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**REPORT BY THE PROFESSIONAL RESPONSIBILITY COMMITTEE****The Receipt of Inadvertently-Disclosed Confidential Information:  
Practical Guidance for Attorneys Practicing in New York****I. INTRODUCTION**

The 2009 adoption of the New York Rules of Professional Conduct introduced in Rule 4.4(b) the requirement that “[a] lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer’s client and knows or reasonably should know that it was inadvertently sent shall promptly notify the sender.” The comments to the Rule elaborate that “[w]hether the lawyer or law firm is required to take additional steps, such as returning the document or other writing, *is a matter of law beyond the scope of these Rules*, as is the question whether the privileged status of a document or other writing has been waived” (emphasis added). The Rule thus does not answer the question of what a recipient of such information must do, if anything, beyond notifying the sender.<sup>1</sup>

The Advisory Committee on Civil Practice<sup>2</sup> recently considered modifications to the C.P.L.R. to address this situation. But the new rule currently proposed by the Committee, §4550 to the C.P.L.R.,<sup>3</sup> would state only that, “[w]hen made in an action or to a government office or agency, a disclosure does not waive any privilege . . . if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure and (3) the holder of the privilege or protection took reasonable steps to rectify the error unless the party in possession of the disclosure demonstrates that it will be unduly prejudiced by the nullification of the waiver.” This rule would satisfy the goal of more closely aligning New York attorney-client privilege law with the waiver provisions of Federal Rules of Evidence Rule 502(b), but it addresses the situation only as a matter of evidence. Thus, while the proposed rule would ensure that such information will not be admitted as evidence in a civil proceeding (if the requirements of the rule are met), it would not address the question of a lawyer’s obligation upon receipt of inadvertently produced information—for example, whether the lawyer must comply with the instructions of the producing party regarding the information, or whether she or he must refrain from using the information or submitting it to a tribunal for guidance. The Committee states that it “considered and rejected the idea of adopting Fed. R. Civ. P. 26(b)(5)(B), which sets forth the action required by the recipient of inadvertently exchanged matter upon realizing, or being

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<sup>1</sup> The comments to Rule 4.4(b) further elaborate that “if applicable law or rules do not address the situation, decisions to refrain from reading such a document or other writing or instead to return them, or both, are matters of professional judgment reserved to the lawyer. *See* Rules 1.2, 1.4.”

<sup>2</sup> One of the standing advisory committees established by the Chief Administrative Judge of the New York State Courts pursuant to sections 212(1)(g) and 212(1)(q) of the Judiciary Law.

<sup>3</sup> This proposed rule, currently New York State Assembly Bill A6606, was passed by the Assembly on March 20, 2018. It was delivered to the New York State Senate and referred to the New York State Senate Committee on Judiciary where it is awaiting a vote.

notified, that the matter exchanged was exchanged inadvertently. The Committee believes that action by the recipient of what is, or comes to be known as, inadvertently exchanged matter *is an ethical matter, appropriately and adequately addressed by New York's Rules of Professional Conduct*. See, Rule 4.4(b)” (emphasis added).<sup>4</sup>

In circular fashion, the proposed civil procedure rule thus would defer to Rule 4.4(b), which in turn defers to the substantive law of civil procedure. This leaves us with the opportunity to provide guidance to fill the guidance gap.

To that end, we present here an analysis of the current state of the ethics rules and substantive law on the issue of inadvertent disclosure in New York. There are both New York County Lawyers Association (NYCLA) and New York City Bar (NYC Bar) ethics opinions that address the question, but each is pre-2009 and thus approached the issue from the perspective of the prior Code.<sup>5</sup> Each provided that a recipient of such information should notify the sender and then follow the sender’s instructions regarding whether to sequester, return, or destroy the information. The NYC Bar went further, however, by allowing the recipient to bring the information to the attention of a court (in an appropriate manner) if the recipient in good faith believed that the information was not, or was no longer, protected.<sup>6</sup> It also permitted the attorney to use “information gleaned prior to knowing or having reason to know that the communication contain[ed] confidences or secrets not intended for the receiving lawyer.”<sup>7</sup>

The NYC Bar withdrew its pre-2009 opinion in 2012 and provided interpretive guidance on then-new Rule 4.4(b). It points out that it does not matter “whether the sender is a lawyer, a client, a third party, or even a tribunal; in each case, the rule still attaches.”<sup>8</sup> Additionally, it opines that the rule only applies when documents are inadvertently sent, and so it “would not apply if . . . a lawyer obtained possession of a document that was deliberately sent to the lawyer’s attention.”<sup>9</sup> It also interprets “prompt” notification by the recipient to mean “as soon as reasonably possible” because the rule was “designed in part to eliminate any unfair advantage that would arise if the lawyer did not provide such notice.”<sup>10</sup> Interestingly, the 2012 NYC Bar opinion contemplates that lawyers may follow its pre-2009 opinion without violating Rule 4.4(b). The opinion also highlights that a lawyer must identify and follow applicable substantive

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<sup>4</sup> Rule 26(b)(5)(B) states that once the recipient of information is informed by a producing party that information produced is subject to a claim of privilege or other protection, the receiving “party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.”

<sup>5</sup> Association of the Bar of the City of New York, Formal Op. 2003-04 (Apr. 2, 2003); NYCLA Comm. On Prof'l Ethics, Formal Op. 730 (2002). The adoption of Rule 4.4(b) thus impacts the applicability of these opinions, but does not undermine their reasoning. James Altman provides compelling arguments that Rule 4.4(b) fails to protect inadvertently disclosed confidential information and in the process, undermines attorney professionalism and the foundational principle of confidentiality. See James. M. Altman, “Inadvertent Disclosure and Rule 4.4(b)’s Erosion of Attorney Professionalism,” NYSBA JOURNAL (2010).

<sup>6</sup> Association of the Bar of the City of New York, Formal Op. 2003-04 (Apr. 2, 2003).

<sup>7</sup> *Id.*

<sup>8</sup> Association of the Bar of the City of New York, Formal Op. 2012-01 (Apr. 24, 2012).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

law on the issue to determine whether there are any additional obligations, beyond notifying the sender, on the part of the receiving attorney.<sup>11</sup>

Above all, we aim in this report to provide clear and consistent guidance to address the gap in guidance between ethical rules and substantive law or the rules of civil procedure. Whether we look at this issue as a matter of ethics or from a procedural standpoint, we should arrive at the same practical conclusion, given the paramount ethical requirements surrounding the protection of confidentiality and the requirement that lawyers act as officers of the courts to preserve the integrity of the judicial process.

As a matter of ethics, of course, confidentiality is fundamental to the attorney-client relationship. There are things lawyers are precluded from doing—even as diligent<sup>12</sup> and competent<sup>13</sup> client advocates—because the principle of confidentiality takes precedence. For example, lawyers cannot extract metadata containing an adversary’s confidential information.<sup>14</sup> They also cannot reveal to a client confidential information that they learned through unsolicited communications from a potential client.<sup>15</sup> We believe that these principles support guidance in line with the New York opinions described above. We also believe that the NYC Bar opinion appropriately balances this concept with the requirement that lawyers act reasonably as client advocates by providing guidance regarding whether and to what extent a lawyer may “use” such inadvertently-produced information it receives on behalf of its client. After all, the receiving lawyer cannot always “unring the bell,” and his or her client should not be unreasonably penalized if there are sufficient reasons why the lawyer should be able to make some use of the information, subject to any counterarguments by the producing party and, ultimately, the decision of a tribunal.

We also believe that the New York civil procedure rules should align with Federal Rule of Civil Procedure 26(b)(5)(B). Just as the New York Rules of Professional Conduct state that lawyers owe a special duty “to avoid conduct that undermines the integrity of the adjudicative process,”<sup>16</sup> the 1993 Advisory Committee notes to F.R.C.P. 26 describe lawyers “[a]s officers of the court,” a concept often borrowed as a matter of substantive law in civil practice before New York courts (as elsewhere). The rules of ethics and civil procedure can work in tandem to achieve these goals.

In sum, this report seeks to guide lawyers who receive inadvertently disclosed confidential information.<sup>17</sup> After analyzing post-2009 case law on the issue, we synthesize the

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<sup>11</sup> *Id.*

<sup>12</sup> See N.Y. Rule of Prof. Conduct 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”). The prior standard of “zealous representation” was eliminated in the 2009 transition from the Code of Professional Responsibility to the Rules of Professional Conduct. Compare New York Lawyer’s Code of Professional Responsibility, Canon 7 (“A Lawyer Should Represent a Client Zealously Within the Bounds of the Law”) with New York Rules of Professional Conduct 1.1 and 1.3); see also Altman, *supra* note 6, at 24.

<sup>13</sup> See N.Y. Rule of Prof. Conduct 1.1 (“A lawyer should provide competent representation to a client.”).

<sup>14</sup> See Altman, *supra* note 6, at 25 (citing NYSBA Op. 749 (2001)).

<sup>15</sup> See *id.* (citing N.Y. City Op. 2001-01 (2001)).

<sup>16</sup> N.Y. Rule of Prof. Conduct 3.3, cmt. 2.

<sup>17</sup> This issue is particularly acute before a formal action has commenced, when proposed rule C.P.L.R. §4550 would kick in. But the issue continues to exist once an action has been commenced to the extent that the substantive law does not provide a resolution. Difficult issues also arise in non-litigation, transactional settings where the ethics rule

current state of the law in order to provide a practical guide for the lawyer who is in receipt of inadvertently disclosed confidential information from his or her adversary, and to provide an idea of how a court might rule on the issue. Ultimately, while the content of Rule 4.4(b) is clear, there are many seemingly-contradictory authorities which create confusion about what is expected of lawyers in receipt of inadvertently disclosed confidential information. Although the NYC Bar has withdrawn its pre-2009 ethics opinion on the issue, NYCLA has not. And while some courts have interpreted Rule 4.4(b) in their analysis, others have required less than what is stated in Rule 4.4(b)'s text, and still others (particularly in the federal arena) have required more.

