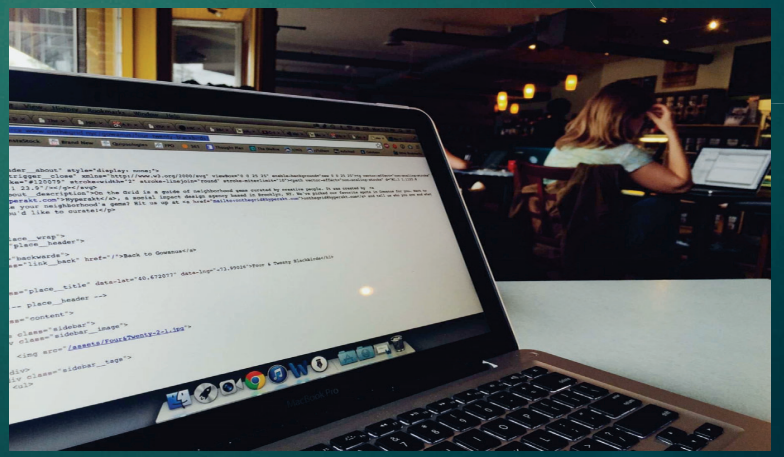
- Regardless of reasonable efforts undertaken by the sending lawyer to remove or screen metadata from the receiving lawyer, it may be possible for the receiving lawyer to thwart the sender's efforts through software designed for that purpose. It is not clear whether uncovering metadata in that manner would trigger an obligation under Oregon RPC 4.4(b) to notify the sender that metadata had been inadvertently sent. Searching for metadata using special software when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously entering the other lawyer's office to obtain client information and may constitute "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation of Oregon RPC 8.4(a)(3).

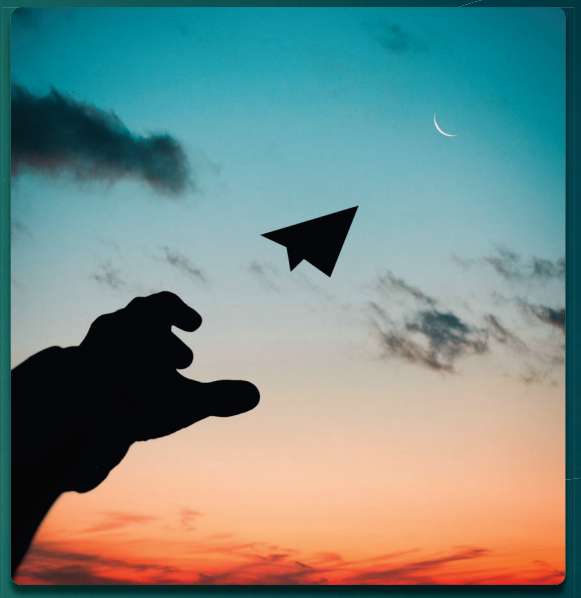
The coffee shop office or shared work space



- Formal Op. 2005-50: Conflicts of Interest, Office Sharers
- The rules do not prohibit office sharers from using the same telephone system or the same file room as long as the files are physically separated and the appropriate limitations on access to files are made clear to, and are observed by, the lawyers and their employees. If a common telephone system is used, however, office sharers may not represent adverse parties unless they have taken steps to assure that telephone messages that contain confidential client information or legal advice (i.e., information relating to the representation of a client) are not given to or transmitted by shared personnel. Similarly, mail must not be opened by shared personnel.
- However, if lawyers share a secretary or other employee who is in possession of the confidences or secrets of both lawyers' clients and steps are not taken to ensure separation and confidentiality, conflicts of interest concerns arise.
- The effect of having created de facto law partners when you did not intend to do so may have other ethical and civil consequences.

