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The February 2010 Attorney Professionalism Forum referred to in this article is reprinted here, starting on page 28.

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# Inadvertent Disclosure and Rule 4.4(b)'s Erosion of Attorney Professionalism

By James M. Altman

New York lawyers became subject to an entirely new rule of professional ethics regarding inadvertent disclosure on April 1, 2009, when the New York Rules of Professional Conduct (Rules) replaced the New York Code of Professional Responsibility (Code). Rule 4.4(b) provides simply: "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."<sup>1</sup> Because Rule 4.4(b)'s use of the term "document" refers to readable electronic information as well as paper documents,<sup>2</sup> Rule 4.4(b) governs the "errant email" as well as the "errant fax."

Although the Code was the backbone of New York's legal ethics regime for almost 40 years, it never contained a disciplinary rule specifically addressing inadvertent disclosure. Nonetheless, in 2002 and 2003, two of New York's most important expositors of legal ethics – the ethics committees of the New York County Lawyers' Association (NYCLA) and of the City Bar, respectively – had opined, with certain qualifications, that a lawyer who receives

an inadvertently disclosed document (the "Receiving Lawyer") had three ethical obligations: first, not to examine the document after receiving notice or realizing that the document had been inadvertently sent; second, to notify the person who had sent the document (the "Sender") of its receipt; and, third, to abide by the instructions of the Sender as to the disposition of the document.<sup>3</sup> Compared to those ethics opinions, Rule 4.4(b) dramatically reduced the ethical obligations of a Receiving Lawyer. It requires the Receiving Lawyer only to notify the Sender; it does not require the Receiving Lawyer to refrain from examining or using the document, or to return, destroy or sequester the document, as the Sender might request.

But, to paraphrase Professor Roy Simon, the Chief Reporter of the New York State Bar Association Committee on Standards of Attorney Conduct (COSAC), which spent five years drafting the Rules, Rule 4.4(b)'s "simple clarity" can be a trap for the unwary.<sup>4</sup> This was demonstrated last year in the answer to an inquiry regarding inadvertent disclosure published in the Attorney Professionalism Forum (Forum) of this *Journal's* February 2010 issue.<sup>5</sup>

## The Attorney Professionalism Forum Answer

In the Forum, a lawyer questioned whether it was “professional” to read a document from an adversary’s law firm attached to an email that inadvertently was sent to him. From the document’s title – “Confidential—Case Plan Report Analysis of Case Including Problems and Recommendations” – and the identity of the other listed recipients of the email, the inquiring lawyer recognized immediately that the email and its attached document “was not meant for me.” Relying on the “facially simple” language of Rule 4.4(b), the Answer advises the inquiring lawyer that she or he can read the Case Plan Report and use the information therein because, even though “there are passionately held opinions on both sides of this issue[,] . . . the Rules of Professional Conduct as established by the four Presiding Justices of the State of New York impose no obligation on the receiving lawyer to refrain from reading the material, keeping the material, and using the information discovered.”

The Answer is technically correct, but only as far as it goes. Because the Answer focuses on what Rule 4.4(b) requires and what it permits, the Answer considers the inquiry solely from the standpoint of professional discipline. The “Rules define proper conduct for the purposes of professional discipline”; they prescribe “the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.”<sup>6</sup> Thus, the Answer rightly concludes that once the Receiving Lawyer notifies the other side of an inadvertent disclosure, the Receiving Lawyer has fulfilled all of his or her ethical obligations under Rule 4.4(b) regarding the errant email. The lawyer would not be subject to professional discipline for examining the inadvertently disclosed Case Plan Report, even though that Report almost surely qualifies under Rule 1.6(a) as “confidential information” of the opposing party<sup>7</sup> and such an examination would be tantamount to learning opposing counsel’s analysis of the strengths and weaknesses of the opposing party’s case. Similarly, the inquiring lawyer would not be subject to professional discipline for making use of the Report or the information gained about the opposing party’s legal analysis of its claims, even, for example, by quoting in motion papers the opposing counsel’s own admissions about the weaknesses of the claims or using the Report as impeachment material during cross-examination at trial.