In short, in New York state court, a lawyer in receipt of inadvertently disclosed information should at least comply with Rule 4.4(b) and notify the sender of the disclosure. There is no indication the lawyer need do more in state court; the disclosing party appears to shoulder the burden of seeking a ruling as to whether the information remains privileged,<sup>18</sup> although the receiving party may bring the issue to the court's attention, including in the form of a motion seeking guidance or additional discovery based on the disclosure.<sup>19</sup> Once a party seeks the court's guidance, the court may well require return of the information<sup>20</sup> and forbid its use in the litigation.<sup>21</sup> In fact, attorneys may be well-advised to seek the court's attention immediately, in order to avoid subsequent repercussions from use of the potentially-confidential information.

In federal courts sitting in New York, the receiving lawyer also should follow Rule 4.4(b) and notify the sender.<sup>22</sup> Additionally, to comply with the Federal Rules of Civil Procedure, the receiving lawyer must "return, sequester, or destroy" the information and not "use or disclose" it until the privilege claim is resolved; either the privilege holder or the receiving attorney may present the information to the court for a determination of the claim.<sup>23</sup> Two federal courts have suggested specifically that the information must be *returned* under Rule 4.4(b) (even though the Rule does not say so), and therefore—and in light of the requirements of the Federal Rules of Civil Procedure—the lawyer would do well to return, rather than sequester or destroy, the information. A federal court might be more receptive than a state court to permitting the recipient to *use* in litigation the information gleaned from the communication prior to learning that it was privileged, although the Federal Rules of Evidence provide that inadvertent disclosure does not operate as a waiver of privilege if the holder of the privilege took reasonable steps to prevent disclosure and rectify the error.<sup>24</sup>

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provides the only guidance. Although it may not be the most practical solution, going to court in response to an issue arising in a transactional setting is nonetheless an available option, as a party may ask for a declaratory judgment.

<sup>18</sup> See, e.g., *Broxmeyer v. United Capital Corp.*, No. 10581/07, 2012 WL 12045242, at \*2 (N.Y. Sup. Ct. Aug. 2, 2012).

<sup>19</sup> See, e.g., *O'Connor v. Lewis*, No. 11-13553, 2013 WL 3961675, at \*2 (N.Y. Sup. Ct. July 19, 2013).

<sup>20</sup> See, e.g., *Murphy v. 150 W. 140th Street LLC* No. 101895/2009, 2013 WL 213027 (N.Y. Sup. Ct. Jan. 8, 2013).

<sup>21</sup> See, e.g., *TC Ravenswood, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 400759/2011, 2014 WL 284241, at \*1 (N.Y. Sup. Ct. Jan. 24, 2014).

<sup>22</sup> We do not cover what New York attorneys should do when litigating outside New York, but they would generally follow the rules of the jurisdiction where the litigation is pending. Additionally, this report focuses on the application of privilege rules in civil cases. There may be other considerations in criminal matters and investigations.

<sup>23</sup> See FED. R. CIV. P. 26(b)(5)(B); FED. R. EVID. 502(b).

<sup>24</sup> See *Stinson v. City of N.Y.*, No. 10 Civ. 4228(RWS), 2014 WL 5090031, at \*4 (S.D.N.Y. Oct. 10, 2014); FED. R. EVID. 502(b).

Ultimately, to avoid protracted disputes and sanctions, parties in both state and federal court should, as a matter of best practice, enter into up-front agreements detailing the steps to be taken in the event of an inadvertent disclosure, and follow those agreements to the letter.

For a quick-reference guide mapping the rules that apply in various settings (state and federal litigation, and in transactional matters), see Appendix A to this report.

This report covers only the law within New York, and a lawyer practicing outside the state should check the law in the applicable jurisdiction(s). New York, along with the majority of states, generally conforms to the approach of the ABA Model Rules in requiring the recipient of inadvertently disclosed confidential information to notify the sender. Some jurisdictions' rules explicitly require a recipient to refrain from examining and return or destroy a document upon realizing it was inadvertently disclosed.<sup>25</sup> Others require only that the recipient notify the sender and await the sender's instructions.<sup>26</sup> Lastly, one jurisdiction, Massachusetts, has allowed lawyers to retain and use inadvertently disclosed documents because of the obligation of zealous client representation.<sup>27</sup>

## II. NEW YORK ETHICS OPINIONS REGARDING INADVERTENT DISCLOSURE

When the NYCLA and the NYC Bar issued their formal opinions regarding ethical obligations upon receipt of inadvertently disclosed privileged information, no rule or opinion had yet squarely addressed the topic in New York, and courts had offered little guidance.<sup>28</sup> The ABA Committee had issued its Formal Opinion No. 92-368 on this subject in 1992, opining that a receiving lawyer should refrain from examining the materials, notify the sender, and abide by the sender's instructions.<sup>29</sup> Although the NYCLA described the ABA's opinion to be "the leading authority" at the time, not all state and local bar associations had followed it.<sup>30</sup> But most, like New York, had yet to consider the question.<sup>31</sup>

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<sup>25</sup> See 4 RONALD E. MALLEN, LEGAL MALPRACTICE § 32.83, n.6 (2018); see, e.g., La. Rule of Prof. Conduct 4.4(b) ("A lawyer who receives a writing or electronically stored information that, on its face, appears to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the writing or electronically stored information was not intended for the receiving lawyer, shall refrain from examining or reading the writing or electronically stored information, promptly notify the sending lawyer, and return the writing or delete the electronically stored information.").

<sup>26</sup> See MALLEN, *supra* note 26, § 32.83, n.7; see, e.g., Ariz. Rule of Prof. Conduct 4.4(b) ("A lawyer who receives a document or electronically stored information and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures.").

<sup>27</sup> See MALLEN, *supra* note 26, § 32.83, n.9; Mass. Bar Assoc. Comm. on Prof'l Ethics, Op. 99-4 (Apr. 1999). Rule 4.4(b) of the Massachusetts Rules of Professional Conduct became effective on July 1, 2015. However, this rule requires only that the recipient of inadvertently disclosed information notify the sender, so it does not necessarily conflict with the liberty permitted by the ethics opinion to retain and use the inadvertently disclosed information. Additionally, the lawyer's obligation to represent his client "zealously within the bounds of law" remains a part of the Massachusetts Rules of Professional Conduct, unlike in New York, where this obligation has been written out of the Rules. Compare Mass. Rule of Prof. Conduct 1.3, with N.Y. Rule of Prof. Conduct 1.3.

<sup>28</sup> NYCLA Comm. on Prof'l Ethics, Formal Op. 730, at 2 (2002).

<sup>29</sup> *Id.* at 3.

<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.*

In 2002, the NYCLA decided to tackle the issue, modeling its resulting Formal Opinion 730 on the ABA’s Formal Opinion No. 92-368, as well as the ABA’s then-recently adopted Rule 4.4(b) of the Model Rules of Professional Responsibility, which was (and still is) substantively identical to New York’s current Rule 4.4(b).<sup>32</sup> Formal Opinion 730 requires the receiving lawyer to notify the sender of the inadvertent disclosure and “abide by the sender’s instructions regarding return or destruction of the information.”<sup>33</sup> The Opinion elaborates, “If a lawyer receives information which the lawyer knows or believes was not intended for the lawyer and contains secrets, confidences or other privileged matter, the lawyer, upon recognition of same, shall, without further review or other use thereof, notify the sender and (insofar as it shall have been in written or other tangible form) abide by sender’s instructions regarding return or destruction of the information.”<sup>34</sup> The court reasoned that this guidance “supplements and enhances the Code’s existing requirement that lawyers preserve the confidences and secrets of their own clients. In the Committee’s view, it is appropriate that all lawyers share responsibility for ensuring that the fundamental principle that client confidences be preserved . . . is respected . . . .”<sup>35</sup>

The NYC Bar addressed the inadvertent disclosure issue one year later, in 2003, in Formal Opinion 2003-04.<sup>36</sup> It too considered the lawyer’s duty to preserve client confidences and secrets under the New York Rules of Professional Conduct and decided that, even though “the receiving attorney has no attorney-client relationship with the client whose information is exposed[,] [t]he Code nevertheless recognizes that preservation of client confidences and secrets is crucial to stability of the legal system.”<sup>37</sup> It cited its own Formal Opinion 1989-1 and numerous New York State Bar Association Ethics Committee opinions in support of the latter principle.<sup>38</sup> Although Formal Opinion 730 referenced the ABA’s Model Rule 4.4(b) and Formal Opinion 92-368, it went beyond them.<sup>39</sup> Specifically, Formal Opinion 2003-04 directed the lawyer receiving a misdirected communication containing confidences or secrets “to promptly notify the sending attorney, to refrain from review of the communication, and to return or destroy the communication if so requested.”<sup>40</sup> Noting that “a blanket proscription on use of inadvertent disclosures in all situations extends too far,” however, Formal Opinion 2003-04 provided for two potential uses.

First, if the receiving attorney believed in good faith that the communication appropriately may be retained or used in a legal dispute before a tribunal, then the attorney could submit the communication for *in camera* review by the tribunal.<sup>41</sup> This could happen if, for instance, an applicable privilege had been waived, or the communication did not in fact contain a

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<sup>32</sup> See *id.* at 5 & n.13. Model Rule 4.4(b) did not require the recipient to abide by the sender’s instructions, even though Formal Opinion No. 92-368 did. See *id.* at 3, 5 n.13. The ABA did not withdraw Formal Opinion No. 92-368 until 2006. See Am. Bar Association, Formal Op. 06-440, at 1 (May 13, 2006).

