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The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

DEAR FORUM:

I am negotiating with an adversary over the terms of a complicated contract that has gone through numerous revisions. My adversary and I have been exchanging redlined Word documents and PDFs showing the edits. When one moves the cursor over the edits, the program identifies who made the changes and the date and time of the edits. This has been helpful to both sides because there have been so many revisions and sometimes it is difficult to remember who made each edit. Sometimes I add comments to my client in the document when I send proposed edits for her review. Before I send it back to my adversary, however, I always make sure to remove my comments to my client.

In the last draft I received from my adversary, it included a tiny note bubble that I clicked on because I thought the comment was intended for me. But when I opened it, I discovered the comment was my adversary's comment to *his* client. I am sure it wasn't for me since it said, "They'll never go for this sentence and I don't think we should push back if they strike it." I realized from the metadata in the edits that the sentence at issue was added by the adversary client, not the attorney. I am not sure what to do. My adversary was right; I wouldn't have gone for it and I am definitely going to strike that sentence in the next version. Do I have an obligation to tell my adversary that I saw his comment? I don't want this to derail all of the time and work we spent negotiating this contract and I really don't think the comment had any impact on me because I certainly would have rejected the proposal. Even if I do tell my adversary about the comment, what happens if I discover other metadata that is beneficial to my client? Am I permitted to review and use information I obtain from the metadata in the document?

This got me thinking about all of the information that gets embedded in documents that we are exchanging with adversaries. Although I am pretty familiar with the information that is embedded in the documents, these programs are adding new features all the time and there is probably some information that is embedded which isn't even on my radar. What are my obligations to my client when it comes to eliminating the metadata in documents I send to an adversary? In litigation discovery, are there any bright line rules as to what metadata I can use in documents produced by my adversary or what I should be removing before sending to an adversary?

Sincerely,
B. Hinds Sedock

DEAR B. HINDS SEDOCK:

Inadvertent disclosure is a subject that the *Forum* has addressed several times. *See, e.g.,* Peter V. Coffey, *Attorney Professionalism Forum*, N.Y. St. B.J., February 2010, Vol. 82, No. 2. Most of us communicate electronically with clients and opposing counsel on a daily basis. Based upon the sheer frequency of the electronic communications that we use in our practices, an inadvertent disclosure is a basic fact of life that all of us will experience at some point in our careers, either as the receiving attorney or transmitting attorney.

So how should one react, and what are our responsibilities as lawyers when faced with an inadvertent disclosure? Section 4.4(b) of the New York Rules of Professional Conduct (RPC) specifically addresses inadvertent disclosure and tells us 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." A "writing" is defined by RPC 1.0(x) as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, email, or electronic communication or any other form of recorded communication or recorded representation." RPC 4.4(b) is intended to include not only "paper documents, but also email and other forms of electronically stored information – including embedded data (commonly referred to as 'metadata') – that is subject to being read or put into readable form." RPC 4.4(b) Comment [2]. A document, electronically stored informa-

tion, or other writing is "inadvertently sent" within the meaning of RPC 4.4(b) "when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or other writing is accidently included with information that was intentionally transmitted." *Id.* RPC 4.4(b) only applies to documents that were "inadvertently sent." Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1351 (2016 ed.). The rule would not apply if a lawyer received a document that was deliberately sent to that lawyer's attention. *Id.* For example, a document obtained improperly, and then transmitted by a person other than the original owner. *Id., citing* New York City Bar Association (NYCBA) Prof'l Ethics Comm. Formal Op. 2012-01 (2012).

Under RPC 4.4(b), a lawyer only has one affirmative obligation upon receiving materials that were inadvertently sent: the sender must be notified "promptly." *See* RPC 4.4(b). Promptly means, "as soon as reasonably possible, as the rule is designed in part to eliminate any unfair advantage that would arise if the lawyer did not provide notice." *See* NYCBA Prof'l Ethics Comm. Formal Op. 2012-01 (2012). While RPC 4.4(b) on its face does not specifically prohibit lawyers from indulging in their curiosity and reading an inadvertently sent document, even when the lawyer "knows or reasonably should know that it was inadvertently sent," you should be mindful of several pitfalls that may not be all that obvious. RPC 4.4(b) only goes so far as to address a lawyer's ethical obligations, but does not consider or address any other legal consequence that may come into play as a result of reviewing an inadvertently sent document.