A disciplinary focus is not a broad enough perspective, however, in determining how a Receiving Lawyer should respond to an inadvertent disclosure, for two reasons: First, the Receiving Lawyer should consider the requirements and limitations of law beyond the Rules; indeed, COSAC’s Comments to Rule 4.4(b) emphasize the importance of doing so. Second, the Receiving Lawyer should take into account that Rule 4.4(b) provides only a minimum standard of ethical conduct, and her own standards of attorney professionalism may require more.

## Rule 4.4(b)’s Seeming Simplicity – A Trap for the Unwary

The Rules themselves articulate the importance of considering the broader context of positive law in deciding how lawyers should conduct themselves. “The Rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general.”<sup>8</sup>

Comment 2 to Rule 4.4 specifically reminds lawyers about the bodies of law beyond the Rules that create obligations for lawyers, including significant legal obligations with respect to inadvertent disclosure:

Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-ordered sanctions, including disqualification and evidence-preclusion. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question whether the privileged status of a document has been waived.

Thus, in determining how to respond to an inadvertently disclosed document, the Receiving Lawyer should look not only to the ethical requirements of the Rules, but also to other applicable law.

In the litigation context, for example, Federal Rule of Civil Procedure 26(b)(5)(B) specifically establishes a protocol for resolving claims of inadvertent disclosure that arise during discovery in a federal lawsuit, and it imposes specific legal obligations upon the Receiving Lawyer. Once the Receiving Lawyer has learned about an ostensibly inadvertent disclosure, the Receiving Lawyer is required to (1) “promptly return, sequester or destroy the specified information and any copies”; (2) “not use or disclose the information until the claim [of inadvertent disclosure of privileged information] is resolved”; and (3) “take reasonable steps to retrieve the information” if the Receiving Lawyer disclosed it before learning of the Sender’s inadvertent disclosure.

Thus, if the Forum’s inquiring lawyer received the inadvertently disclosed Case Plan Report during the discovery phase of a federal lawsuit, that lawyer would not only need to consider Rule 4.4(b) but also Federal Rule 26(b)(5)(B) in determining how to respond. Although further disclosure and use of that Report is not prohibited by Rule 4.4(b), it is proscribed by Federal Rule 26(b)(5)(B). And, even though that Federal Rule does not flatly preclude the inquiring lawyer from thoroughly examining the Case Plan Report, federal case law confirms, as envisioned in COSAC’s Comment 2 to Rule 4.4, that at least in some circumstances the inquiring lawyer could be disqualified in the event that the Case Plan Report

was, in fact, privileged and the privileged information contained therein was sufficiently crucial to the defense of the opposing client.<sup>9</sup> Similarly adverse consequences might befall lawyers acting too precipitously under Rule 4.4(b) in a state lawsuit as well.<sup>10</sup>

The Forum Answer makes no attempt to evaluate whether, as a matter of substance, Rule 4.4(b) is a good rule for resolving the conflict between the principle of client confidentiality underlying our legal system and a lawyer's duty of competent and diligent representation that shapes the differing perspectives of the Receiving Lawyer and the Sender whenever a document containing confidential information is inadvertently disclosed. As discussed below, however, Rule 4.4(b)'s resolution of that conflict is profoundly flawed.

### **Rule 4.4(b) Inadequately Protects Confidential Information**

The principle of client confidentiality, which encompasses the protection afforded by the attorney-client privilege as well as the broader ethical duty of confidentiality,<sup>11</sup>

ethics opinions required the Receiving Lawyer initially to respect a Sender's claim that the document was inadvertently disclosed and contained confidential information, Rule 4.4(b) provides no immediate protection to confidential information in the inadvertently disclosed document. Instead, it places on the Sender the burden of taking legal action to retrieve and shield any confidential information. Rule 4.4(b) is a bad default rule, because, in a variety of circumstances, substantive law and procedural rules do not enable the Sender to safeguard confidential information.