<sup>33</sup> NYCLA Comm. on Prof’l Ethics, Formal Op. 730, at 5 (2002).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 4.

<sup>36</sup> Association of the Bar of the City of New York, Formal Op. 2003-04 (Apr. 2, 2003).

<sup>37</sup> *Id.*

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

confidence or secret. This use was permitted only if the attorney viewed the communication before the disclosing party realized the mistake and asked the receiving attorney not to view it.<sup>42</sup> Second, the attorney could use “information gleaned prior to knowing or having reason to know that the communication contain[ed] confidences or secrets not intended for the receiving lawyer.”<sup>43</sup>

The NYC Bar and NYCLA reacted differently to the implementation of Rule 4.4(b) in 2009. In Formal Opinion 2012-01, the NYC Bar withdrew Formal Opinion 2003-04 “[t]o the extent that it imposed requirements beyond those set forth in Rule 4.4(b).”<sup>44</sup> As described above, Formal Opinion 2003-04 had exceeded Rule 4.4(b) by requiring that the receiving attorney not only notify the sender (Rule 4.4(b)’s only requirement), but refrain from reviewing the communication and return or destroy it as requested.<sup>45</sup>

Formal Opinion 2012-01 essentially re-states Rule 4.4(b) as follows: “A lawyer who receives a letter, fax, e-mail or other communication that the lawyer knows or reasonably should know was transmitted by mistake must promptly notify the sender, pursuant to Rule 4.4(b) of the New York Rules of Professional Conduct, and follow any other applicable law.”<sup>46</sup> Like the New York State Bar Association, it defers to other entities on the issue of additional obligations on the part of the receiving attorney, noting that “[o]ther issues relating to involuntary disclosure, including substantive issues of state and federal law, are outside the purview of this Committee.”<sup>47</sup>

However, Formal Opinion 2012-01 adds that “there may be circumstances in which a lawyer may choose to act in conformity with the guidance in Formal Opinion 2003-04 without thereby per se violating Rule 4.4(b).”<sup>48</sup> It does not elaborate on what these circumstances might be. Formal Opinion 2012-01 also adds that “[c]ounsel would do well . . . to remember the New York State Bar Association comment [Comment [2]] that ‘a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion.’”<sup>49</sup>

In sum, although the NYC Bar has formally withdrawn its pre-2009 ethics opinion on the issue and has released a subsequent opinion adopting the approach of Rule 4.4(b), it contemplates that lawyers may follow its pre-2009 opinion without violating Rule 4.4(b). Additionally, it highlights that a lawyer must identify and follow applicable substantive law on the issue of additional obligations on the part of the receiving attorney (beyond notifying the sender),<sup>50</sup> just like the Rules of Professional Conduct. Although the NYC Bar provides helpful interpretation, the lawyer in receipt of inadvertently disclosed confidential information is left without comprehensive guidance.

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Association of the Bar of the City of New York, Formal Op. 2012-01 (Apr. 24, 2012).

<sup>45</sup> *See* Association of the Bar of the City of New York, Formal Op. 2003-04 (Apr. 2, 2003).

<sup>46</sup> Association of the Bar of the City of New York, Formal Op. 2012-01 (Apr. 24, 2012).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

The NYCLA has never formally withdrawn Formal Opinion 730, which raises additional questions regarding the proper guidance for New York attorneys.

### III. NEW YORK CASE LAW REGARDING INADVERTENT DISCLOSURE

After Rule 4.4(b)'s implementation, state courts and federal courts in New York have taken different approaches to the steps required when there is an inadvertent disclosure of confidential materials. There is no uniformity among individual state and federal court judges—but there are some trends worth examining.

#### a. New York State Courts on Inadvertent Disclosure

Few state courts have addressed, in published opinions, the recipient's obligations under Rule 4.4(b) or otherwise. Those that have done so have interpreted the Rule in various ways—both before and after the withdrawal of Formal Opinion 2003-04.

##### i. *Before the withdrawal of formal opinion 2003-04*

After Rule 4.4(b)'s adoption, but prior to the withdrawal of Formal Opinion 2003-04, courts took a mixed approach to whether they required compliance with this Opinion, as well as Formal Opinion 730. Some did insist on compliance. For instance, in *Massey v. Anand*, plaintiff's counsel's secretary inadvertently sent unredacted copies revealing the identities of plaintiff's experts to defense counsel; a letter accompanying the copies specified that they were confidential and to be used for the court's *in camera* inspection only.<sup>51</sup> Defense counsel never notified plaintiff's counsel that they received the copies; instead, they included extensive research on plaintiff's experts in their replies, which was how plaintiff's counsel discovered the disclosure.<sup>52</sup> The *Massey* court cited to both ethics opinions, stating that “[b]oth conclude that when receiving a communication or an e-mail which the lawyer knows or should reasonably know contains privileged material, the attorney is *obligated* to ‘promptly notify the sending attorney’ thereof, to refrain from further review of the communication, and to return or destroy it as requested.”<sup>53</sup> It ultimately decided to conduct a conference to determine which remedies (including sanctions) might be appropriate after defense counsel failed to comply with any of those requirements.<sup>54</sup>

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<sup>51</sup> No. 05-10671, 2011 N.Y. Misc. LEXIS 805, at \*30 (N.Y. Sup. Ct. Feb. 23, 2011). The 2011 *Massey* opinion was superseded by a May 10, 2012 “Corrected Order,” which made no changes to the section addressing inadvertent disclosure other than to cite to the ABA’s Model Rule 4.4(b) rather than New York’s version. *See Massey v. Anand*, No. 05-10671, 2012 WL 2396515 (N.Y. Sup. Ct. May 10, 2012). The 2012 order continued to insist on compliance with both ethics opinions, not mentioning that the NYC Bar had withdrawn Formal Opinion 2003-04 several weeks earlier. *See id.*

<sup>52</sup> 2011 N.Y. Misc. LEXIS 805, at \*30-31.

<sup>53</sup> *Id.* at \*33.

<sup>54</sup> *Id.*

In *Forward v. Foschi*, plaintiff unlawfully gained access to defendants’ email accounts, downloaded emails and documents, and gave them to his attorney for use in the litigation.<sup>55</sup> Defendants moved to disqualify plaintiff’s attorney, arguing (among other things) that he had violated Rule 4.4 “by failing to notify and turn over the privileged communications upon receipt of same from [plaintiff].”<sup>56</sup> The court did not disqualify plaintiff’s attorney because defense counsel had acted with equal impropriety when they made no complaint to plaintiff’s attorney (or to the court) and then attempted to take advantage of the situation by planting fake emails.<sup>57</sup> It did, however, find that plaintiff’s counsel had violated Rule 4.4(b), noting that he had “failed to immediately notify opposing counsel of his receipt of the e-mails. Nor did he seek an in camera review of the e-mails based on a good faith belief the privilege had been waived. [Plaintiff’s attorney] thus violated the spirit and intent of relevant ethics principles.”<sup>58</sup> In so holding, the court cited Formal Opinion 2003-04.<sup>59</sup>

Another decision citing Formal Opinion 2003-04 post-Rule 4.4(b) was *MNT Sales LLC v. Acme Television Holdings, LLC*.<sup>60</sup> Defense counsel in this case inadvertently forwarded plaintiffs’ counsel an email that had been sent to defense counsel by a third party’s attorney.<sup>61</sup> Three days later, it notified plaintiffs’ counsel that the email had been inadvertently sent and

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<sup>55</sup> 911 N.Y.S.2d 692, at \*1 (N.Y. Sup. Ct. May 18, 2010) (unpublished table decision).

<sup>56</sup> *Id.* at \*4.

<sup>57</sup> *Id.* at \*17.

<sup>58</sup> *Id.* at \*14.

<sup>59</sup> *Id.* Several cases in this report, including *Forward*, address situations in which the “sender” produces confidential information related to an adversary, but is not the adversary itself. From these cases, it is apparent that Rule 4.4(b) still applies in situations where the “sender” is not the adversary, and the underlying premise of the Rule—that a lawyer should not take advantage of what is ultimately the confidential information of the adversary—is the same. In *Forward*, plaintiff’s counsel received from his own client the defendant’s confidential information; the client obtained the information by improperly accessing defendant’s email accounts. *Id.* at \*1. The court nonetheless held that plaintiff’s counsel violated Rule 4.4(b) for failing to notify defense counsel immediately of the receipt of defendant’s confidential emails. *Id.* at \*14. (Note that this is a nuanced distinction from the suggestion in the NYC Bar opinion that the rule does not apply when the information is deliberately produced. Association of the Bar of the City of New York, Formal Op. 2012-01 (Apr. 24, 2012). Here, plaintiff sent the information to his counsel quite deliberately. Rather, this was not information that the defendant chose to provide.) In *O’Connor v. Lewis*, No. 11-13553, 2013 WL 3961675 (N.Y. Sup. Ct. July 19, 2013), the plaintiff’s psychiatrist inadvertently supplied confidential notes to the defense. The court noted Rule 4.4(b)’s requirements, then precluded the defendant from using these records and ordered their return “under the penalty of sanctions.” *Id.* at \*2-3. *Broxmeyer v. United Capital*, No. 10581/07, 2012 WL 12045242 (N.Y. Sup. Ct. Aug. 2, 2012), involved the defendant’s contractor inadvertently producing a report to plaintiffs after receiving a subpoena. The receiving lawyer was not sanctioned for failing to notify the sender, but the court ruled that the documents remained subject to the attorney-client privilege. *Id.* at \*4. *Kirby v. Kenmore Mercy Hospital*, 996 N.Y.S.2d 822 (N.Y. App. Div. 2014), involved a state agency producing its confidential report to the plaintiff when it should not have done so. Although the court did not cite Rule 4.4(b) in its analysis, it entered a protective order to “restore the matter to the ‘status quo prior to the [inadvertent] disclosure,’” where opposing counsel did not become aware of plaintiff’s receipt until plaintiff’s deposition. *Id.* at 824. Finally, in *SEC v. LEK Securities Corp.*, No. 17-CV-1789 (DLC), 2018 WL 417596 (S.D.N.Y. Jan. 16, 2018), the third-party U.S. Attorney’s Office was responsible for the inadvertent production, and the court still applied Rule 4.4(b) and found the recipient complied with the Rule by returning the documents to the U.S. Attorney’s Office. *LEK Securities’* conclusion is consistent with the NYC Bar, which opines that Rule 4.4(b) applies “whether the sender is a lawyer, a client, a third party, or even a tribunal.” Association of the Bar of the City of New York, Formal Op. 2012-01 (Apr. 24, 2012).