The Comments to RPC 4.4 set forth explicit cautionary warnings to lawyers regarding the receipt of inadvertently sent materials and their treatment. For example, RPC 4.4 Comment 2 unequivocally warns 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.*" RPC 4.4 Comment [2] (emphasis added). RPC 4.4 Comment 3 explains that, "Refraining from reading or continuing to read a document or other writing once a lawyer realizes that it was inadvertently sent, and returning the document to the sender or permanently deleting electronically stored information, honors the policy of these Rules to protect the principles of client confidentiality." RPC 4.4 Comment [3]. RPC 4.4 Comment 3 goes on to note that substantive or procedural rules may require an attorney to stop reading, return and/or delete the material, but where the applicable law or rules don't address the circumstances, the decision is a matter of professional judgment for the attorney. *Id.,* citing RPC 1.2, 1.4.

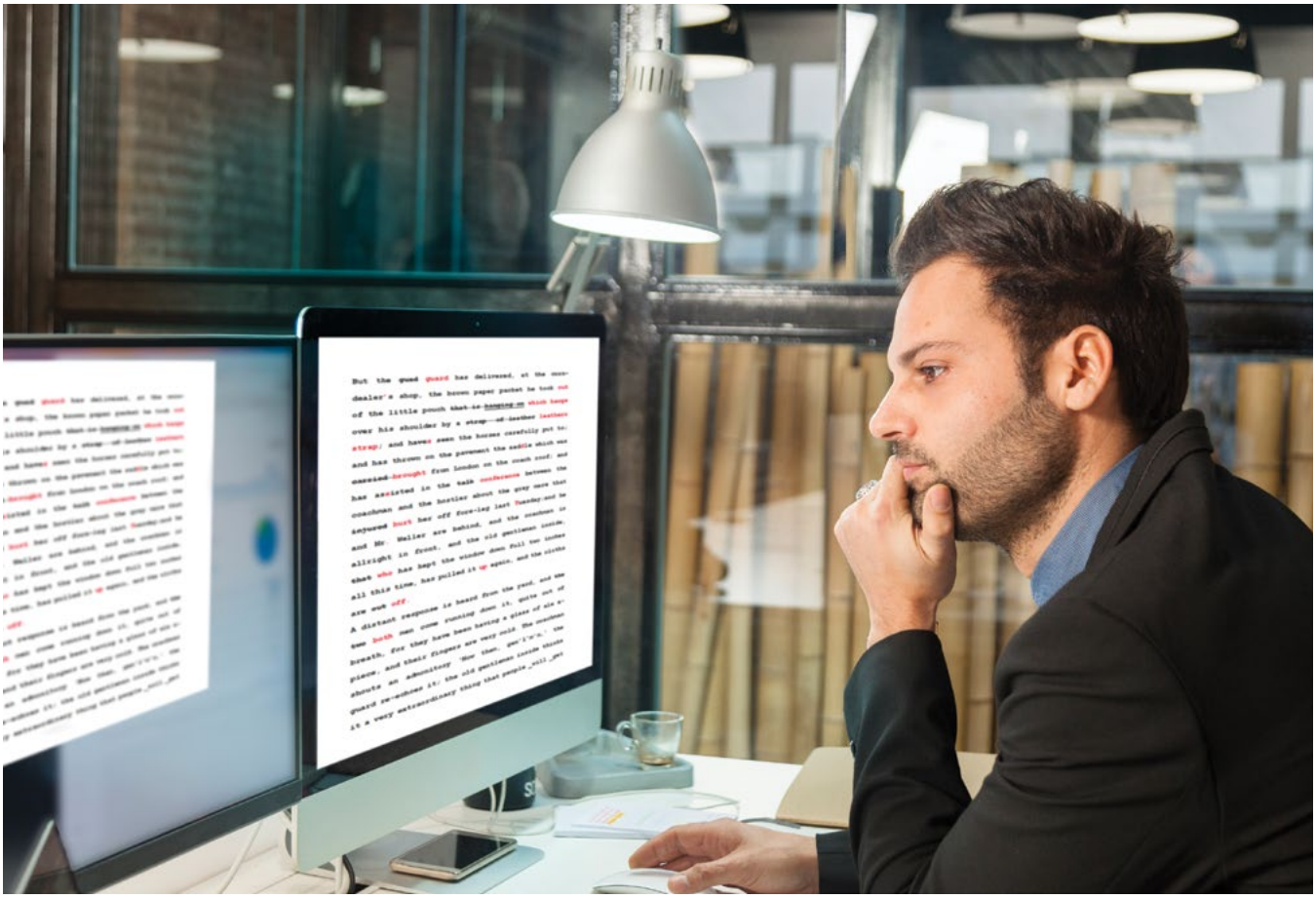
These concerns have prompted criticism of RPC 4.4(b) since its adoption, and recommendations have been made to amend the rule by adding several affirmative obligations. *See* James M. Altman and Glenn B. Coleman, *Inadvertent Disclosure and Rule 4.4(b)'s Erosion of Attorney Professionalism*, N.Y. St. B.J., November/December 2010 Vol. 82, No. 9. Indeed, in July 2011 the Committee on Attorney Professionalism proposed to NYSBA's Committee on Attorney Standards and Conduct (COSAC) that Rule 4.4(b) be amended and replaced with a new rule providing additional requirements on attorneys receiving an inadvertent disclosure. *See* Anthony E. Davis, *Inadvertent Disclosure – Regrettable Confusion*, N.Y. St. L.J., Nov. 7, 2011. The proposed amendments, if enacted, would have required that lawyers do more than notify the sender. The recommended changes were thought necessary to protect client information by requiring the recipient to: (1) cease reading the document once the recipient realizes the document was inadvertently disclosed; (2) notify the sender of the receipt; (3) return, sequester or destroy the materials; (4) refrain from using the inadvertently disclosed documents; and (5) take reasonable steps to retrieve any documents circulated prior to the realization that the documents were inadvertently sent. *See* Vincent J. Syracuse and Amy S. Beard, *Attorney Professionalism Forum*, N.Y. St. B.J., Febr. 2012, Vol. 84, No. 2. The fact that the proposed amendments were not enacted is not necessarily the end of the story, and there are many who still believe that, ethical rules aside, attorneys should still do much more than simply notify the producing party.