Consider, first, inadvertent disclosure in the transactional context. Suppose two lawyers are negotiating a commercial lease. What happens if the landlord's lawyer receives an unambiguously inadvertent disclosure from the tenant's counsel of an email between counsel and the tenant discussing the strengths and weaknesses of the tenant's position on several key negotiating points and its strategy on those points? The email clearly would be protected by the attorney-client privilege and disclosure to the landlord's lawyer surely would be damaging to the

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underlies both the private attorney-client relationship and the successful functioning of our public system of justice. Comment 2 to Rule 1.6 explains the importance of that ethical duty to the success of the attorney-client relationship:

The lawyer's duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer, even as to embarrassing and legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.<sup>12</sup>

But the principle of client confidentiality supports not only a private relationship, it also promotes the "broader public interests in the observance of law and administration of justice."<sup>13</sup> Full and frank communication is essential to a lawyer's skillful advocacy in our adversary system of justice.<sup>14</sup> Not surprisingly, the principle of client confidentiality has been considered the single most important rule of legal ethics.<sup>15</sup>

When COSAC rejected the approach of the prevailing ethics opinions and decided to adopt Rule 4.4(b), it placed confidential information at risk. Whereas the prevailing

counsel's representation of the tenant. Under Rule 4.4(b), however, the sole ethical obligation of the landlord's lawyer would be to notify the tenant's counsel of the email's receipt.

But what remedy is available to the tenant once its lawyer learns about the errant email? Virtually none. Unlike inadvertent disclosure in a litigation context, when there is already a pending court proceeding in which the Sender can seek to prevent the Receiving Lawyer from examining, disclosing and using privileged information inadvertently disclosed, in the transactional context the Sender has no immediate access to a judge. Moreover, it is not even clear what claim for relief the Sender could assert successfully to prevent examination, disclosure and use of the privileged information. Thus, Rule 4.4(b) does not adequately protect the principle of client confidentiality when inadvertent disclosure occurs in the transactional context

Second, what if the inadvertent disclosure concerned confidential information a sending lawyer had an ethical duty to protect, but which was not protected by the attorney-client privilege or work-product doctrine? For example, the fact of a client's criminal conviction – the crime, the date of conviction, even the legal proceedings

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that led to the conviction – is a matter of public record that is not protected by the attorney-client or work-product privilege, but, because its disclosure can be embarrassing or detrimental to the client, it is still confidential information that lawyers have an ethical duty to protect.<sup>16</sup> Suppose a lawyer and his client are discussing the client’s conviction in an email that is mistakenly addressed to opposing counsel and the Receiving Lawyer satisfies her ethical duty under Rule 4.4(b) by notifying the Sender. What can the Sender do to prevent the Receiving Lawyer from using that confidential information or disclosing it to others? Nothing. Even though there is a judge available in a pending lawsuit, the Sender cannot seek a protective order preventing the Receiving Lawyer and her client from disclosing that confidential information to others or possibly using that confidential information to its benefit in the lawsuit because that information is not protected by any evidentiary privilege. In that circumstance also, Rule 4.4(b) fails to protect a client’s confidential information.

Third, even when an admittedly privileged document is inadvertently disclosed during formal discovery in a federal civil lawsuit and the judge ultimately grants the Sender’s protective order, the interim protection afforded the privileged document under Federal Rule 26(b)(5)(B) is, as a practical matter, limited. Even though that Rule requires the Receiving Lawyer to take various steps to prevent further disclosure of the privileged document – the Receiving Lawyer must not disclose or use the document until the claim of privilege has been resolved – the Receiving Lawyer still may further examine the document. Thus, that Rule does not prevent the Receiving Lawyer from learning as much as possible about the privileged information contained in the inadvertently disclosed document, and once the Receiving Lawyer has done so, that information is available to assist the Receiving Lawyer in the litigation, even if, on the Sender’s motion for a protective order, the judge ultimately prohibits the Receiving Lawyer from disclosing or using the privileged document. It is highly unlikely that what already has been learned by the Receiving Lawyer will be, in effect, unlearned, and Federal Rule 26(b)(5)(B) makes no effort to limit how much privileged information the Receiving Lawyer learns from the inadvertently disclosed document.