<sup>60</sup> Index No. 602156-2009 (N.Y. Sup. Ct. Apr. 14, 2010).

<sup>61</sup> *Id.*

requested it be discarded.<sup>62</sup> Plaintiffs’ counsel did not respond or comply.<sup>63</sup> The court stated that “this email should have been discarded as requested, or at the very least plaintiffs’ counsel should have advised that it did not intend to do so. Whether this document was privileged or contained confidences or secrets is beside[] the point. The document was clearly inadvertently sent, there was an immediate request that it be discarded, and it was not. Nor . . . did the unintended recipient respond to the request. Such conduct certainly violates the spirit, if not the letter of Formal Opinion 2003-04 of the Committee on Professional and Judicial Ethics of the Bar Association of the City of New York, relied upon by both sides.”<sup>64</sup> It added that at a minimum, plaintiffs’ counsel should have followed the procedures set forth in that opinion and submitted the communication for *in camera* inspection by the court.<sup>65</sup> Because counsel did not do this until defendants moved for an unrelated protective order, the court denied plaintiffs’ motion seeking permission to use the email at trial.<sup>66</sup>

Other courts, however, did not reference Formal Opinion 2003-04, even before its withdrawal. In *GoSmile, Inc. v. Levine*, the court conducted an *in camera* inspection of an inadvertently produced email after the parties agreed to “sequester” it pending resolution of the recipient’s application to use the email at trial.<sup>67</sup> The court did not reference either ethics opinion.<sup>68</sup> The court in *Current Medical Directions, LLC v. Salomone* not only ignored the opinions, but it seemed to ignore Rule 4.4(b), too: it held that the sender’s “tardy request” to remedy his inadvertent disclosure “should not be approved,” even though he did not know of this particular disclosure until the recipient tried to use the communication in the litigation.<sup>69</sup>

## *ii. After the withdrawal of formal opinion 2003-04*

Those state courts that have addressed the recipient’s obligations, under Rule 4.4(b) or otherwise, after the withdrawal of Formal Opinion 2003-04 have also revealed varying approaches—with one referencing withdrawn Formal Opinion 2003-04’s requirements, several requiring return of the communications, and still others requiring even less than Rule 4.4(b)’s instruction. This makes it difficult to predict how a court might rule in the future, or to synthesize a clear rule regarding inadvertent disclosure of confidential information when in New York state court.

One order issued just over a year after the NYC Bar’s withdrawal of Formal Opinion 2003-04 still referenced it, indicating that the Opinion held persuasive, if not authoritative, weight with this court. In *O’Connor v. Lewis*, defendant sought discovery of medical records from plaintiff’s psychiatrist, and plaintiff’s counsel contended that the psychiatrist had inadvertently produced notes from earlier than the authorized date.<sup>70</sup> Defense counsel used the unauthorized disclosure as a basis for a motion to obtain further discovery, which plaintiff’s

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> No. 601148/2009, 2011 WL 7989434 (N.Y. Sup. Ct. July 25, 2011).

<sup>68</sup> *See id.*

<sup>69</sup> 907 N.Y.S.2d 99, at \*10 (N.Y. Sup. Ct. Feb. 2, 2010) (unpublished table decision).

<sup>70</sup> No. 11-13553, 2013 WL 3961675, at \*2 (N.Y. Sup. Ct. July 19, 2013).

counsel argued contravened Rule 4.4(b).<sup>71</sup> The court quoted Rule 4.4(b) and then “further noted” the requirements of Formal Opinion 2003-04 and the NYCLA’s Formal Opinion 730, stating that both require the recipient attorney to promptly notify “the sending attorney” of receipt of a communication or email the lawyer knows or should reasonably know contains privileged material, to refrain from further review of it, and to return or destroy it as requested.<sup>72</sup> The court also cited to pre-Rule 4.4(b) cases, including *Galison v. Greenberg*,<sup>73</sup> which directed counsel to return all copies of an inadvertently produced email and to remove all references to the email from any filings, and *People v. Terry*,<sup>74</sup> which cited ABA Formal Opinion 92-368’s requirement that the recipient attorney refrain from examining the materials, notify the sending lawyer, and abide by the instructions of the sending lawyer.<sup>75</sup> Then, the court denied defendant’s discovery request, precluded defendant from using those records inadvertently obtained from plaintiff’s doctor, and ordered the return of those records “under the penalty of sanctions.”<sup>76</sup>

*O’Connor*, with its reliance on pre-Rule 4.4(b) ethics opinions, appears to be an outlier in New York state court, however. Another order issued after the withdrawal of Formal Opinion 2003-04 cited only Rule 4.4(b) and its comments, and it did not sanction the receiving party for failing to comply with the Rule’s only stated requirement. In this nuisance and negligence action, defense counsel emailed its consulting expert’s report to an officer at the defendant corporation “as a private attorney-client communication.”<sup>77</sup> The officer inadvertently forwarded the email and report to a contractor, which produced the documents in response to plaintiffs’ subpoena, and defendants demanded return of the document; it is not clear whether plaintiffs complied.<sup>78</sup> Defendants moved for an order precluding use of the documents at trial.<sup>79</sup> The court resolved the matter primarily under privilege law, holding that the inadvertently disclosed email and report remained covered by the attorney-client and work-product privileges. The court precluded the plaintiffs from offering or admitting into evidence, or making any reference to, the documents, noting that “the defendants [the sender] made a demand for the return of said email and documents promptly upon discovery” and that plaintiffs did not have a substantial need for them, could obtain the substantial equivalent by other means, and would not be unduly prejudiced by the order.<sup>80</sup> It added, “Further, the Court notes that the Rules of Professional Conduct 4.4(b) state 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,’” and there is no evidence that same was done here.”<sup>81</sup> Notably, the court did not order the return of the inadvertently disclosed documents, although defendant did not appear to include this request in its motion. Although the court cited Rule 4.4(b), it used the Rule only as a metric for the quality of the recipient’s ethical behavior as

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<sup>71</sup> *Id.* In many of the cases discussed in this section, the court does not specify whether the receiving party notified the sender of the inadvertent production, whether the sender instructed the recipient about what to do, whether the instructions were ignored, or what actions counsel (as opposed to the parties) took.

<sup>72</sup> *Id.*

<sup>73</sup> 799 N.Y.S.2d 160 (N.Y. Sup. Ct. 2004).

<sup>74</sup> 764 N.Y.S.2d 592 (N.Y. Cnty. Ct. 2003).

<sup>75</sup> *O’Connor*, 2013 WL 3961675, at \*2.

<sup>76</sup> *Id.* at \*3.

<sup>77</sup> *Broxmeyer v. United Capital Corp.*, No. 10581/07, 2012 WL 12045242, at \*2 (N.Y. Sup. Ct. Aug. 2, 2012).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at \*4.

<sup>81</sup> *Id.*

opposed to a decisional factor. In other words, the fact that the recipient did not notify the sender did not lead to a ruling that the documents needed to be returned to the sender (although it was a reason to preclude their use at trial), nor did the failure to notify result in sanctions.

The court in *Young v. Utica First Insurance Co.*, meanwhile, completely ignored Rule 4.4(b), even when invoked by the sending party.<sup>82</sup> During discovery, plaintiff's attorney inadvertently produced a letter between himself and plaintiff regarding a recommended settlement amount in a related case.<sup>83</sup> Defendant subsequently demanded the attorney's entire file, arguing that plaintiff had waived the attorney-client privilege.<sup>84</sup> Plaintiff's counsel argued that defense counsel had failed to comply with Rule 4.4(b) because they did not notify plaintiff upon receipt of the "clearly privileged" inadvertent disclosure.<sup>85</sup> But the court did not address this argument. Instead, it noted that plaintiff had made no objection to the initial use of the "inadvertently disclosed" document when defendant supplied it as an exhibit—seemingly putting the onus on the *sender* to notify the *recipient*, the opposite of what Rule 4.4(b) requires. Ultimately, the court determined that the letter related directly to the issue in the present case, and that the privilege was therefore waived with respect to it.<sup>86</sup>

Several orders and cases issued after the withdrawal of Formal Opinion 2003-04 referenced neither the ethics opinions nor Rule 4.4(b); instead, in contravention of Rule 4.4(b)'s minimal requirement, they seemed explicitly or implicitly to place any burden of notification or recovery on the sender—although they did require return of the inadvertently produced documents. For instance, in *Miller v. City University of New York*, defendants inadvertently produced five pages of educational records without redacting students' confidential information.<sup>87</sup> The court quoted a 2002 case stating that disclosure of a privileged document operates as a waiver of the privilege "unless it is shown that the client intended to maintain the confidentiality of the document, that reasonable steps were taken to prevent disclosure, that the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and that the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued."<sup>88</sup> It then noted that the defendants, the sender, met these requirements by redacting sensitive information, *notifying plaintiffs' counsel immediately upon discovering the inadvertent disclosure*, and requesting the return of the documents to redact non-relevant information.<sup>89</sup> The court ordered that plaintiffs return the documents to defendants so that defendants could redact them.<sup>90</sup> Nowhere did it mention Rule 4.4(b) or the recipient's duty to notify the sender.