With respect to the inadvertent exchange of metadata specifically, ethics committees across the country have expressed different opinions. "Metadata" is "loosely defined as data hidden in documents that is generated during the course of creating and editing such documents." *See* NYSBA Comm. on Prof'l Ethics, Op. 782 (2004). In its 2004 opinion, the New York State Bar Association Committee on Professional Ethics ("NYSBA Committee") opined that attorneys receiving documents with metadata "have an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets" and cited to its prior opinion that using computer technology to intentionally mine metadata contained in an electronic document would constitute "an impermissible intrusion on the attorney-client relationship." *Id.*, citing NYSBA Comm. on Prof'l Ethics, Op. 749 (2001). In 2001, the NYSBA Committee observed, "[w]e believe that in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine or that may otherwise constitute a 'secret' of another lawyer's client would violate the letter and spirit

of these Disciplinary Rules." NYSBA Comm. on Prof'l Ethics, Op. 749 (2001).

Expressing a different view, the American Bar Association Standing Committee on Ethics and Professional Responsibility ("ABA Committee") opined that the lawyer was not prohibited from extracting metadata intentionally in ABA Comm. on Ethics and Prof'l Responsibility, Formal 06-442. (American Bar Association (ABA) Model Rule 4.4(b), also addressing inadvertent disclosures, is nearly identical to RPC 4.4(b).) The ABA Committee reasoned, "the [ABA Model Rules of Professional Conduct] do not contain any specific prohibition against a lawyer reviewing and using embedded information in electronic documents." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006). *See also* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1353 (2016 ed.). The New York County Lawyer's Association (NYCLA) Committee on Professional Ethics specifically rejected the ABA's position and opined that "[a] lawyer who receives from an adversary electronic documents that appear to contain inadvertently produced metadata is ethically obligated to avoid searching the metadata in those documents." NYCLA Prof'l Ethics Comm., Op. 738 (2002). Ethics committees in New York have been relatively consistent in stating that inadvertently produced metadata should not be examined by receiving attorneys. Thus, in your situation, the most prudent course of action is to promptly advise your adversary of the discovery of the inadvertent disclosure of his attorney-client communications, as required by RPC 4.4(b), and not engage in any further review or use of the metadata you discovered.

Various ethics committees have also expressed different opinions on a lawyer's duty to protect metadata when transmitting documents. The ABA Committee does not cite to any specific duty of a lawyer pertaining to metadata, but has offered options for eliminating metadata from documents, including "scrubbing metadata," printing or scanning documents so that only the image is transmitted to an adversary and negotiating a confidentiality agreement or protective order with an adversary that allows for the "claw back" or "pull back" of inadvertently sent embedded information. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006). The NYSBA Committee has opined that a lawyer who "uses technology to communicate with clients *must use reasonable care* with respect to such communication, and therefore must assess the risks attendant to the use of



that technology and determine if the mode of transmission is appropriate under the circumstances." *See* NYSBA Comm. on Prof'l Ethics, Op. 782 (2004) (emphasis added). It should also be noted that a lawyer is always bound by RPC 1.6(a) which prohibits an attorney from knowingly revealing a client's confidential information. Based upon the foregoing, best practices likely indicate engaging in routine scrubbing of documents, including

drafts of agreements (the situation you specifically raised in your inquiry) to prevent any inadvertent disclosure of attorney-client communications.

