A misdirected email from opposing counsel! Looks like he hit the "send" button to the wrong email group. Yikes. Ok, I know these rules. I learned them years ago. Where is that 1990's CLE? What can I do with this email? Whoaa—hold that thought and dump that old CLE! Unfortunately the world keeps changing and there are a few new wrinkles. . .

Inadvertent Disclosure: It's a Whole New Ballgame

BY JOHN K. VILLA

The Olden Days

Not so long ago, the answer to this question would have been clearer, as many jurisdictions imposed affirmative obligations on a lawyer who *received* privileged information that had been inadvertently disclosed by an opposing party. Relying on ABA Formal Opinion 92-368,[1] these jurisdictions required that a lawyer who received privileged material through an inadvertent disclosure take the following steps: (1) refrain from further examination of the material; (2) notify opposing counsel of their receipt; and (3) abide by opposing counsel's instructions concerning disposition of the materials.[2] This threefold obligation was not premised on a particular ethical rule, but on general principles of confidentiality underlying the professional conduct rules,[3] and was viewed as consistent with the majority position that inadvertent disclosures do not necessarily result in a waiver of the attorney-client privilege.[4]

Nowadays, however, the rules are not as clear. Recent amendments to the Model Rules have effectively nullified the guidance set forth in ABA Formal Opinion 92-368, though not all jurisdictions have incorporated these amendments into their rules of professional conduct. And, to confuse matters further, modifications have been made to the federal rules of civil procedure that impose different obligations with respect to inadvertent disclosures. To get a better grasp of the issues, let's stroll through these various rules.

Model Rules/State Professional Conduct Rules

Issued in 1992, ABA Formal Op. 92-368 articulated the three-part rule described above and imposed the primary duty on the receiving lawyer. It received considerable criticism for the absence of an explicit provision in the Modes Rules to support the imposition of the obligations set forth in the opinion.[5] For this reason, the Ethics 2000 Commission amended Model Rule 4.4, governing the rights of third persons, by adding a new paragraph governing a lawyer's duty upon receipt of inadvertently disclosed privileged information. Paragraph (b) provides:

> *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.*[6]

As is apparent from its face, Rule 4.4(b), unlike Formal Op. 92-368, does not impose additional obligations on the recipient lawyer, other than the duty to notify the sender if the lawyer "knows or reasonably should know that the document was inadvertently sent." According to the commentary, the purpose of the notification requirement is to enable the *sending lawyer* to take protective measures.[7] Any further obligations on the recipient lawyer, the commentary explains, "is a matter of law beyond the scope of these Rules."[8] The commentary further notes that, while some lawyers may voluntarily choose to return the document, the decision to do so, when not required by applicable law, "is a matter of professional judgment ordinarily reserved to the lawyer."[9]

Prompt notification, therefore, is the only requirement imposed on a recipient lawyer by Model Rule 4.4(b). Indeed, clarified by the ABA in a more recent opinion, Rule 4.4(b) "does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer."[10] Nor does the rule explicitly prohibit the subsequent use of the privileged information obtained after reviewing the inadvertently sent material.[11] Instead, all responsibility falls on the *sending* lawyer to take appropriate action after being notified of the inadvertent disclosure.[12]

Many state ethics commissions concur with the approach set forth in Model Rule 4.4(b)[13]; some predictably, don't. For example, some jurisdictions follow closely the approach set forth in former ABA Formal Op. 92-368.[14] In other jurisdictions, the extent of a receiving lawyer's duty depends on *when* that lawyer obtains knowledge that the documents have been inadver-

JOHN K. VILLA is a partner with Williams & Connolly LLP in Washington, DC. He specializes in corporate litigation (civil and criminal) involving financial services directors', officers', and lawyers' liabilities, securities, and related issues. He is an adjunct professor at Georgetown Law School and a regular lecturer for ACC. He is also the author of *Corporate Counsel Guidelines*, published by ACC and West. He can be reached at jvilla@wc.com.

tently sent—i.e., before or after review of the documents—a dicey question as it turns on the recipient lawyer's good faith.[15] And, in jurisdictions that have not amended their rules to conform to Model Rule 4.4(b), there may be no ethical obligation to notify and no ethical prohibition against use of the inadvertently sent material, at least where the material consists of embedded metadata in electronic documents.[16]

This thrusts upon the receiving lawyer (if she first sees the issue) a decision on choosing the first appropriate ethical rule, and then applying it correctly. Model Rule 8.5(b) dictates choice of law. Where a matter is before a tribunal, the ethical rules of the jurisdiction where the tribunal sits prevail (see Rule 8.5(b)(1)). If there is no pending action, the jurisdiction where the lawyer's conduct occurred is usually the law unless trumped by the "predominant effect" test. (Model Rule 8.5(b)(2)).