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<sup>82</sup> No. 102204/2010, 2013 WL 425261 (N.Y. Sup. Ct. Jan. 22, 2013).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> No. 158924/2014, 2016 WL 2647669, at \*3 (N.Y. Sup. Ct. May 10, 2016).

<sup>88</sup> *Id.* (quoting *N.Y. Times Newspaper Div. of N.Y. Times Co. v. Lehrer McGovern Bovis, Inc.*, 752 N.Y.S.2d 642 (N.Y. App. Div. 2002)).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

Similarly, in *Kirby v. Kenmore Mercy Hospital*, the court did not seem troubled that the recipient failed to notify the sender.<sup>91</sup> There, plaintiff sought damages for the wrongful death of her husband based on defendants' negligent medical treatment, and the New York State Office of Professional Medical Conduct sent plaintiff a report on its investigation into the husband's death, even though the report was not discoverable as a matter of law.<sup>92</sup> It is not clear whether plaintiff or her counsel notified the sender (New York State) of her receipt of the report, but plaintiff did not notify defendants until she testified about it at her deposition, at which point she disclosed it to them.<sup>93</sup> The court did not comment further on these facts. It did, however, enter a protective order pursuant to C.P.L.R. § 3103 to "restore this matter to the 'status quo prior to the [inadvertent] disclosure'"; it is unclear what exactly this entailed.<sup>94</sup>

The court was equally untroubled in *Glavatski v. Broadway E. Townhouses, Inc.*, a Labor Law action, when plaintiff's counsel inadvertently produced to defendants during discovery a letter written by plaintiff's Worker's Compensation attorney, and defense counsel failed to notify either of plaintiff's attorneys.<sup>95</sup> Instead, defense counsel attempted to question plaintiff regarding the letter's contents during a deposition.<sup>96</sup> Plaintiff's counsel stopped the deposition, and defendants moved and cross-moved to compel plaintiff to answer the questions, claiming privilege had been waived.<sup>97</sup> The court held that "the privilege remains," insulating plaintiff from questioning, but it did not address defense counsel's obligations to notify the sender, return the letter, or take any other action, nor did it explicitly require the letter's return.<sup>98</sup>

In several cases where the court ultimately required the recipient to return the documents, the orders provide few details on the circumstances surrounding the disclosure and very little reasoning. For instance, in *TC Ravenswood, LLC v. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania*, the plaintiff who inadvertently produced documents sought an order directing defendant to return the documents and destroy all copies; to strike questions related to the documents from deposition transcripts; and to refrain from using the documents, information contained therein, and related deposition questioning.<sup>99</sup> Without addressing Rule 4.4(b) or the defendant's obligations in this situation, the court ordered defendant to do what the plaintiff had requested.<sup>100</sup> In *Murphy v. 150 W. 140th Street LLC*, a negligence action in which plaintiff sought damages for the wrongful death of her husband, former counsel for defendant inadvertently turned over to plaintiff privileged mental health records of the husband's killer without a court order or authorization from either party.<sup>101</sup> The court directed plaintiff's counsel "to return the privileged documents to [d]efendant's counsel" and to destroy any copies.<sup>102</sup> It then ordered defendant's counsel "to submit the records to the Court for *in camera* review with a privilege log to determine if the interests of justice significantly outweigh the need for and the

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<sup>91</sup> 996 N.Y.S.2d 822 (N.Y. App. Div. 2014).

<sup>92</sup> *Id.* at 823-24.

<sup>93</sup> *Id.* at 823.

<sup>94</sup> *Id.* at 824 (quoting *In re Beiny [Weinberg]*, 517 N.Y.S.2d 474 (N.Y. App. Div. 1987)).

<sup>95</sup> No. 160897/2016, 2018 WL 4964627, at \*1 (N.Y. Sup. Ct. Oct. 12, 2018).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> No. 400759/2011, 2014 WL 284241, at \*1 (N.Y. Sup. Ct. Jan. 24, 2014).

<sup>100</sup> *Id.*

<sup>101</sup> No. 101895/2009, 2013 WL 213027 (N.Y. Sup. Ct. Jan. 8, 2013).

<sup>102</sup> *Id.*

right of the patient’s confidentiality.”<sup>103</sup> Finally, in *Howard v. Diamond 530 Park Avenue Owner, LLC*, plaintiff’s counsel inadvertently produced to defendants emails between plaintiff and her former attorney during the course of discovery.<sup>104</sup> The court did not note how plaintiff’s counsel came to know of the production. It held that the emails fell within the attorney-client privilege and ordered defendants to “return the documents to plaintiff’s counsel together with attorney affirmations indicating that the defendants are no longer in possession of a copy of these documents.”<sup>105</sup>

In sum, few New York state courts have addressed, in published opinions, the obligations of a recipient of a confidential, inadvertently disclosed communication—whether under Rule 4.4(b) or otherwise. Those that have done so have taken varying approaches. Prior to the withdrawal of Formal Opinion 2003-04, some courts required compliance with that Opinion and/or Formal Opinion 730, while others did not even reference the Opinions. After the withdrawal of Formal Opinion 2003-04, courts have continued to use varying approaches—with one referencing withdrawn Formal Opinion 2003-04’s requirements, several requiring return of the communications, and still others requiring even less than Rule 4.4(b)’s instruction. It is therefore difficult to predict how a court might rule in the future, or to synthesize a clear rule under New York state common law regarding inadvertent disclosure of confidential information.

#### **b. Federal Courts in New York State on Inadvertent Disclosure**

Even fewer federal courts in New York have interpreted Rule 4.4(b), but two that did required more than most New York state courts. For instance, one opinion in the Southern District of New York, issued after the NYC Bar’s withdrawal of Formal Opinion 2003-04, still referenced it.<sup>106</sup> In *Stinson v. City of New York*, the City inadvertently produced unredacted documents to the plaintiffs. Upon realizing this, defense counsel notified plaintiffs’ counsel of the inadvertent disclosure of privileged material and asked them to return the CD containing the documents and to destroy any copies.<sup>107</sup> Plaintiffs’ attorneys returned the CD but contended they could retain a copy to review the documents for privilege. The court denied this request but permitted plaintiffs to use the knowledge acquired before the claw back.<sup>108</sup> Although the court relied mostly on Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure and Rule 502(d) of the Federal Rules of Evidence, it also recited Rule 4.4(b).<sup>109</sup> When deciding to permit plaintiffs to use the knowledge they acquired before the claw back, the court relied in part on Formal Opinion 2003-04: “[T]he Association of the Bar of the City of New York has found that while lawyers are ethically bound to return or destroy inadvertently disclosed documents, the non-disclosing lawyer is not ethically barred from using information gleaned prior to knowing or having reason to know that the communication contains information not intended for the non-disclosing lawyer.

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<sup>103</sup> *Id.*

<sup>104</sup> No. 1159302008, 2012 WL 11896768, at \*1 (N.Y. Sup. Ct. Aug. 17, 2012).

<sup>105</sup> *Id.*

<sup>106</sup> See *Stinson v. City of N.Y.*, No. 10 Civ. 4228(RWS), 2014 WL 5090031 (S.D.N.Y. Oct. 10, 2014). Note that the NYC Bar Opinion was referenced only as secondary support for the holding that plaintiffs could use any knowledge they acquired from the inadvertently produced documents before defendants notified them of the disclosure. First, the court cited two S.D.N.Y. cases. Then it paraphrased and cited to Formal Opinion 2003-04.

<sup>107</sup> *Stinson*, 2014 WL 5090031, at \*1.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at \*2.

. . . As such, while Plaintiffs must return remaining copies of the Documents, the Plaintiffs may rely on any information learned prior to notification of the inadvertent disclosure for the purposes of litigating the privilege claim.”<sup>110</sup> *Stinson* thus relied in part on the pre-2009 approach to the inadvertent disclosure of confidential materials in permitting the recipient to use only the information gleaned from such materials prior to notification of its disclosure; Rule 4.4(b)’s text includes no such limitation.

Another S.D.N.Y. opinion, *SEC v. LEK Sec. Corp.*,<sup>111</sup> also issued after the withdrawal of Formal Opinion 2003-04, took a different approach than *Stinson*, in that it did not reference the withdrawn opinion and cited only Rule 4.4(b) and its comments—but it held that the recipient had complied with the Rule by returning the inadvertently produced communications. In *LEK*, defendant failed to produce certain documents responsive to the SEC’s investigative subpoena, so the U.S. Attorney’s Office obtained the records pursuant to a search warrant and provided them to the SEC after filtering out potentially privileged materials.<sup>112</sup> When an SEC attorney discovered a document that included one of the search terms used for filtering, the SEC returned the documents to the U.S. Attorney’s Office.<sup>113</sup> After other potentially privileged materials appeared in subsequent productions, the SEC shared this information with defense counsel, and the SEC segregated these materials.<sup>114</sup> The defendant moved to disqualify the SEC attorneys, contending they violated Rule 4.4, but the motion was denied.<sup>115</sup> The court noted that the SEC’s “careful approach” reflected respect for the attorney-client privilege. It stated that the SEC complied with Rule 4.4(b) by returning the production to the U.S. Attorney’s Office—which had sent the documents—as soon as an SEC attorney identified a potentially privileged document. It added, “As comment 3 [to Rule 4.4] explains, the Rule ‘does not subject a lawyer to professional discipline for reading and using . . . information’ contained in a document inadvertently sent.”<sup>116</sup> Although *LEK* did not cite the pre-2009 ethics opinion, it seemed to read the pre-2009 approach into Rule 4.4(b) when it found that the SEC complied with Rule 4.4(b) by returning the inadvertently disclosed documents to the sender. Rule 4.4(b) would require only that the SEC notify the U.S. Attorney’s office in this case.