In short, Rule 4.4(b) is ethically challenged. The Rule itself fails to offer any protection to inadvertently disclosed confidential information, and the substantive law and procedural rules to which it defers leave the Sender remediless – and, therefore, confidential information wrongly exposed to disclosure and use – when the inadvertent disclosure takes place in a transactional context or otherwise outside the context of an existing lawsuit; when, in the litigation context, the confidential information is not protected by the attorney-client privilege or

work product doctrine; and, in the interim period, when a protective order has not yet been granted.

### **There Is No Justification for Leaving Inadvertently Disclosed Confidential Information Unprotected**

Why, then, did COSAC adopt Rule 4.4(b) and leave inadvertently disclosed confidential information unprotected, as described above? It appears that COSAC had two reasons. First, Rule 4.4(b) is identical to ABA Model Rule 4.4(b); adopting Rule 4.4(b) fostered the goal of uniformity, which was one of the animating principles of COSAC’s work.<sup>17</sup> Second, COSAC believed that imposing obligations upon Receiving Lawyers other than mere notification was “too complex and would likely result in a rule too difficult to implement and enforce.”<sup>18</sup>

Neither of these reasons is compelling. Together, they constitute an admission that COSAC avoided the substantive and practical difficulties of creating its own rule regarding inadvertent disclosure by following the ABA’s approach. But, COSAC proposed, and the Rules contain, many provisions that differ from the Model Rules. So, uniformity is in itself a weak reason, especially when compared to the principle of client confidentiality. If, as a matter of substance, Model Rule 4.4(b) is a bad solution to the problem of inadvertent disclosure, then, in this case, the goal of uniformity is misleading.

Some of COSAC’s concerns about the complex circumstances affecting inadvertent disclosure and the problem of enforcing a rule that imposes an ethical obligation upon the Receiving Lawyer beyond mere notification are reflected in the following three possible justifications for Rule 4.4(b):

1. if the Receiving Lawyer owes a duty not to examine the inadvertently disclosed document once the Receiving Lawyer realizes or is notified that the disclosure was inadvertent, there could be problems with enforcement because of ambiguity about when the Receiving Lawyer realized that or was notified and whether the Receiving Lawyer failed to stop examining the document at the appropriate point;
2. the Receiving Lawyer needs the opportunity to examine the inadvertently produced document in order to evaluate and possibly litigate whether the document is privileged or the privilege was waived; and
3. the Receiving Lawyer has a duty, as a partisan advocate, to exploit the Sender’s mistake and that duty takes precedence over the principle of client confidentiality.

None of those justifications is sufficient.

First, COSAC’s concern about whether disciplinary authorities will bring unwarranted cases against a Receiving Lawyer for examining an inadvertently disclosed document after realizing or being notified that the disclosure was inadvertent seems overblown. Given



the lack of sufficient resources plaguing disciplinary authorities, it is unlikely that disciplinary authorities will use scarce resources to bring such fact-specific, questionable cases. A healthier respect for the prosecutorial discretion of chief disciplinary counsel seems warranted. Conversely, the potential difficulties in proving a violation should not militate against adopting a rule that prohibits lawyers from examining documents they know were not intended for their eyes.

Second, the opportunity to evaluate whether the document was or still is privileged is not a reason that the Receiving Lawyer should be able to examine the document further or disclose it to others after realizing or learning that it was sent inadvertently. In the transactional context, the Receiving Lawyer generally has no right to information not intentionally provided by a counterparty. In the litigation context, the normal ways of providing information to opposing counsel sufficient to evaluate whether a document is protected as privileged are time tested and workable. The Sender will need to put the inadvertently disclosed document on a privileged log and describe it, the same as any other purportedly privileged document. The Receiving Lawyer should not be able to use the possibility that the document never was or is no longer

Lawyers have a duty of confidentiality even to clients not their own.

privileged in order to bootstrap an opportunity to examine the contents of the document further before returning or destroying it, because the content of the document is unrelated to the determinative facts under Federal Rule of Evidence 502 and its state analogues regarding the carefulness or carelessness of the Sender in making and rectifying the disclosure.<sup>19</sup> The content of the document may be related to an argument that the document never was privileged, but in that respect the privilege log will give as much information about the document's content as that provided with respect to any other purportedly privileged document. And, if someone needs to examine the contents of the document to rule on whether the document is privileged or not, the court can and generally will review the document *in camera*. Thus, the issue of whether the inadvertently disclosed document was or still is privileged provides no justification for examining the document or sharing it with others or making use of it prior to the determination of its privileged status.