Virtual Office Questions

FORMAL OPINION NO 2016-191 Client Property: Electronic-Only or "Paperless" Client Documents and Files

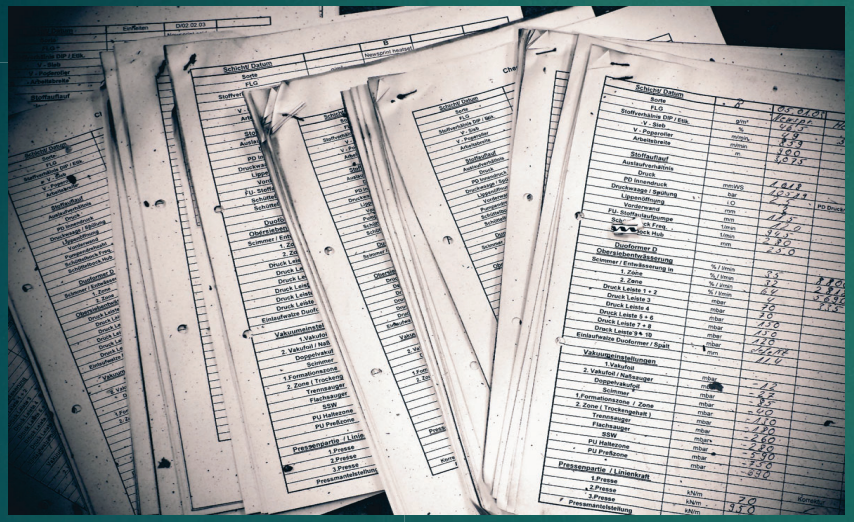


- With limited exceptions for documents that are intrinsically significant or are valuable original paper documents, such as securities, negotiable instruments, deeds, and wills, there is no ethical prohibition against maintaining the "client file" solely in electronic or paperless form.
- Lawyers must take appropriate steps to safeguard client property (RPC 1.15-1(a), maintain confidentiality (RPC 1.6(c)/1.9(c)(2)) and communicate with the client regarding the terms of the representation and developments affecting the representation (RPC 1.4). Accordingly, lawyers who maintain electronic-only client files should take reasonable steps to ensure the security and availability of electronic file documents during appropriate time periods, including following the completion of the matter or termination of the representation.

- Lawyers and clients may enter into reasonable agreements regarding how the lawyer will maintain the client's file during and after the conclusion of a matter. A lawyer who chooses to convert paper file documents in closed files to electronic-only documents should confirm that doing so will not violate the terms of the retention agreement with the client. The lawyer should also consider the former client's circumstances—that is, whether an electronic-only file might present a hardship for the former client if the former client needs to access and work with the documents in paper form. See Oregon RPC 1.16(d).
- Even after a lawyer has taken reasonable steps to electronically preserve original documents created by a client, the lawyer should not destroy original client documents without the client's express consent.

- Whether and how long to maintain a client file is a matter of substantive law and beyond the scope of this opinion. The Professional Liability Fund (PLF) generally recommends that files be kept for a minimum of 10 years to ensure the file will be available to defend the lawyer against malpractice claims. See, for example, “File Retention and Destruction,” part of the PLF practice aid and form collection in the “File Management” category on the PLF’s website: www.osbplf.org

FORMAL OPINION NO 2017-192
Client Property: Duplication Charges for Client Files, Production or Withholding of Client Files



- Facts:
- Client A terminates Lawyer A while matter is ongoing. Client A does not owe Lawyer A any fees or expenses. Client A asks Lawyer A to provide a copy of the entire file to Client's A new lawyer.
- Lawyer B represented Client B in a matter years ago. Client B requests a copy of Lawyer B's entire file. Client B does not owe any fee to Lawyer B.
- Lawyer A and Lawyer B would like to withhold portions of the client files. Lawyer A and Lawyer B also would like to keep either the original or a copy of what they do provide to Client A and Client B.

- Question: What is a “client file?”

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- Historically, lawyers maintained documents or information needed to represent each client in a paper client file, which was typically stored in a single physical location. Information technology has radically altered the form and location of what now may constitute a client file.
- Think of a client file, regardless of form or location, as the sum total of all documents, records, or information (either in paper or electronic form) that the lawyer maintained in the exercise of professional judgment for use in representing the client.

- Question: What portions of the client files must Lawyer A and Lawyer B make available to their clients?