Other federal court cases have not discussed Rule 4.4(b) or the recipient’s obligations under other law because most parties in federal court agree on the steps to be taken in the event of an inadvertent disclosure of a confidential communication. For example, in *Greater New York Taxi Association v. City of New York*, the parties agreed to a “Stipulation and Order governing the clawback of confidential information . . . provid[ing] that when a party inadvertently produces protected material, the producing party may notify, in writing, the receiving party and demand that the material be returned or destroyed. The party that received the protected materials must (i) within five (5) business days after receipt of the Clawback Demand, provide to the Producing Party written assurance that it will cease further review, use and/or dissemination of the identified Protected Material and (ii) within ten (10) business days after receipt of the

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<sup>110</sup> *Id.* at \*4.

<sup>111</sup> *SEC v. LEK Sec. Corp.*, No. 17-CV-1789 (DLC), 2018 WL 417596 (S.D.N.Y. Jan. 16, 2018).

<sup>112</sup> *Id.* at \*1.

<sup>113</sup> *Id.* at \*1.

<sup>114</sup> *Id.* at \*2.

<sup>115</sup> *Id.* at \*1, 3, 5.

<sup>116</sup> *Id.* at \*5.

Clawback Demand, destroy the Protected Material or return it to the Producing Party.”<sup>117</sup> The agreement also stated that “nothing contained therein ‘overrides any attorney’s ethical responsibilities to refrain from examining or disclosing materials that the attorney knows or reasonably should know to be privileged.’”<sup>118</sup> Plaintiffs claimed that defendants clawed back documents with “no colorable basis for a privilege claim,” and in response, defendants argued that plaintiffs based this claim on improper review of the clawed-back documents within the five-day window, in violation of the agreement, Federal Rule of Civil Procedure 26(b)(5)(B), and New York Rule of Professional Conduct 4.4(b).<sup>119</sup> The court sided with the defendants: “Upon being notified that the documents were privileged, Plaintiffs should have immediately ceased their review of the clawed back documents. The Court declines to award sanctions at this juncture but admonishes Plaintiffs to strictly comply with any future clawback requests.”<sup>120</sup> Thus, even where an agreement exists, a federal court might interpret Rule 4.4(b) as requiring the strictest compliance with the agreement.

Again, there are a limited number of published federal cases on the receipt of inadvertently-produced confidential information in New York, making it difficult to state a settled rule on the issue. Nonetheless, it is useful to know that *Stinson* and *LEK* both require more with respect to Rule 4.4(b) than most New York state courts. *Stinson* relies in part on the more rigorous pre-2009 approach in permitting the recipient to use only the information gleaned from documents prior to notification by the sender of an inadvertent disclosure. *LEK* seems to read the pre-2009 approach into Rule 4.4(b) in finding that the recipient complied with Rule 4.4(b) by returning the inadvertently disclosed documents to the sender. Perhaps the most important takeaway is that the dearth of federal cases discussing the issue may be due in part to parties entering into clawback agreements.

#### **IV. PRACTICAL GUIDANCE FOR THE NEW YORK LAWYER IN RECEIPT OF INADVERTENTLY DISCLOSED INFORMATION**

The cases that have discussed Rule 4.4(b) or inadvertent disclosure generally present differing approaches. Additionally, the New York ethical rules and civil practice rules defer to each other on the issue of inadvertent disclosure, leaving no clear solution on how a lawyer should handle the issue. This leaves us with the opportunity to provide guidance. The following should serve as a practical guide for the lawyer who is in receipt of inadvertently disclosed confidential information from his or her adversary. Whether we look at this issue as a matter of ethics or from a procedural standpoint, we should arrive at the same practical conclusion, given the paramount ethical requirements surrounding the protection of confidentiality and the requirement that lawyers act as officers of the courts to preserve the integrity of the judicial process.

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<sup>117</sup> No. 13-CV-3089(VSB)(RWL), 2018 WL 2316629, at \*5-6 (S.D.N.Y. May 8, 2018).

<sup>118</sup> *Id.* at \*6.

<sup>119</sup> *Id.* at \*1.

<sup>120</sup> *Id.* at \*6.

### a. When Appearing in New York State Court

In New York, the four appellate departments of the supreme court have authority to “censure, suspend from practice or remove from office any attorney... admitted to practice who is guilty of professional misconduct.”<sup>121</sup> Each department has appointed grievance committees with the power to investigate and prosecute attorney misconduct through disciplinary proceedings.<sup>122</sup> It seems clear that the recipient lawyer will not be subject to disciplinary proceedings if the lawyer complies with Rule 4.4(b)’s requirement and simply notifies the sender of receipt.<sup>123</sup> New York state courts also have been reluctant to sanction attorneys even for failing to follow this step.<sup>124</sup> However, should the sender take steps to claw back the information, and a court is petitioned for guidance, the court may well require its return<sup>125</sup> and forbid its use in the litigation;<sup>126</sup> New York courts do not appear to give much credit to the argument that it will be difficult for the sender to “unring the bell” once the communication has been reviewed.

Beyond consideration of what a lawyer appearing in New York State Court needs to do to avoid discipline or sanctions upon receipt of inadvertently disclosed information is the question of what a lawyer should do to uphold the principle of confidentiality and preserve the integrity of the judicial process. The principle of confidentiality has been considered the most important rule of legal ethics.<sup>127</sup> The NYCLA opined that “[t]he ethical obligation to preserve the confidences and secrets of a client is the sine qua non of the attorney-client relationship.”<sup>128</sup> The New York Rules of Professional Conduct similarly contemplate the centrality of the principle, commenting, “[t]he lawyer’s duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship.”<sup>129</sup>

Nonetheless, a client has the right to diligent and competent representation,<sup>130</sup> and when his or her lawyer receives inadvertently disclosed information from the adversary, this right may appear to conflict with the adversary’s right to confidentiality. But there are many situations in which an attorney may be required to act in a manner that is contrary to his or her client’s interests. A court may issue an order requiring it. The crime-fraud exception to the duty of

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<sup>121</sup> N.Y. Judiciary Law § 90 (McKinney 2013).

<sup>122</sup> See 22 N.Y.C.R.R. § 603.4 (1st Dept.); 22 N.Y.C.R.R. § 691.4 (2d Dept.); 22 N.Y.C.R.R. § 806.4 (3d Dept.); 22 N.Y.C.R.R. §§ 1020.2, 1020.3 (4th Dept.).

<sup>123</sup> See N.Y. Rule of Prof. Conduct 8.4, cmt. 1 (“Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct . . .”).

<sup>124</sup> See, e.g., *Broxmeyer v. United Capital Corp.*, No. 10581/07, 2012 WL 12045242, at \*2 (N.Y. Sup. Ct. Aug. 2, 2012). Although a prudent attorney might notify the sender, refrain from reviewing the communication, and abide by the sender’s instructions—as required by the court in *O’Connor v. Lewis*—even that court gave the recipient a second chance to comply before it would issue sanctions. See No. 11-13553, 2013 WL 3961675, at \*3 (N.Y. Sup. Ct. July 19, 2013).

<sup>125</sup> See, e.g., *Murphy v. 150 W. 140th Street LLC* No. 101895/2009, 2013 WL 213027 (N.Y. Sup. Ct. Jan. 8, 2013).

<sup>126</sup> See, e.g., *TC Ravenswood, LLC v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 400759/2011, 2014 WL 284241, at \*1 (N.Y. Sup. Ct. Jan. 24, 2014).

<sup>127</sup> See Altman, *supra* note 6, at 22, citing Roy Simon, SIMON’S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 81 (2009 edition).

<sup>128</sup> NYCLA Comm. On Prof’l Ethics, Formal Op. 730 (2002).

<sup>129</sup> N.Y. Rule of Prof. Conduct 1.6, cmt. 2.

<sup>130</sup> See N.Y. Rule of Prof. Conduct 1.1, 1.3.

confidentiality is another example, as are the rules that may require an attorney to withdraw from representing a client.<sup>131</sup> Moreover, there are a number of reasons provided in the ethics rules why an *adversary's* right to confidentiality should be respected. New York Rule of Professional Conduct 1.3, which requires a lawyer to “act with reasonable diligence...in representing a client,” also recognizes that a lawyer need not “press for every advantage that might be realized for a client.”<sup>132</sup> And recall that, as discussed above, the standard of “zealous representation,” which might be interpreted as requiring a lawyer to press for every advantage for a client, despite the importance of preserving the confidentiality of adversaries, has been written out of the New York Rules of Professional Conduct.<sup>133</sup> Further to this end, the Rules permit a lawyer to “accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.”<sup>134</sup> This Rule would seem to permit a lawyer, in many circumstances, to comply with the directions of an inadvertent discloser, as the right of the receiving lawyer’s client to diligent and competent representation would not be upset by the forfeiture of the unmerited advantage obtained through the inadvertent disclosure.

Under the New York Rules of Professional Conduct, “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>135</sup> This rule focuses on providing legal advice, not on seeking information advantages for the client that violate the principle of confidentiality. Thus, the concepts of competence and diligence as presented in the Rules do not compel the use of inadvertently disclosed information.

Regardless of the Rules, it does not make sense that a lawyer in receipt of inadvertently disclosed information *must* use it to represent his or her client effectively. It simply is not expected that a lawyer will obtain confidential information from an adversary, nor from any other party through sheer inadvertence. The baseline presumption in our legal system is that effective legal representation is rendered when no confidential information from our adversary is discovered.

There may be times that a lawyer concludes that the prejudice to his or her client will outweigh the interests of a sender who requests return or destruction of inadvertently-produced confidential information, and that the integrity of the judicial process will not be undermined as a result of keeping this information.<sup>136</sup> In such a case, however, the lawyer would need to take into

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<sup>131</sup> See N.Y. Rule of Prof. Conduct 1.6(b), 1.16(c).

