

***Inadvertent Disclosure:  
When Your Opponent Has Let The Cat Out Of The Bag***

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This article addresses what to do when opposing counsel accidentally discloses confidential information to you. At first blush, the errant email or over-inclusive document production feels like a fortuitous windfall for you and your client; in reality, you are now caught in an ethical dilemma. Should you exploit your opponent's mistake in service of your client or, as an officer of the court, are you forbidden from taking unfair advantage of an opposing party?

With Massachusetts' recent adoption of ABA Model Rule 4.4(b), we now have a rule that specifically addresses this issue. Mass. Rule Prof. C. 4.4(b) states as follows:

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.

Thus, the recipient of any inadvertently produced information must -- at a minimum -- promptly notify the sender of his/her discovery.<sup>1</sup> In so doing, the recipient is afforded an opportunity to take what Comment 2 calls "protective measures." In bar counsel's view, such measures might include seeking a court order requiring the return of any confidential material.

For a lawyer on the receiving end of an inadvertent disclosure, it is important to recognize that Rule 4.4(b) sets the minimum level of ethical conduct. There are related issues that are beyond the scope of the Rule and that also warrant attention.

For instance, whether the recipient must take additional steps, such as returning or deleting the inadvertently produced information, is "a matter of law beyond the scope of these Rules." In practice, recipients therefore must investigate whether there is a law or court rule requiring them to do more than merely give notice to the senders. For example, in cases involving the inadvertent production of privileged materials and/or work product, both Massachusetts state and federal courts impose specific obligations on the recipient beyond mere notification of the sender. See Mass. R. Civ. P. 26(b)(5)(B); Fed. R. Civ. P. 26(b)(5)(B). Under these rules, once the sender asserts that the materials were inadvertently produced and must be returned, the recipient must promptly return, sequester or destroy the specified information, and must not use or disclose the information until the issue is resolved. The rules provide that the recipient (not the sender) then may present the issue to the court for resolution.

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<sup>1</sup> The Rule is not limited to confidential and/or privileged documents; it applies to any document inadvertently sent. The document may be in hard copy or electronic form, and includes metadata (i.e., embedded data in electronic documents) whenever the recipient knows or reasonably should know that the metadata production was accidental.

Rule 4.4(b) also does not address whether any privilege has been waived by the inadvertent disclosure. This too is a matter of law that would need to be resolved in the courts. See e.g., Proposed Mass. R. Evid. Section 523 (no waiver if disclosure was unintentional and reasonable precautions were taken to prevent disclosure).

And finally, there is no definitive guidance on what the recipient should do when the sender's mistake is immediately apparent upon receipt; that is, before the material is even opened or read. In these circumstances, the recipient must determine if there is any controlling law or rule in the matter (such as a "claw back" provision in a court-approved protective order). In the absence of any such law or rule, recipients should use their "professional judgment" to determine whether or not to voluntarily return or delete the material unread. In cases where the recipient decides to retain the material and wait for the sender to take a "protective measure" (see above), another question emerges -- may the lawyer review the material? Rule 4.4(b) fails to answer this question. It imposes no affirmative ethical obligation on the recipient beyond giving the sender notice so that he/she may try to protect the confidentiality of the inadvertently disclosed information through judicial intervention. Even so, bar counsel recommends that the recipient refrain from reading the material until the question of confidentiality is resolved (either amicably or through the courts).

In summary, Rule 4.4(b) provides some clarity to lawyers who are the unintended recipients of an adversary's confidential information. Put simply, it places a burden of notification on the receiving lawyer, but leaves to the sender the burden of taking steps to rectify the error. Beyond the scope of the new rule, lawyers must exercise their professional and moral judgment, guided by the Rules of Professional Conduct and any governing law(s). It is bar counsel's view that the bare minimum required by Rule 4.4(b) is not the limit of a lawyer's obligation.