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- As a general proposition, and absent viable attorney liens, a lawyer is obligated to deliver the entire client file to the former client or forward it to the client's new counsel upon receiving client consent.
- In most instances, the entire client file will include documents and property that the client provided to the lawyer; litigation materials, including pleadings, memoranda, and discovery materials; all correspondence; all items that the lawyer has obtained from others, including expert opinions, medical or business records, and witness statements. The client file also includes all electronic documents, records, and information that the lawyer maintained for use in the specific client matter, such as e-mail, word-processing documents on a server, audio files, digital photographs and even text messages. *Subject to certain exceptions, the entire file also includes the lawyer's notes or internal memoranda that may constitute "attorney work-product."*

- Potential exceptions:
- 1. The client file maintained by the lawyer may possess documents or information to which the client is not entitled. For example, Lawyer A may store with Client A's documents, a legal memorandum from a prior case when Lawyer A represented Client C and the same or similar issues were present. Client A may not be entitled to a copy of the memorandum unless Lawyer A's reliance on the memorandum is relevant to a dispute between Lawyer A and Client A. Even then, Lawyer A might violate the duty of confidentiality to Client C if Lawyer A provides the memorandum to Client A without redacting confidential information.
- 2. A lawyer may possess notes or other communications that do not so much bear on the merits of the client's position in a matter as they do on the lawyer-client relationship. A lawyer might, for example, have e-mails showing that the lawyer has consulted counsel to explore the lawyer's potential exposure to discipline or malpractice liability to the client. Documents reflecting matters of this type are not part of the client file and need not be produced to the client or provided during a change in representation. Cf. Crimson Trace Corp. v. Davis Wright Tremaine LLP, 355 Or 476, 326 P3d 1181 (2014) (holding that the attorney-client privilege as defined in OEC 503 applies to communications between lawyers in a firm and in-house counsel).

- Potential exceptions continued:
- 3. A client file may also include internal firm communication relating to administrative matters, such as work assignments, routine conflicts review, client's creditworthiness, time and expense records, or personnel matters. Such documents are created for internal use primarily for the lawyer's own purpose and need not be produced to the client.
- 4. A client file may contain electronic documents or information that could be construed as computer metadata, or which would otherwise be too burdensome and expensive to identify, locate, and produce in a readable or accessible format. Such data need not be produced as part of the client file.
- 5. There may be substantive legal reasons, such as law or court order, that prohibit the delivery of certain documents, either in whole or part, to clients.

- Question: May Lawyer A and Lawyer B retain a copy of the client files and charge their clients for expenses related to duplicating the files?

- Question: May Lawyer A and Lawyer B retain a copy of the client files and charge their clients for expenses related to duplicating the files?
- A lawyer has a right to retain a copy of the client file. The ethics issues concern under what circumstances the lawyer can charge a client to duplicate all or part of the client file.
- The lawyer cannot charge for copies of original documents given by the client to the lawyer. The lawyer also cannot charge for copies of original documents prepared by the lawyer for the client and held by the lawyer at the client's request (e.g., the original of a client will or trust agreement). Any copies of such documents to be retained by the lawyer upon providing the original to the client must be made at the lawyer's expense.
- With respect to all other documents, the question of duplication expenses depends primarily on the fee agreement. If the agreement provides for duplication charges to be paid by the client, there is generally no reason to apply a different standard after the lawyer-client relationship has ended. If, on the other hand, the fee agreement provides that the client is entitled to copies of documents without separate charge, the client is entitled to one copy, without charge, of any documents not previously provided. To the extent that a client wants duplicate copies of documents or information previously sent to the client, the lawyer is entitled to charge for those costs.

- What special considerations apply to paperless file materials?

- To the extent a lawyer has maintained an electronic-only copy of a file, the lawyer may provide the client a copy of the file electronically in the same format in which it was maintained, through a thumbdrive, CD, or other mechanism sufficiently designed to protect client confidentiality.
- In some limited situations, such as when an in-custody client may not have regular computer access, a lawyer may be required to provide a file maintained in an electronic-only format in a format that can be accessed or read by the client.
- Some lawyers and law firms use propriety software in the practice of law. Among other things, proprietary software may manipulate, organize, and search data, or may populate information into docketing or other programs. Specific licensing agreements between the lawyer and the software provider may dictate the terms under which the data created by the software may be produced, and whether it may be produced at all. To the extent a summary or report can be created by the software, the lawyer should include that as part of the client file. The cost of extraction or conversion of the data to a different proprietary format may be burdensome for a lawyer and, absent an agreement to the contrary, the client is not required to bear that cost.