<sup>132</sup> N.Y. Rule of Prof. Conduct 1.3, cmt 1.

<sup>133</sup> Compare New York Lawyer’s Code of Professional Responsibility, Canon 7 (“A Lawyer Should Represent a Client Zealously Within the Bounds of the Law”) with New York Rules of Professional Conduct 1.1 and 1.3); see also Altman, *supra* note 6, at 24.

<sup>134</sup> N.Y. Rule of Prof. Conduct 1.2.

<sup>135</sup> N.Y. Rule of Prof. Conduct 1.1.

<sup>136</sup> See N.Y. Rule of Prof. Conduct 1.2(e) (“A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.”); see also *id.* at cmt. 14 (“[P]aragraph (e) effectively creates a limited exception to the lawyer’s obligations under Rule 1.1(c) (a lawyer shall not intentionally ‘fail to seek the objectives of the client through reasonably available means permitted by law and these Rules’ or ‘prejudice or damage the client during the course of the representation except as permitted or required by these Rules’). If the lawyer is representing the client before a tribunal, the lawyer is required under Rule 3.3(f)(1) to comply with local customs of courtesy or practice of the bar or a particular tribunal unless the lawyer gives opposing counsel timely notice of the intent not to comply.”).

account whether his or her client's interests will still be protected by raising the issue with the court even without attaching the actual documents themselves.

**b. When Appearing in Federal Court in New York State**

In federal court, the prudent lawyer must do more than simply meet Rule 4.4(b)'s requirement to notify the sender in order to avoid sanctions, given its interplay with the Federal Rules of Evidence and the Federal Rules of Civil Procedure. Rule 502(b) of the Federal Rules of Evidence provides that the inadvertent disclosure of privileged material does not operate as a waiver if the holder of the privilege “took reasonable steps to prevent disclosure” and “the holder promptly took steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).”<sup>137</sup> That rule in turn provides that:

If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.<sup>138</sup>

To avoid sanctions in federal court, therefore, the receiving lawyer must—in addition to notifying the sender as Rule 4.4(b) (but not the federal rules) requires—“return, sequester, or destroy” the communication and not “use or disclose” it until the privilege claim is resolved; either the privilege holder or the receiving attorney may present the communication to the court for a determination of the claim.<sup>139</sup> Note, however, that two federal cases seemed to import some of the federal requirements into Rule 4.4(b), indicating that the recipient complies with the Rule by *returning* the communication.<sup>140</sup>

A federal court might be more receptive to the “unring the bell” argument, permitting the recipient to use the information gleaned from such materials prior to learning of its privileged nature: the Southern District of New York in *Stinson* relied in part on the pre-Rule 4.4(b) approach to the inadvertent disclosure of confidential materials in permitting the recipient to do so, even after the NYC Bar had formally withdrawn Formal Opinion 2003-04.<sup>141</sup>

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<sup>137</sup> FED. R. EVID. 502(b).

<sup>138</sup> FED. R. CIV. P. 26(b)(5)(B).

<sup>139</sup> *See id.*; FED. R. EVID. 502(b).

<sup>140</sup> *See SEC v. LEK Sec. Corp.*, No. 17-CV-1789 (DLC), 2018 WL 417596 (S.D.N.Y. Jan. 16, 2018); *Stinson v. City of N.Y.*, No. 10 Civ. 4228(RWS), 2014 WL 5090031 (S.D.N.Y. Oct. 10, 2014).

<sup>141</sup> *See Stinson*, 2014 WL 5090031, at \*4.

**c. Whether Appearing in Federal Court or State Court in New York**

While the analysis above provides some guidance, it would be advisable for a lawyer to make decisions based on his or her role as an “officer of the court” in such situations. Just as the New York Rules of Professional Conduct state that lawyers owe a special duty “to avoid conduct that undermines the integrity of the adjudicative process,”<sup>142</sup> the 1993 Advisory Committee notes to Rule 26 of the Federal Rules of Civil Procedure describe lawyers “[a]s officers of the court.” Federal courts have shown more of a willingness to issue sanctions in the name of policing the conduct of lawyers appearing before those courts.

The NYCLA has presented an ethical take on this concept, opining that the principle of confidentiality requires “lawyers to refrain from exploiting confidences and secrets of clients not their own.”<sup>143</sup> Similarly, Altman interprets it to mean that “lawyers have an obligation as officers of the court to help safeguard the key underpinnings of the legal system, including the duty of confidentiality *even to clients not their own.*”<sup>144</sup> When a lawyer in receipt of inadvertently disclosed information notifies the sender and complies with the sender’s instructions, the lawyer is placing the integrity of the judicial process and the principle of confidentiality above his or her individual partisan advocacy.<sup>145</sup>

Just as there is an arguable conflict between the principle of confidentiality and the duty to one’s client as described above, a lawyer must weigh his or her duty to the client against his or her duty to the legal system as a whole. Because the principle of confidentiality is so important to the effective functioning of the legal system, it is the duty of all lawyers to maintain it. There is inevitably a wide range of situations in which information might be inadvertently disclosed. The impact of these situations on the disclosing attorney’s relationship with his or her client will thus vary, but the receiving lawyer will nonetheless need to consider the interests of his or her client along with the interests of the legal system as a whole if he or she is to effectively embody the role of an officer of the court.

**d. Entering into Agreements Regarding Inadvertent Disclosure**

Ultimately, in both state and federal court, parties seeking to avoid protracted disputes and sanctions may wish to enter into agreements detailing the steps each side must take in the event of an inadvertent disclosure—and then comply with such agreements to the letter.<sup>146</sup>

***i. When appearing in federal court in New York state***

Federal Rule of Evidence 502 is the primary mechanism through which parties in federal court enter agreements regarding inadvertent disclosure. Rule 502 was enacted in 2008 to help

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<sup>142</sup> N.Y. Rule of Prof. Conduct 3.3, cmt. 2.

<sup>143</sup> NYCLA Comm. On Prof’l Ethics, Formal Op. 730 (2002).

<sup>144</sup> Altman, *supra* note 6, at 24.

<sup>145</sup> *See id.* at 26.

<sup>146</sup> *See, e.g., Greater N.Y. Taxi Assoc. v. City of N.Y.*, No. 13-CV-3089(VSB)(RWL), 2018 WL 2316629, at \*5-6 (S.D.N.Y. May 8, 2018).

litigants protect against the unintentional waiver of privilege during discovery.<sup>147</sup> In general, Rule 502(b) explains the circumstances under which inadvertent disclosure of privileged information does not constitute waiver of privilege.<sup>148</sup> Under Rule 502(d), a court may issue an order providing that a party's disclosure of documents protected by the attorney-client privilege or work product protection does not waive the privilege.<sup>149</sup>

The protection against the waiver of privilege contemplated by Rule 502(d) is very broad. The statement of congressional intent regarding Rule 502(d) suggests that the privilege of a disclosing party may still be protected by a Rule 502(d) order even if the disclosing party produced documents without conducting an "exhaustive pre-production privilege review[.]"<sup>150</sup> In *Brookfield Asset Management, Inc. v. AIG Financial Products Corp.*, the court held that a Rule 502(d) order, which the court issued before the defendant produced privileged documents, preserved the defendant's right to claw back the privileged documents, "no matter what the circumstances giving rise to their production were."<sup>151</sup> Rule 502(d) therefore provides broader protection than Rule 502(b), which requires the disclosing party to take "reasonable steps to prevent disclosure" in order to avoid waiving privilege.<sup>152</sup> It should be noted, however, that it is still advisable to conduct as rigorous a privilege review as possible. Even though inadvertently produced documents may be clawed back, the disclosure of such material, even if only temporary, may provide a strategic advantage to opposing counsel or prompt opposing counsel to search for sources containing the same information that are not protected.<sup>153</sup> Given the broad protection offered by Rule 502(d), retired Magistrate Judge Andrew Peck (S.D.N.Y.) had good reason to opine that he considered it malpractice to not enter into a Rule 502(d) order before discovery.<sup>154</sup>

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<sup>147</sup> The Explanatory Note on FRE 502 indicates the rule "responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery," which involve voluminous document productions. See FED. R. EVID. 502, EXPLANATORY NOTE ON EVIDENCE RULE 502.

<sup>148</sup> See FED. R. EVID. 502(b) (When made in a federal proceeding, a disclosure does not waive privilege if "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)").

<sup>149</sup> Rule 502(d) states, "A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding." FED. R. EVID. 502(d).

<sup>150</sup> See 154 CONG. REC. H7818–H7819 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence). With respect to FRE 502(d), the statement reads, "This subdivision is designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege to preclude use in litigation of information disclosed in such discovery." *Id.*

<sup>151</sup> See PLC LITIGATION, RULE 502(D) ORDERS: THE MOST EFFECTIVE AND UNDERUSED PROTECTION AGAINST PRIVILEGE WAIVERS (Mar. 5, 2013), Westlaw, citing *Brookfield Asset Mgmt., Inc. v. AIG Fin. Prods. Corp.*, No. 09-cv-8285, 2013 WL 142503, at \*1 (S.D.N.Y. Jan. 7, 2013).

<sup>152</sup> FED. R. EVID. 502(b).

<sup>153</sup> See PRACTICAL LAW LITIGATION, FRE 502(D) ORDER, PRACTICAL LAW STANDARD DOCUMENT 2-526-0807 (2018), Westlaw.

<sup>154</sup> See PLC LITIGATION, *supra* note 152, citing Evan Koblentz, *View from the Bench: Judges on E-Discovery at LegalTech Day Two*, LEGALTECH NEWS (Jan. 31, 2013).