Third, in addressing the Receiving Lawyer's ethical duty upon receipt of an inadvertently disclosed document, the ABA,<sup>20</sup> NYCLA,<sup>21</sup> and the City Bar<sup>22</sup> all opined that the duty of zealous representation – enshrined previously as Canon 7 of the Code – was an insufficient reason for invading the confidentiality of the relationship between the opposing party and its counsel. As NYCLA's ethics committee explained, "all lawyers share responsibility for ensuring that the fundamental principle that client confidences be preserved – the most basic tenet of the attorney-client relationship – is respected when privileged information belonging to a client is inadvertently disclosed."<sup>23</sup> In effect, the NYCLA opinion provides 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>24</sup> Although the ABA's opinion has been withdrawn in light of Model Rule 4.4(b) and the NYCLA and City Bar opinions have been superseded *sub silentio* by the adoption of Rule 4.4(b), the reasoning of those decisions, particularly their weighing of the principle of client confidentiality vis-à-vis the duty of zealous representation, remains persuasive.

Moreover, the priority of a broadly conceived principle of client confidentiality over the duty of zealous representation has been woven into the fabric of legal ethics in New York. For example, lawyers who are interviewing former employees of adverse corporate parties represented by counsel are prohibited from eliciting information about privileged communications with company counsel.<sup>25</sup> Similarly, it is unethical for lawyers to elicit from litigation experts or knowledgeable others an opposing party's privileged communications with its counsel.<sup>26</sup> Lawyers may not use technology to extract metadata containing another client's confidential information.<sup>27</sup> Nor may lawyers disclose to their clients or use for their clients' benefit confidential information gained through a good-faith unsolicited communication from a would-be client.<sup>28</sup> In each of these situations, the duty of zealous representation is circumscribed by the duty to respect the confidentiality of communications between another party and its current, former, or prospective counsel.

In fact, the 2009 change from the Code to the Rules gives the general principle of client confidentiality even greater priority over the demands of partisan advocacy. Whereas Canon 7 of the Code stated that "a lawyer should represent a client zealously," the Rules deliberately abandoned "zealous representation" as the standard for ethical partisan advocacy. Under Rules 1.1 and 1.3, competent and diligent representation of a client is sufficient. The view of courts and ethics committees that the duty of client confidentiality trumped the duty of zealous representation under the Code applies with even greater force now that the Rules have rejected "zeal" as the criterion for ethical client advocacy.

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### Rule 4.4(b) Undermines Attorney Professionalism

Comment 3 to Rule 4.4 seems to reflect COSAC's ambivalence about Rule 4.4(b)'s minimalist approach. In its first sentence, Comment 3 acknowledges that certain actions that Rule 4.4(b) does not ethically require of the Receiving Lawyer would foster the principle of client confidentiality: "Refraining from reading or continuing to read a document once a lawyer realizes that it was inadvertently sent to the wrong address and returning the document to the sender honors the policy of these Rules to protect the principles of client confidentiality." Recognizing that there are lacunae in the substantive law and procedural rules regarding the Receiving Lawyer's obligations when confronting an inadvertently disclosed document, the last sentence of Comment 3 purports to identify a zone of impunity where, as a matter of professional conscience, a Receiving Lawyer who wants to honor the principle of client confidentiality may choose, subject in at least some circumstances to a discussion with the client, (1) not to examine or continue to examine the document after realizing or learning that it was inadvertently sent or (2) to abide by the Sender's instructions as to its disposition. That last sentence provides: "[I]f applicable law or rules do not address the situation, decisions to refrain from reading such documents or to return them, or both, are matters of professional judgment reserved to the lawyer. See Rules 1.2, 1.4."

This effort to identify a safe harbor for an ethically minded Receiving Lawyer is misconceived, because it ignores that lawyers who want to reject a legally permissible course of action that would benefit a client on the grounds of a higher professional duty may need to justify their conscientious choice through recourse to mandatory disciplinary rules that in effect provide protection from client pressure and malpractice liability. Because the last sentence of Comment 3 envisions a course of action that a conscientious Receiving Lawyer may, but is not required to, take, that makes it less likely that a Receiving Lawyer will do so.