- Question: When may Lawyer A and Lawyer B charge costs related to locating and segregating file documents?

- Question: When may Lawyer A and Lawyer B charge costs related to locating and segregating file documents?
- Look to the agreement between the lawyer and client.
- A lawyer may not charge clients for costs related to identifying and segregating the materials that the lawyer chooses not to produce. However, a lawyer may charge clients for the costs related to segregating materials that the lawyer is legally prohibited from producing, or if the client has requested only certain portions of the file.
- Subject to this limitation and to the limitation noted above, a lawyer may charge a client for costs associated with the production of a file to the extent that the lawyer could have charged the client for the same work if the request had been made during the lawyer-client relationship. In addition, a lawyer may charge the client if the lawyer is asked to reproduce documents or information already made available to the client.
- As is true in other circumstances, “clearly excessive” or “unreasonable” fees or charges are prohibited. Oregon RPC 1.5(a); Oregon RPC 1.8(i); OSB Formal Ethics Op No 2005-124.

Formal Ethics Op. 2011-188
Information Relating to the Representation of a Client: Third-Party Electronic Storage of Client Materials

Oregon RPC 5.3 With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a nonlawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

- Lawyer may store client materials on a third-party server as long as Lawyer complies with the duties of competence and confidentiality to reasonably keep the client's information secure within a given situation. To do so, the lawyer must take reasonable steps to ensure that the storage company will reliably secure client data and keep information confidential.
- Under certain circumstances, this may be satisfied through a third-party vendor's compliance with industry standards relating to confidentiality and security, provided that those industry standards meet the minimum requirements imposed on the Lawyer by the Oregon Rules of Professional Conduct. This may include, among other things, ensuring the service agreement requires the vendor to preserve the confidentiality and security of the materials. It may also require that vendor notify Lawyer of any nonauthorized third-party access to the materials.
- Lawyer should also investigate how the vendor backs up and stores its data and metadata to ensure compliance with the Lawyer's duties. Although the third-party vendor may have reasonable protective measures in place to safeguard the client materials, the reasonableness of the steps taken will be measured against the technology "available at the time to secure data against unintentional disclosure." As technology advances, the third-party vendor's protective measures may become less secure or obsolete over time. Accordingly, Lawyer may be required to reevaluate the protective measures used by the third-party vendor tosafeguard the client materials.

Fn. 3: In 2014, leaked documents indicated that several intelligence agencies had the capability of obtaining electronic data and monitoring electronic communications
between, among others, attorneys and clients through highly sophisticated methods beyond the capabilities of the general public. Oregon RPC 1.6(c) does not require an attorney to protect a client's data against this type of advanced interception, as it only requires an attorney to take reasonable steps to secure client data. *Nevertheless, an attorney may want to take additional security precautions if he or she handles clients or matters that involve national security interests.*

Cyber Liability & Breach Response Endorsement

- Beginning in 2013, the PLF added a Cyber Liability & Breach Response Endorsement ("Endorsement") to all PLF Excess Coverage plans. The Endorsement provides coverage for information security and privacy liability, privacy breach response services, regulatory defense and penalties, website media content liability, and crisis management and public relations services. The Endorsement covers many claims that would otherwise be excluded under both PLF primary and excess plans. In 2016, the Endorsement was expanded to begin including coverage for Cyber Extortion events at no additional cost to covered law firms.
- https://www.osbplf.org/excess-coverage/cyber-endorsement.html

- Formal Opinion No. 2005-141 Information Relating to the Representation of a Client: Recycling of Documents
- The reality of modern law practice requires disposal of a great deal of paper, some of which will contain information protected by Oregon RPC 1.6. Oregon RPC 1.6(c) and 5.3 require lawyers to take reasonable efforts to prevent inadvertent or unauthorized access. As long as a lawyer makes reasonable efforts to ensure that a recycling company's conduct is compatible with a lawyer's obligation to protect client information, a lawyer is permitted to recycle paper. Reasonable efforts include, at least, instructing the recycling company about Law Firm's duties pursuant to Oregon RPC 1.6 and obtaining its agreement to treat all materials appropriately.
- Similar to paper files, you must also use care in disposing of or recycling equipment used to electronically store and process client information.