A lawyer who wishes to draft a Rule 502(d) agreement in a federal litigation should consult various sources of guidance before starting to draft. Counsel should review relevant federal and local rules regarding 502(d) agreements and should consult the particular judge's model forms or guidance.<sup>155</sup> Additionally, lawyers should consult the various sources that provide 502(d) drafting guidance and model language.<sup>156</sup>

In terms of the substantive language to use in such agreements, the following two examples have been approved by federal courts. Judge Peck's standard 502(d) language is as follows:

1. The production of privileged or work-product protected documents, electronically stored information ("ESI") or information, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. This Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).
2. Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation or privileged and/or protected information before production.<sup>157</sup>

Language approved by the District Court for the Northern District of California, as part of that Court's "[Model] Stipulated Order Re: Discovery of Electronically Stored Information for Standard Litigation" reads:

- a) Pursuant to Fed. R. Evid. 502(d), the production of a privileged or work-product-protected document, whether inadvertent or otherwise, is not a waiver of privilege or protection from discovery in this case or in any other federal or state proceeding. For example, the mere production of privileged or work-product-protected documents in this case as part of a mass production is not itself a waiver in this case or in any other federal or state proceeding.<sup>158</sup>

These examples should be used as guides for useful points to cover in a 502(d) agreement, rather than verbatim templates. As noted above during discussion of the recent *Greater New York Taxi Association* case, parties frequently add their own language detailing the steps each must take in the event of an inadvertent disclosure.<sup>159</sup>

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<sup>155</sup> See PRACTICAL LAW LITIGATION, *supra* note 154.

<sup>156</sup> Practical Law has published two useful articles on the subject. See *id.*; PRACTICAL LAW LITIGATION, PRIVILEGE WAIVER CLAUSE WITH CLAW-BACK PROVISION, Westlaw, based on an original submission by Amy Longo and O'Melveny & Myers LLP.

<sup>157</sup> Judge Andrew J. Peck, United States Magistrate Judge (retired), Model Rule 502(d) Order (on file with author).

<sup>158</sup> United States District Court, Northern District of California, [Model] Stipulated Order Re: Discovery of Electronically Stored Information for Standard Litigation (on file with author).

<sup>159</sup> See *supra* note 119 and accompanying text.

*ii. When appearing in New York state court*

There is no parallel to FRE 502 in New York state court (despite the opportunity of the Advisory Committee on Civil Practice to rectify the discrepancy), which is part of the reason lawyers in New York need the guidance provided in this paper regarding inadvertent disclosure. However, the New York State Commercial Division has recognized the same gap we have in the New York substantive law regarding the waiver of privilege in the context of inadvertent disclosure. In March 2018, the Chief Administrative Judge of the Courts approved a rule amendment to the Commercial Division’s Statewide Rules of Practice to address the problem.<sup>160</sup> Commercial Division Rule 11-g (N.Y.C.R.R. § 202.70(g)), which addresses confidentiality orders, now incorporates language regarding inadvertent disclosure.<sup>161</sup> The amended rule provides sample privilege clawback language set forth in Appendix E to the rule to be included with the standard form of confidentiality stipulation and order (the “Stipulation and Order for the Production and Exchange of Confidential Information”<sup>162</sup>) used by many Commercial Division judges.<sup>163</sup> Parties including the inadvertent disclosure language would agree to: (1) implement reasonable procedures to ensure that privileged documents are not produced; (2) take reasonable steps to correct errors when privileged information is inadvertently produced, including making timely requests for return of inadvertently produced documents from recipients; (3) return or destroy copies of inadvertently produced privileged information upon the producing party’s request; and (4) neither challenge the producing party’s document review procedure or efforts to rectify production errors, nor claim that the return of the protected information has caused it to suffer prejudice.<sup>164</sup>

Lawyers practicing in New York state court are thus advised to draft and enter into inadvertent disclosure agreements similar to those in federal court. Rule 11-g contains sample language that is useful in drafting such agreements. The sample language reads:

\_\_\_ . In connection with their review of electronically stored information and hard copy documents for production (the “Documents”), the Parties agree as follows:

- a. to implement and adhere to reasonable procedures to ensure that Documents protected from disclosure pursuant to CPLR 3101[c], 3101[d][2] and 4503 (“Protected Information”) are identified and withheld from production.
- b. if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error, including a request to the Receiving Party for its return.
- c. upon request by the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the

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<sup>160</sup> 22 N.Y.C.R.R. § 202.70(g)(c).

<sup>161</sup> *See id.*

<sup>162</sup> 22 N.Y.C.R.R. § 202.70, Appendix B.

<sup>163</sup> *See* Memorandum from Subcommittee on Procedural Rules to Promote Efficient Case Resolution to Commercial Division Advisory Council, regarding Proposal to Mitigate Risk Associated with Inadvertent Privilege Waiver During Disclosure, at 3 (Sept. 5, 2017).

<sup>164</sup> *See* 22 N.Y.C.R.R. § 202.70(g), Appendix E.

Protected Information and destroy all copies thereof. Furthermore, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice.<sup>165</sup>

Parties in the Commercial Division may deviate from this proposed language with approval from the court, and parties in other courts may use this language as a guide for useful points to cover in a clawback agreement, rather than a verbatim template.<sup>166</sup> Such agreements can provide parties with some certainty at a time when the Rules of Professional Conduct, ethics opinions, and case law do not clarify exactly which steps a lawyer must take (or should not take) when he or she receives an inadvertently disclosed confidential communication.

Committee on Professional Responsibility  
Wallace L. Larson, Jr., Chair

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Robert Malionek  
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March 2019

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<sup>165</sup> *Id.*

<sup>166</sup> *See* 22 N.Y.C.R.R. § 202.70(g)(c).

## **APPENDIX A**

Practical Guidance for the New York Lawyer in Receipt of Inadvertently Disclosed Information

## State Civil Litigation

### Relevant rules

- Rule 4.4(b)
- CPLR §§ 4503 & 4548
- Caselaw on use/non-use of information

### Guidance

#### *Promptly notify the sender*

- The receiving lawyer should not be subject to disciplinary proceedings if he or she complies with Rule 4.4(b)'s requirement and simply notifies the sender of receipt.

#### *When in doubt, consider seeking a ruling as to whether the information remains privileged*

- The disclosing party may shoulder the burden of seeking a ruling as to whether the information remains privileged, but the receiving party may bring the issue to the court's attention. This can be in the form of a motion seeking guidance or additional discovery based on the disclosure.
- Counsel should seek the court's attention immediately in order to avoid the risk of subsequent repercussions from the use of the potentially-confidential information.

#### *The receiving lawyer need not use the information, even if it would benefit his or her client – unless the client truly would be prejudiced*

- The receiving lawyer may be permitted to comply with directions of an inadvertent discloser, insofar as the right of his or her client to diligent and competent representation is not upset by the forfeiture of the unmerited advantage obtained through inadvertent disclosure. See N.Y. Rule of Prof. Conduct 1.2.
- In order to uphold the principle of confidentiality, which the Rules contemplate as being crucial to the attorney-client relationship, the receiving lawyer may choose to respect an adversary's right to confidentiality.
- There may be times that a lawyer concludes that the prejudice to his or her client will outweigh the interests of a sender who requests return or destruction of inadvertently-produced confidential information, and that the integrity of the judicial process will not be undermined as a result of keeping this information. In such a case, however, the lawyer would need to take into account whether his or her client's interests will still be protected by raising the issue with the court even without attaching the actual documents themselves.

#### *Enter an agreement regarding inadvertent disclosure*

- Before discovery, counsel should enter into an inadvertent disclosure agreement similar to those in federal court. Note, however, that there is no parallel to FRE 502(d) in New York state court.
- When drafting an inadvertent disclosure agreement, counsel should consult sources that provide model language, for example, the language presented *supra* at 22-23.

*A lawyer who receives inadvertently disclosed confidential information should consider the context in order to determine which rules and law apply*

### Transactional

#### Relevant rule

- Rule 4.4(b)

#### Guidance

#### *Promptly notify the sender*

- In addition, a party has, as an available option even in a transactional setting, going to court for guidance, *e.g.*, by asking for a declaratory judgment.

### Whether in State or Federal Civil Litigation

A lawyer should take into account his or her role as an "officer of the court." A lawyer must weigh his or her duty to the client against his or her duty to protect the legal system as a whole. Because the principle of confidentiality is so important to the effective functioning of the legal system, it is the duty of all lawyers to honor it, within the bounds of the representation. A lawyer thus must balance the interests of his or her client along with the interests of the legal system as a whole in order to embody effectively the role of an officer of the court.

## Federal Civil Litigation

### Relevant rules

- Rule 4.4(b)
- FRCP 26 & 45
- FRE 402
- Caselaw on use/non-use of information

### Guidance

#### *In order to avoid sanctions, the prudent lawyer must do more than simply meet Rule 4.4(b)'s requirement to notify the sender*

- Under FRCP 26(b)(5)(B), the receiving lawyer must "return, sequester, or destroy" the communication, "not use or disclose it" until the privilege claim is resolved, and "take reasonable steps to retrieve the information if the [receiving lawyer] disclosed it before being notified."
- It is advised that the lawyer return, rather than sequester or destroy, the information because two federal courts have suggested doing so under Rule 4.4(b) (even though the Rule does not say so).
- Either the privilege holder or the receiving attorney may present the communication to the court for a determination of the claim.

#### *Enter an agreement regarding inadvertent disclosure*

- Counsel should enter into a Rule 502(d) order before discovery.
- Under FRE 502(d), a court may issue an order providing that a party's disclosure of documents protected by the attorney-client privilege or work product protection does not waive the privilege.
- When drafting a Rule 502(d) order, counsel should review relevant federal and local rules regarding 502(d) agreements, consult the particular judge's model forms or guidance, and consult sources that provide model language. For model 502(d) language, see *supra* at 21-22.