Federal Discovery Rules

To introduce further complications, the rule may be different in federal courts or in states that have adopted the federal rule. In December 2006, Rule 26 of the Federal Rules of Civil Procedure was amended, in part, to provide a procedure for claims of privilege with respect to inadvertent disclosures during discovery. Subsection (b)(5)(B) provides that:

> *[i]f 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.*[17]

Like former ABA Formal Op. 92-368, amended Rule 26(b)(5)(B) imposes upon the receiving lawyer the duty to "return, sequester, or destroy" the inadvertently disclosed information, and prohibits use of the information until resolution of the claim of privilege. But, unlike either former ABA Formal Op. 92-368 or current Model Rule 4.4(b), the amended federal rule places the responsibility for notification on the producing party—not the receiving lawyer. Thus, until the producing party makes a claim of privilege, there is no duty on the part of the receiving attorney with respect to the return, maintenance, or use of the inadvertently disclosed information.

Query if our hero looks at the privileged documents and proves to be wrong, what will happen? Disqualification, perhaps, or worse.[18]

What Should In-house Counsel Do?

So how do we handle the misdirected email?

Don't read it until you figure out the rules. This is always true.

The safest course is always to notify the sender and then agree to litigate whether you can read the documents. That is clearly the best approach if the action is pending in a state that either still adheres to ABA Formal Op. 92-368 or has adopted Model Rule 4.4(b). Otherwise, there is a reasonable chance that *our lawyer's* failure to provide notice of the inadvertent disclosure to the producing party would result in sanctions against the recipient, which could include disqualification,[19] as long as the privileged nature of the documents is reasonably apparent.[20]

If the action is a federal case pending in federal court, different rules apply, but if the producing counsel learns of the inadvertent disclosure and makes a claim of privilege, our lawyer may still be subject to sanctions if she continues reviewing the documents without waiting for the court to make a determination of the claim of privilege.

Have a comment on this article? Email editorinchief@acc.com.

NOTES

1. *ABA Comm. on Ethics and Prof'l Responsibility,* Formal Op. 92-368 (1992).
2. *Id.* at ¶ 4. *See Transportation Equipment Sales Corp. v. BMY Wheeled Vehicles,* 930 F. Supp. 1187 (N.D. Ohio 1996); *RTC v. First of America Bank,* 868 F. Supp. 217 (W.D. Mich. 1994); *see also* Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Eth. Op. 2004-F-150 (Sept. 17, 2004); N.Y. L.A. Eth. Op. 730 (July 19, 2002); Va.

L E Op. 1702 (March 24, 1997). The ABA imposed similar obligations on an attorney who received unsolicited privileged or confidential materials of an adversary from an unauthorized source, unless the law recognized a right to use such material despite their transmittal from an unauthorized sender. *See ABA Comm. on Ethics and Prof'l Responsibility*, Formal Op. 94-382 (1994).

