



**“If an attorney receives documents regarding a case from an anonymous source, the attorney has an ethical obligation to inform opposing counsel.”**

# Practice Tips

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## Anonymous Documents - What Should I Do? (Part 1)

The Office of Bar Counsel is occasionally contacted by attorneys who have received what they believe are privileged documents. Sometimes the information was inadvertently included in response to a discovery request. In such cases, there is a specific rule on point, namely Rule of Professional Conduct 4.4(b) (Respect for Rights of Third Persons), which concerns documents that are inadvertently sent. In such an instance, the rule requires that the sender be promptly notified.<sup>1</sup>

Promptly informing the sender satisfies RPC 4.4(b), but what about using the inadvertently sent documents? RPC 4.4 does not speak to that issue, nor is there language necessarily requiring the documents be returned. Also, what if the sender is unknown?

The Nevada Supreme Court recently provided guidance in regard to these questions in a case entitled *Merits Incentives, LLC, v. Eighth Judicial District Court*, 2011 WL 4634159, 127 Nev. Adv. Op. 63 (October 6, 2011).

The matter involved Merits Incentives, LLC, along with other defendants, seeking a writ of mandamus from the Nevada Supreme Court to disqualify the counsel for plaintiff Bumble and Bumble Products, LLC, for using what they considered misappropriated and privileged documents to gain an advantage in the litigation.

In short, in *Merits* the Nevada Supreme Court held that if an attorney receives documents regarding a case from an anonymous source, the attorney has an ethical obligation to inform opposing counsel. The Nevada Supreme Court also promulgated a nonexhaustive list of factors to aid the trial court in determining whether to disqualify an attorney who, through no wrongdoing of his or her own, received an opponent's privileged materials.<sup>2</sup>

This month's column discusses the underlying facts leading to the writ petition. January's article will detail the Nevada Supreme Court's decision in *Merits*.

### Summary of Facts

The underlying litigation in this matter concerned a lawsuit by Bumble against petitioners for breach of contract, fraud and injunctive relief because of the alleged distribution of Bumble beauty-care products by petitioners to entities other than those authorized by the parties' contract.<sup>3</sup>

After the lawsuit had commenced, on September 24, 2009, Bumble received an anonymous package from Lebanon at its New York headquarters that contained a disk and instructions to give it to counsel.<sup>4</sup> Bumble subsequently forwarded the package to its attorney, John Mowbray of the firm Fennemore Craig, P.C.<sup>5</sup>

Three weeks later, on October 15, 2009, Bumble filed a supplemental NRCP 16.1 mandatory pretrial discovery disclosure. This disclosure identified the disk, provided a copy of the disk and included a copy of the containing envelope (which noted that the contents were "highly confidential"). The NRCP 16.1 disclosure indicated that the package had been received from an unidentified source. Four days later, on October 19, 2009, Bumble provided another supplemental 16.1 disclosure, which again contained an identical copy of the disk.<sup>6</sup>

On November 6, 2009, Bumble served the defendants with a second request for production, which individually listed 503 documents that were contained on the disk and requested authentication and hard copies of some of these documents. On January 11, 2011, the opposing side filed their response, which generally objected to the request, stating that:

[Petitioners] object to this Request on the grounds that it seeks information and documents already in Bumble's possession, on the grounds that it is overbroad and unduly burdensome, on the grounds that it seeks information protected by the attorney/client and/or attorney work product privilege, on the grounds that many of the documents on the Disk are corrupted and will not open, and on the grounds that it is vague and ambiguous in that Bumble has not identified the source of the Disk. Subject to the foregoing, [petitioners] state that they have produced all documents they have an obligation to produce in response to this Request. The documents previously produced...are generally responsive to this Request.<sup>7</sup>

On January 27, 2010, Bumble used some of the documents contained in the disk in a deposition of one of the opposing parties' employees. No objection to the documents was made at the time.<sup>8</sup>

On May 14, 2010, the petitioners first objected to the use and possession of the documents on the disk and filed a motion

with the district court to either dismiss the case with prejudice or prohibit the use of misappropriated confidential and privileged documents and for disqualification of Bumble's counsel.<sup>9</sup>

In doing so, the petitioners also argued that Bumble failed to notify them for more than eight months that it had the petitioners' confidential and privileged documents, and that Bumble used that information "to gain a tactical advantage in [the] litigation."<sup>10</sup>

The district court, in its findings of fact, which went unchallenged on appeal, stated that, "[o]n or about September 24, 2009, [Bumble] received...an unsolicited package from an anonymous source." The district court also found that Bumble and its counsel "conspicuously set forth" their receipt of the disk in the NRCPC 16.1 disclosure....<sup>11</sup>

The district court concluded that petitioners failed to show that any of the documents contained on the disk, except a draft affidavit, were privileged. The court excluded the use of the draft affidavit, but otherwise allowed the use of the documents contained on the disk.<sup>12</sup>

Despite the one privileged document on the disk, the district court concluded that Bumble's counsel "acted reasonably and in accordance with the Nevada Rules of Professional Conduct with respect to the documents and the Disk." The court also concluded that Mowbray "went out of [his] way to advise [petitioners] that [he] had received the documents and Disk, to let [petitioners] ascertain their provenance and to give them every opportunity to register an objection and demand return and non-use."<sup>13</sup>

The petitioners, unhappy with the result, subsequently sought a writ of mandamus from the Nevada Supreme Court to reverse the district court's decision.

*To be continued in the January 2012 issue of Nevada Lawyer.*<sup>14</sup> ■

1 Specifically, RPC 4.4(b) states that "[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."

2 The Supreme Court noted that its test was based on the factors listed in *In re Meador*, 968 S.W.2d 346 (Tex.1998).

3 See 2011 WL 4634159 \*1.

4 The package was later determined to have been sent by a disgruntled former employee, against whom the petitioners had obtained an injunction.

5 See 2011 WL 4634159 \*1.

6 See *id.*

7 See *id.* \*2.

8 See *id.*

9 See *id.* \*2.

10 See *id.* \*2.

11 See *id.* \*2.

12 See *id.* \*3.

13 See *id.*

14 In other words, I am way beyond my word limit for this month's column.