Integrity

Inadvertent disclosure of privileged information. Formal Ethics Op. 2005-150

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.

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. 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.

Formal Ethics Op. 2011-186
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. (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")

- Questions:
- Must Lawyer notify the opposing party of the receipt of the documents? Must Lawyer return the documents to the opposing party?

- Questions:
- Must Lawyer notify the opposing party of the receipt of the documents? Must Lawyer return the documents to the opposing party?
- 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.
- Other rules, however, limit Lawyer's options or direct Lawyer's actions.

- The circumstances in which the documents were obtained by the sender may involve criminal conduct. If so, Oregon RPC 1.6 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.

- 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.
- For additional information see Helen Hierschbiel, *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).

Electronic Recording of Conversations Formal Ethics Op. 2005-156

- The recording of a telephone call or in-person conversation in Oregon is subject to regulation by state and federal statutes, and cases interpreting the statutes. Sometimes the recording is permitted, at other times the recording is not permitted. See, e.g., ORS 165.540; 18 USC §§ 2510–2521. As a general rule, Oregon law allows one party to a telephone conversation to record the conversation without notice to or consent of the other person. However, in-person conversations may not be recorded unless all persons participating know or have notice that the conversation is being recorded. For an extensive discussion of wiretaps, see Checkley v. Boyd, 198 Or App 110, 107 P3d 651, rev den, 338 Or 583 (2005).
- A lawyer who makes a recording in knowing disregard of statutory prohibitions to the contrary would be in violation of RPC 3.3(a)(5), which prohibits a lawyer from knowingly engaging in illegal conduct. See also RPC 8.4(a)(2), which makes it professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." If the substantive law does not prohibit a recording, however, and in the absence of conduct that would affirmatively lead a person to believe that no recording would be made, the lawyer may make a recording.

Communicating with Represented Persons: Contact through Websites and the Internet Formal Ethics Op. 2005-164

- Visiting a Public Website:

- Oregon RPC 4.2 provides: In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

  (a) the lawyer has the prior consent of a lawyer representing such other person;

  (b) the lawyer is authorized by law or by court order to do so; or

  (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

There is no reason to distinguish between electronic or nonelectronic forms of contact. Both are permitted or both are prohibited.

- Accessing an adversary's public website is no different from reading a magazine article or purchasing a book written by that adversary. Because the risks that Oregon RPC 4.2 seeks to avoid are not implicated by such activities, no Oregon RPC 4.2 violation would arise from such electronic access. A lawyer who reads information posted for general public consumption is not communicating with the represented owner of the website.
- On the other hand, written communications via the Internet are directly analogous to written communications via traditional mail or messenger service and thus are subject to prohibition pursuant to Oregon RPC 4.2.
- RPC 1.0(h) provides that "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances.
- If a lawyer does not know a person is represented, that lawyer is permitted to communicate (electronically or otherwise).

Formal Opinion No. 2013-189
Accessing Information about Third Parties through a Social Networking Website

- Facts: Lawyer wishes to investigate an opposing party, a witness, or a juror by accessing the person's social networking website. While viewing the publicly available information on the website, Lawyer learns that there is additional information that the person has kept from public view through privacy settings and that is available by submitting a request through the person's website.

- Facts: Lawyer wishes to investigate an opposing party, a witness, or a juror by accessing the person's social networking website. While viewing the publicly available information on the website, Lawyer learns that there is additional information that the person has kept from public view through privacy settings and that is available by submitting a request through the person's website.
- Like accessing other public website, it is not communicating with a represented party to access publicly available information on a represented person's social networking website.
- To access nonpublic information on a social networking website, a lawyer may need to make a specific request to the holder of the account. Absent actual knowledge that the person is represented by counsel, a direct request for access to the person's nonpublic personal information is permissible.
- However, if the holder of the account asks for additional information to identify Lawyer, or if Lawyer has some other reason to believe that the person misunderstands Lawyer's role, Lawyer must provide the additional information or withdraw the request.
- Do not engage in subterfuge except with extreme caution and upon making certain you are complying with RPC 8.4(b).

