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Federal Court Relies on Washington Decision to Order Return of Confidential Documents

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The federal district court in Portland recently relied on a decision by its counterpart in Seattle to order the return of confidential documents taken by an executive that later surfaced in his subsequent claim against his former employer. In *Wickersham v. Eastside Distilling, Inc.*, ___ F. Supp.3d ___, 2024 WL 455070 (D. Or. Jan. 25, 2024), the plaintiff was the former chief executive of the defendant. Following his termination, he sued the defendant over his departure. Early in discovery, the plaintiff produced roughly 3,000 pages of documents (mostly emails) that he had taken when he left. They included “hundreds” of privileged communications between the defendant and its outside legal counsel. Company policy required that such documents be returned when leaving.

When the defendant realized the number and scope of the privileged information taken, it moved both for the return of the documents and disqualification of Wickersham’s counsel. A magistrate denied both requests. On review by the district judge, however, the court ordered the return of the confidential documents and forbade their use in the case. In light of this latter restriction, the district court also declined to disqualify counsel.

In ordering the return of the documents, the Oregon federal court relied principally on a decision from the federal court in Seattle: *Richards v. Jain*, 168

F. Supp.2d 1195 (W.D. Wash. 2001). Like *Wickersham*, *Richards* involved a senior executive who on leaving his employer took a trove of documents that included a large number of privileged communications. Richards' lawyers then used the confidential documents in preparing his claim for stock compensation against his former employer. When this tumbled out at an early deposition, the defendant employer moved both for the return of the documents and disqualification of Richards' counsel. In *Richards*, the federal court in Seattle ordered the return of the documents and, because use of the documents by the plaintiff was more starkly developed in the record, also disqualified Richards' lawyers as a sanction.

Neither *Wickersham* nor *Richards* involved "inadvertent" production and, therefore, the body of law that has developed to guide lawyers in that scenario did not apply directly. At the same time, ABA Model Rule 4.4(a)—which has been adopted in both Oregon and Washington—prohibits improper invasion of privilege. On a practical level, a court as in *Richards* may conclude that there is no other way to "un-ring the bell" in terms of an opponent's improper access to privileged information other than to disqualify the lawyers. In short, this can be an unexpectedly fraught situation for lawyers receiving documents from their client. What may initially seem like a "gold nugget" may turn into a "rotten egg" if

a court later determines the lawyer's client was wrong to take the documents. As illustrated by *Wickersham* and even more so by *Richards*, lawyers should probe clients on the source of proffered documents before accepting them and, if they appear relevant to the litigation and there are legitimate questions over whether privilege has been waived (or never attached), should consider approaching the court on those issues before accepting and using them.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author and the editor-in-chief for the WSBA *Legal Ethics Deskbook* and is a contributing author and principal editor for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.860.2163 and Mark@frllp.com.