Consider the dialogue between the conscientious Receiving Lawyer and her client that Rules 1.2 and 1.4 appear to require in the event that the Receiving Lawyer in a transactional matter is notified promptly that opposing counsel inadvertently sent her a document containing opposing counsel's analysis of the open negotiating points. Rule 1.4 arguably would require the Receiving Lawyer to inform her client about receipt of the document, since, given the practical value of knowing opposing counsel's analysis, receipt of that document might be construed as a "material development[] in the matter" or part of the Receiving Lawyer's obligation to "keep the client reasonably informed about the status of the matter."<sup>29</sup> In the resulting dialogue, it is easy to imagine the client's wanting the Receiving Lawyer to examine thoroughly the inadvertently disclosed document. It is also easy to imagine that the client would not agree to subordinate

its self-interest to the far more abstract concern about the principle of client confidentiality, especially when the disclosure of confidential information was caused by the mistake of the opposing party or its counsel. After all, how much does the Receiving Lawyer's client care about harm to the opposing client or to the legal system generally? Given the client's likely views, the conscientious Receiving Lawyer may find it difficult to convince her client that she should return the document to the Sender without examining it. Absent the client's agreement, it becomes difficult for the Receiving Lawyer to do what she believes is right, because she likely would be concerned that her client might discharge her in the pending matter, not retain her for future matters, or even sue her for malpractice for not aggressively exploiting the Sender's mistake.<sup>30</sup>

If, instead, Rule 4.4(b) required the Receiving Lawyer to return the document without examining it after notification that it was inadvertently sent, then the dialogue between the Receiving Lawyer and her client would be entirely different. Rule 1.4(a)(5) would require the Receiving Lawyer to consult with her client, because the Receiving Lawyer would know that her client would expect her to examine the document, but the pertinent ethical rule would prohibit that.<sup>31</sup> Because the Receiving Lawyer would be able to present the conscientious course of action as the only one allowed by the Rules (and, presumably, followed by responsible lawyers), this would parry both the malpractice concern and the concern that the client could take its business to another lawyer whose professional conscience was more malleable. In effect, reliance upon a disciplinary rule mandating conscientious conduct would make it possible for the Receiving Lawyer to do the right thing without any adverse consequence.

Professional ethics seeks to impose upon lawyers certain ethical obligations that, because they are based upon the fiduciary nature of the attorney-client relationship or the lawyer's special role in the administration of justice, are "higher" than the morals of the marketplace and sometimes more extensive or demanding than what positive law requires. Attorney professionalism shares the goal of professional ethics to establish such a realm of better conduct through disciplinary rules but, beyond that, also seeks to inculcate, support, and elicit the aspiration to exceed even those minimum ethical requirements. Regarding inadvertent disclosure, for example, professional ethics and attorney professionalism share the view that the ethical duty of client confidentiality is more expansive than the analogous evidentiary privileges both in terms of the scope of client information that is protected and the scope of the protection required.<sup>32</sup>

Lawyers act as partisan advocates for their clients, but they are also "officers of the court," with a special obligation as members of the legal profession to take care of our legal system and to safeguard justice. When, as a matter

of professional conscience, a Receiving Lawyer returns an inadvertently disclosed document without examining it in order to honor a broadly conceived principle of client confidentiality, she is giving priority to her role as an officer of the court over her role as a partisan advocate. Because it is not ethically required, that is an act of attorney professionalism exhibiting special concern for the well-being of the legal system as a whole rather than a particular party participating in that system. In failing to support such action, Rule 4.4(b) erodes attorney professionalism.