Dear diary…

- RPC 1.6 Confidentiality of Information
- (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).
- RPC 1.0(f) “Information relating to the representation of a client” denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

- RPC 1.9 Duties to Former Clients
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known.

- Formal Opinion No. 2005-23 [REVISED 2014]
- Information Relating to the Representation of a Client: Retired and Former Lawyer
- Facts: Lawyer, who has retired, would like to give some files to an educational institution for historical purposes. The files to be given contain confidential information that Lawyer has obtained from clients over the years.
- After Lawyer has retired, the new lawyer for one of Lawyer's former clients approaches Lawyer and asks for information about the prior representation.

- Questions:
- May Lawyer give the files to the educational institution?
- May Lawyer convey client confidences or secrets to the new lawyer?

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- May Lawyer give the files to the educational institution?
- May Lawyer convey client confidences or secrets to the new lawyer?

- Not without informed consent of the affected clients.

Formal Ethics Op. 2007-179
Trial Publicity

- In addition to concerns regarding client confidentiality, ethics rules also restrict a lawyer who is participating or has participated in the investigation or litigation of a matter from making an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- RPC 3.6 provides very specific exceptions to the general restriction.
- Public communication includes information published via the internet and is not limited to big media.

Solicitation

Prior RPC 7.3

Adopted 01/01/05

Amended 01/01/14: Title is changed and the phrase "target of the solicitation" or the word "anyone" is substituted for "prospective client" to avoid confusion. The phrase "Advertising Material" is substituted for "Advertising" .

Amended 01/01/17: Deleting requirement that lawyer place "Advertising Material" on advertising.

Amended 01/11/18: Deleting requirements specific to "in-person, telephone or real-time electronic contact" and deleting exception for prepaid and group legal service plans

Current RPC 7.3

A lawyer shall not solicit professional employment by any means when:

(a) the lawyer knows or reasonably should know that the physical, emotional or mental state of the subject of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;

(b) the subject of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(c) the solicitation involves coercion, duress or harassment.

- In general, once lawyers "claim" their personal listings, they become responsible for their content, including testimonials, reviews or endorsements from others, and must ensure that they comply with the advertising ethics rules.

- Some websites invite members of the public to post questions on legal topics and permit lawyers to post answers or comments. Generally, a lawyer may post responses that discuss the law in general terms without risking the creation of a lawyer-client relationship. Disclaimers may be advisable to further limit that risk. See, e.g., New Mexico Ethics Op. 2001-1, 17 Law. Man. Prof. Conduct 573 (2001) (when posting article on electronic bulletin board, lawyer should include disclaimer stating that article is not legal advice); New York State Ethics Op. 899 (2011) (lawyer may post general answers but not individual advice in response to nonlawyers' legal questions on real-time or interactive social media Internet sites; lawyer may not use site to solicit employment, but may direct user to private mode of communication if user expresses interest in retaining lawyer); South Carolina Ethics Op. 12-03, 28 Law. Man. Prof. Conduct 191 (2012) (lawyer must limit participation in informational website to basic information of general applicability and, when providing individual responses, must clearly warn that information is not advice).

ABA/BNA Lawyer's Manual on Professional Conduct: Advertising and Solicitation 81:551 Internet

- RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW
- (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
- (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:
- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
- (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Sometimes the old way may be the best way

OSB Ethics Helpline

503 431-6475

The Oregon State Bar offers the assistance of its General Counsel's Office to discuss your legal ethics questions. One of the lawyers in General Counsel's Office can help you identify applicable disciplinary rules, point out relevant formal ethics opinions and other resource material, and give you a reaction to your ethics question. No attorney-client relationship is established between callers and the lawyers employed by the Oregon State Bar and the information submitted and responses provided are public records. Lawyers seeking legal ethics advice subject to the lawyer-client privilege should consult a lawyer of their choice in private practice. To protect the confidentiality of client information, questions posed to General Counsel's Office are requested to be in the form of a hypothetical.