3. See *ABA Comm. on Ethics and Prof'l Responsibility*, Formal Op. 92-368, at ¶¶5-7.
4. *Id.* at ¶15. While some courts still adhere to the strict view that inadvertent disclosures result in a waiver of the privilege, see *FDIC v. Singh*, 140 F.R.D. 252, 253 (D. Me. 1992), most courts adhere to a more flexible view that inadvertent disclosures will not result in a waiver where reasonable precautions were undertaken to preserve the confidentiality of the information. *See Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 291 (D. Mass. 2000). As to inadvertent disclosures and the issue of waiver generally, *see* J. Villa, *Corporate Counsel Guidelines*, §1:23 (Thomson/West 2007).
5. *See* ABA Ethics 2000 Commission, *Report on the Model Rules of Professional Conduct: Rule* 4.4—Reporter's Explanation of Changes, available at *www.abanet.org/cpr/e2k/e2k-rule4.4rem.html.*
6. *ABA Model Rules of Professional Conduct*, Rule 4.4(b).
7. *Id.* at cmt. [2].
8. *Id.*
9. *Id.* at cmt. [3].
10. *ABA Comm. on Ethics and Prof'l Responsibility*, Formal Op. 05-437 (2005) (withdrawing Formal Op. 92-368); *see also ABA Comm. on Ethics and Prof'l Responsibility*, Formal Op. 06-440 (2006) (withdrawing Formal Op. 94-382, which addressed the unsolicited receipt of privileged or confidential materials from an unauthorized source).
11. *See ABA Comm. on Ethics and Prof'l Responsibility*, Formal Op. 06-442 (2006) (addressing Rule 4.4(b)'s application to the disclosure of metadata, and explaining that "Rule 4.4(b) is silent as to the ethical propriety of a lawyer's review or use of [inadvertently sent information]").
12. *ABA Model Rules of Professional Conduct*, Rule 4.4(b), cmt. [2].
13. *See Or. State Bar Ass'n Bd. of Governors*, Formal Op. No. 2005-150 (Aug. 2005); *Pa. State Bar*, Eth. Op. No. 2005-22 (2005); *Utah State Bar Eth. Advisory Op. Comm.*, Op. No. 99-01 (Jan. 29, 1999); *see also N.Y.C. Ass'n. B. Comm. Prof. Jud. Eth.*, Eth. Op. 2003-04 (Dec. 2003). One state court, in approving a similar rule for inadvertent disclosures, has described the duty imposed on the receiving lawyer as "a reasonable standard of professional conduct." *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 767 (2007) (approving and applying standard set forth in *State Comp. Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th 644, 82 Cal. Rptr. 2d 799 (1999), that upon receipt of inadvertently sent privileged materials lawyer should refrain from examining the materials any more than necessary to establish privileged nature, and should notify sending lawyer immediately of receipt of privileged materials).
14. *See Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn.*, Formal Eth. Op. 2004-F-150 (Sept. 17, 2004); *Va. L.E. Op.*, No. 1702 (March 24, 1997); *see also N.Y. Cty. Law Ass'n. Comm. Prof. Eth*, Eth. Op. 730 (July 19, 2002).
15. The Legal Ethics Committee of the DC Bar has opined that the duty, if any, of a recipient lawyer depends upon whether the lawyer knows that the document was inadvertently sent before reviewing the document, or whether the lawyer only realizes that the document was inadvertently sent after making a good faith review of the document. In the former situation, the lawyer must "seek guidance from the sending lawyer and, if that lawyer confirms the inadvertence of the disclosure and requests return of the material, unread, the receiving lawyer should do so." *DC Bar Legal Eth. Comm.*, Eth. Op. 256 (1995). In the latter situation, however, no such duty exists and no ethical violation occurs if the lawyer retains and uses the document. *Id.* Consistent with this opinion, Rule 4.4(b) of the DC Rules of Professional Conduct has recently been amended to require the receiving lawyer to notify the sending lawyer and to "abide by the instructions of the sending party regarding the return or destruction of the writing," if the receiving lawyer knows before examining the writing that it has been inadvertently sent. *See DC Rule of Professional Conduct*, Rule 4.4(b), cmt. [2]; *see also Colo. Rules of Professional Conduct*, Rule 4.4 (similar rule).
16. *See Md. State Bar Ass'n Comm. on Ethics*, Formal Op. 2007-09 (2007). The ABA and other jurisdictions that have addressed the issue of a receiving lawyer's duty with respect to inadvertent disclosures of metadata have generally followed their respective positions on inadvertent disclosures in the context of other types of information. *See ABA Comm. on Ethics and Prof'l Responsibility*, Formal Op. 06-442 (2006); *D.C. Bar Legal Eth. Comm.*, Eth. Op. 341 (2007).
17. Fed. R. Civ. P., Rule 26(b)(5)(B).
18. Depending upon counsel's conduct after realizing her error, she may not only be booted from the case, see *Maldonado v. New Jersey ex rel.* Administrative Office of Courts—Probation Division, 225 F.R.D. 120, 138 (D. N.J. 2004); *see also Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 767-768 (2002), but she may risk having the case dismissed. See *Perna v. Electronic Data Corp.*, 916 F. Supp. 388 (D. N.J. 1995).
19. *See Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 767-768 (2007) (holding that disqualification was proper remedy where plaintiffs' counsel failed to notify opposing counsel of possession of clearly privileged documents that had been inadvertently obtained, but subsequently used and disseminated documents to plaintiffs' experts and other attorneys).
20. Likewise, if the privileged nature of the documents are apparent on their face, sanctions may also be possible under the ethics rules of Colorado and the District of Columbia, which premise the receiving lawyer's duty, or lack thereof, on when he realizes that the privileged materials were sent inadvertently, i.e., either before or after reviewing them. *See* n. 15, *supra; cf. In re Kagan*, 351 F.3d 1157, 1163-1164 (D. D.C. 2003) (applying DC Bar Op. 256 and finding that no misconduct occurred with respect to use of confidential information inadvertently sent to plaintiff's counsel where confidential nature of document became apparent only after counsel had reviewed document).