Viewed in this context, the fundamental problem with Rule 4.4(b) stems from its overly modest ambition. Rule 4.4(b) is ethically anemic. Rather than impose a demanding ethical standard on Receiving Lawyers confronting an inadvertent disclosure, COSAC deliberately imposed a *de minimis* ethical requirement – mere notification – in effect referring to the civil justice system the resolution of the substantive conflict between the principle of client confidentiality and competent client representation. Unfortunately, the substantive law and procedural rules of the legal system sometimes leave confidential information unjustifiably unprotected. If a specific ethics rule really needed to be adopted to define the Receiving Lawyer’s obligations in the event of an inadvertent disclosure,<sup>33</sup> it needed to be robust: it needed to be more protective of confidential information than the normal processes of law are. In terms of what was needed, Rule 4.4(b) is a failure.

Finally, the strategy underlying Rule 4.4(b) – to use the legal system’s substantive and procedural rules to define the obligations imposed upon the Receiving Lawyer – not only resulted in a bad rule regarding inadvertent disclosure, but, more generally, it also undermined the view that the ethical realm constituted by professional ethics and attorney professionalism is different from – indeed, sometimes should be more extensive and more demanding than – what the law requires. That, too, erodes attorney professionalism.

In sum, Rule 4.4(b) should be replaced by a new rule that, without judicial intervention, provides protection for confidential information that is as complete as possible. In the interim, lawyers should consider their own professional conscience to determine if and when to respond to an inadvertent disclosure in a manner that better serves the principle of client confidentiality than the ethical minimum of mere notice to the Sender. ■

1. 22 N.Y.C.R.R. § 1200.35(b).  
 2. See Rule 4.4(b), cmt. 2. This article also uses the term “document” to refer to emails and other electronic information as well as paper documents.  
 3. NYCLA Comm. on Prof’l Ethics, Formal Op. 730 (2002); Ass’n of the Bar of the City of New York, Formal Op. 2003-04.  
 4. Roy Simon, *Simon’s New York Rules of Professional Conduct Annotated* 257 (2009 ed.).

5. Attorney Professionalism Forum, N.Y. St. B.J. (Feb. 2010), pp. 52–53.  
 6. Rules, Scope, § 6.  
 7. Rule 1.6(a) defines “confidential information” as “information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.” 22 N.Y.C.R.R. § 1200. Thus, “confidential information” includes privileged information as well as other information that, under DR 4-101(A) of the Code, was defined as a “secret.” See generally, James M. Altman, *The Secret About Secrets*, N.Y.L.J., Jul. 14, 2000, p. 24, col. 1.  
 8. Rules, Scope, § 7.  
 9. See, e.g., *Cars R US Sales & Rentals, Inc. v. Ford Motor Co.*, No. 08 C50270, 2009 WL 1703123, at \*1 (N.D. Ill. Jun. 18, 2009).  
 10. Cf., e.g., *Forward v. Foschi*, No. 9002/08, 2010 WL 1980838, at \*15 (Sup. Ct. Westchester Co. May 18, 2010) (denying motion to disqualify counsel for violating Rule 4.4(b) because “the e-mails in question . . . do not give Forward and his counsel an unfair advantage in this litigation”). Cf. also *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807, 819–20 (Cal. 2007) (upholding disqualification of counsel for disseminating and using inadvertently disclosed privileged documents).  
 11. See *supra* note 7.  
 12. Rule 1.6, cmt. 2.  
 13. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (discussing the purposes of the attorney-client privilege).  
 14. David M. Greenwald, Edward F. Malone & Robert R. Stauffer, 1 *Testimonial Privileges*, 1-6 (3d ed. 2005).  
 15. Roy Simon, *Simon’s New York Rules of Professional Conduct Annotated*, 81 (2009 edition).  
 16. See Nassau Co. Bar Op. 96-7 (criminal conviction remains a secret unless public knowledge is widespread). See generally note 7, above.  
 17. See Executive Summary of Rule 4.4(b) when that Rule was presented to the New York State Bar Association House of Delegates meeting on January 26, 2007.  
 18. The Reporter’s Notes to Rule 4.4(b) when that Rule was presented to the New York State Bar Association House of Delegates meeting on January 26, 2007 stated that “[a] disciplinary rule that would take into account all of the circumstances in which a lawyer should be able to read, retain, and use . . . the information contained in an inadvertently sent document would be too complex and would likely result in a rule too difficult to implement and enforce.”  
 19. Federal Rule of Evidence 502 provides that inadvertent disclosure does not automatically constitute a privilege waiver. As to whether a waiver occurred, Rule 502(b) focuses the court’s attention on whether the disclosure was inadvertent, whether the Sender took reasonable precautions to prevent inadvertent disclosure, and whether the Sender promptly took reasonable steps to rectify the disclosure.  
 20. Prior to the adoption of Model Rule 4.4(b), for roughly a decade the ABA’s ethical guidance on inadvertent disclosure was based on ABA Formal Op. 92-368, which specifically rejected that a lawyer has an “obligation to capitalize on an error of this sort on the part of opposing counsel.”  
 21. NYCLA Op. 730 (2002).  
 22. N.Y. City Op. 2003-04 (2003).  
 23. NYCLA Op. 730 (2002).  
 24. NYCLA 730, n.5 (2002) (“the principle that client confidences and secrets be preserved must sweep more broadly [than DR 4-101’s duty to one’s own clients], requiring lawyers to refrain from exploiting confidences and secrets of clients not their own. . . . Put another way, the Disciplinary Rule prohibiting lawyers from knowingly revealing the confidences and [secrets] of their own clients does incomplete justice to the fundamental principle that client confidences and secrets be preserved.”).  
 25. See NYSBA Comm. on Prof’l Ethics, Op. 700 (1998); *Muriel Siebert & Co., Inc. v. Intuit Inc.*, 8 N.Y.3d 506, 512 (2007).  
 26. See NYSBA Op. 735 (2001).  
 27. See NYSBA Op. 749 (2001).  
 28. See N.Y. City Op. 2001-01 (2001).