In the litigation context, there are rules that vary from court to court that may determine the required course of conduct. For example, for attorneys handling cases in Federal Court, Federal Rule of Civil Procedure (FRCP) 26(b)(5)(B), imposes specific obligations that go beyond the RPC 4.4(b). As stated in the rule, once a producing party notifies the receiving party of a claim of privilege, 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." A violation of this rule can have serious consequences for attorneys. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1353-54, citing *Am. Exp. v. Accu-Weather, Inc.*, 1996 WL 346388 (S.D.N.Y. June 25, 1996). (Even before F.R.C.P. 26(b)(5)(B) was introduced in 2006, the court relied upon ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92–368 and sanctioned attorneys who ignored opposing counsel's instructions to return a misaddressed unopened package containing privileged documents).

In addition, reaching an agreement with opposing counsel concerning the claw back of any privileged documents is also prudent for the exchange of discovery. The New York Commercial Division recently adopted new suggested claw back language in Rule 11-g(c) that parties are encouraged to agree to at the outset of a matter. 22 N.Y.C.R.R. § 202.70, Rule 11-g(c). The rule states that, "upon request by the Producing Party for the return of Protected Information inadvertently produced the Receiving Party shall promptly return the 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." *Id.* at Appendix E. Reaching this type of agreement can alleviate many of the complicated issues pertaining to the inadvertent exchange of information. Generally, in the context of litigation discovery, attorneys should be preserving metadata contained in original documents collected from their clients that are responsive to discovery demands. Depending on the allegations and issues raised in the case, these documents may need to be produced with all of their applicable metadata if they are not protected by any available privilege or work-product protection.

In the end, what one does or does not do when one receives inadvertently produced material may not be a simple matter of applying the plain language of RPC 4.4(b) and any court rules that may be applicable. Basic concepts of attorney professionalism and yes, even civility, may often dictate a more nuanced approach. Lawyers must balance ethical obligations, legal obligations and their duties to the client when they respond to an inadvertent disclosure.

Sincerely,
The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I represented a client in a dispute including allegations that my client improperly took confidential proprietary data from the plaintiff. In the course of discovery, my firm obtained a copy of that data from our client which we maintained on our computer network. After some initial discovery and motion practice in the case, we were replaced as counsel. At the time, I believed that we were not owed any additional fees by the now former client, and I turned over the files requested by the incoming counsel, including a copy of the data. I kept digital copies of all of the files in the case, however, including the data. I later learned that our firm was owed significant fees by the client and, when advised of this, the former client started to complain about our work in the case and refused to pay our fees. Although I believe that the former client's complaints were not serious, and were likely part of an attempt to negotiate a reduction in fees, we issued a retaining lien and declined to provide any further files requested by the new counsel until the payment issue was resolved.

I just received a call from the former client's new counsel who said that they settled the underlying matter with the plaintiff, but as part of the settlement, all copies of the data needed to be destroyed within the next week, including any copies we have in our files. I reminded the new counsel that we had a lien on the file, and we had not signed any agreement to destroy the data. The new counsel quickly said that we had no right to hold the client's data "hostage" and we had an obligation to destroy the client's data if the client directed it.

I don't believe that the new counsel is correct. I think that I have the right to retain copies of my former client's files (including discovery materials) in order to defend myself against any accusations of malpractice by the client. I don't want to prejudice the former client, but I think I have a legitimate reason to retain the data. Can I demand that my outstanding legal fees be paid and request a release from any wrongdoing from my former client as a condition of my destruction of the data?

Sincerely,
Lee Ninplace

Honoring Vincent J. Syracuse for his 20 years of leadership and service to the Ethics and Civility CLE program.

Vincent J. Syracuse was honored for 20 years of leadership and service to the Ethics and Civility Program in New York City in April. He is pictured with Committee on Attorney Professionalism Chair Andrew Oringer, above left, and Commercial and Federal Litigation Section Chair Robert Holtzman, above right. The program is co-sponsored by the Committee and the Section.