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29. Rule 1.4(a)(1)(iii) states that “[a] lawyer shall promptly inform the client of material developments in the matter including settlement or plea offers.” 22 N.Y.C.R.R. § 1200.4. Rule 1.4(a)(3) states that “[a] lawyer shall keep the client reasonably informed about the status of the matter.” 22 N.Y.C.R.R. § 1200.

30. Although Rule 1.2(e) provides that “[a] lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, . . . when doing so does not prejudice the rights of the client,” 22 N.Y.C.R.R. § 1200, it is likely that Rule 1.2(e) would not apply to the Receiving Lawyer’s proposed course of action of returning the document to the Sender without examination because it is plausible, if not likely, that not examining the document would adversely effect the success of the Receiving Lawyer’s negotiation efforts. In other words, it is likely that knowing the opposing counsel’s evaluation of the open items would enable the Receiving Lawyer to achieve a better result for her client than if the Receiving Lawyer lacked such knowledge.

31. Rule 1.4(a)(5) provides that “[a] lawyer shall consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.” 22 N.Y.C.R.R. § 1200.

32. The scope of information protected by Rule 1.6’s ethical duty of confidentiality is broader than that protected by the attorney-client privilege, *see* Rule 1.6, cmt. 3, and *supra* note 7, above, and Rule 1.6(a) proscribes disclosing and using confidential information in certain circumstances, while the attorney-client privilege only proscribes disclosure.

33. In deciding to create a rule specifically addressing inadvertent disclosure instead of allowing the prevailing ethics opinions to provide less positivistic guidance, COSAC followed the approach of the ABA, which adopted its own Rule 4.4(b) in 2002 as part of the Ethics 2000 Commission. *See* ABA Formal Op. 05-437. The ABA’s decision to adopt Rule 4.4(b) was based, in part, on concerns of commentators and ethics committees that ethics committees did not have the authority to determine how lawyers should respond to inadvertent disclosures without previously adopted specific rules to guide them and that such lack of notice was unfair to respondents in disciplinary proceedings. *See* Maine Op. 146 (1994) (“this Commission is not free to add ethical limitations not expressed by the Bar Rules”), withdrawn by Maine Op. 172 (2000); Monroe Freedman, *The Errant Fax*, *Legal Times*, Jan. 23, 1995. From the standpoint of attorney professionalism, however, it would have been better for New York lawyers to have relied on the prevailing ethics opinions and perhaps others than to have COSAC avoid the difficult process of adopting a comprehensive ethical rule fully supportive of the principle of client confidentiality and leave protection for confidential information to the normal processes of law.