

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS**

Formal Opinion 2019-3: Obligations Regarding a Lawyer’s Use of Information Inadvertently Sent by Another

TOPIC: Obligations of a lawyer regarding the use of information inadvertently sent to the lawyer by another

DIGEST: This Opinion addresses the obligations of a lawyer who, after receiving and reviewing a document relating to the lawyer’s representation of a client, knows or reasonably should know that the document was sent inadvertently.¹ Rule 4.4(b) requires the lawyer to promptly notify the sender in order to give the sender an opportunity to seek the document’s return and, if necessary, to seek legal recourse before the recipient attempts to use it. But Rule 4.4(b) does not address whether the receiving lawyer may disclose the information to the client or attempt to use the information to benefit the client. Substantive law, procedural rules, judicial decisions, court orders, and/or agreements between the parties typically will impose additional obligations or restrictions; and when the boundaries of the law (including professional conduct rules) are unclear, the lawyer may act cautiously to avoid the risk of violating the law or incurring sanction.

This Opinion addresses the lawyer’s obligations in litigation and transactions when applicable law does not appear to dictate or limit the lawyer’s conduct. Subject to legal limitations, Rules 1.1, 1.2 and 1.4 may establish additional obligations in this situation. Although Rule 1.4 does not invariably require the lawyer to consult with the client regarding whether and how the inadvertently sent information should be used, the lawyer should do so if the use of the information can reasonably be expected to have some significance to achieving the client’s objectives of the representation. If the client instructs the lawyer to use the inadvertently sent information, Rules 1.1 and 1.2 do not invariably require the lawyer to defer, but the lawyer should do so if otherwise the lawyer would be failing “to seek the objectives of the client through reasonably available means permitted by law and these Rules” within the meaning of Rule 1.1(c) and/or if the lawyer would otherwise “prejudice the rights of the client” within the meaning of Rule 1.2(e). The applicability of these rules may depend on whether reasonably available alternative means exist for obtaining the information in admissible form from independent sources, and how much time and expense would be involved in those efforts. If the lawyer reasonably determines that Rules 1.1(c) and 1.2(e) do not require using the information, then the lawyer may refrain from doing so, provided that the lawyer is not acting solely out of self-interest but is undertaking a competent and diligent means of achieving the client’s objectives of the representation.

¹ This Opinion does not address the situation where the receiving lawyer knows, *before* reviewing the document, that it was inadvertently produced.

RULES: 1.1, 1.2, 1.4, 1.16, 4.4(b)

QUESTION: Suppose that, after receiving and reviewing a document relating to the lawyer’s representation of a client, a lawyer knows or reasonably should know that the document was sent inadvertently and promptly notifies the sender in accordance with Rule 4.4(b). Thereafter, to the extent that substantive law, procedural rules, judicial decisions and court orders permit such use, to what extent may or should the lawyer make use of such information for the benefit of the client?

OPINION:

I. Introduction

a. Current Rules

Rule 4.4(b) of the New York Rules of Professional Conduct (the “Rules”) provides: “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 Rule is not limited to matters pending before a tribunal and applies equally to transactional representations.

Rule 4.4(b) imposes no obligations or restrictions on the receiving lawyer beyond requiring the lawyer to notify the sender. Among other things, Comment [2] explains that the Rule “does not require that the receiving lawyer refrain from reading or continuing to read the document” (although it cautions that a lawyer who does so in a judicial proceeding may be subject to court-imposed sanctions, including disqualification and evidence-preclusion). Comment [2] adds that whether the lawyer is required to take additional steps, such as returning the document, “is a matter beyond the scope of these Rules.” Likewise, Comment [3] states that Rule 4.4(b) “does not subject a lawyer to professional discipline for reading and using that information.” The Comment adds that, if applicable law and rules do not address the situation, a decision to refrain from reading such a document or to return it, or both, are matters of professional judgment reserved to the lawyer under Rules 1.2 and 1.4.

As the Comments to Rule 4.4 reflect, substantive or procedural law may limit the use of inadvertently sent information. For example, Fed. R. Civ. P. 26(b)(5)(B) provides that when information produced in discovery in a federal civil proceeding is subject to a claim of privilege or work product protection and the receiving party is so notified, 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.”²

² Fed. R. Evid. 502, in turn, provides that when information is disclosed in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver of the attorney-client privilege or work product protection 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 Fed. R. Civ. P. 26(b)(5)(B).

In a representation before a tribunal, practical limits on the use of inadvertently sent information may apply where the views of the tribunal on the permissible use of such information are known or can reasonably be anticipated. The possibility of court-ordered sanctions, for example, may warrant a decision to refrain from using the information regardless of whether professional discipline would be imposed.

In addition, as suggested in Comment [2] to Rule 4.4(b), the parties' counsel in a matter may agree in advance on how they will deal with inadvertently sent documents. Further, in cases pending before a tribunal, upon receiving notice under Rule 4.4(b), the inadvertent sender of information may seek judicial relief concerning any use, return, and/or destruction of the information. The receiving lawyer and client would be bound by any ensuing court order, subject to appellate review. Implicit in Rule 4.4(b)'s notification requirement is that if the receiving lawyer intends to use inadvertently sent information, the lawyer will so advise the sender and give the sender a reasonable opportunity to seek a judicial ruling.

If other applicable law, rules, agreements, judicial decisions or court orders govern the situation, then a lawyer must, of course, comply with those mandates. At a minimum, this will require promptly notifying the sender, as mandated by Rule 4.4(b), and complying with any court rulings that ensue. The question addressed by this Opinion is whether, after promptly notifying the sender, and insofar as the law permits, a lawyer may or should use, or attempt to use, inadvertently sent information.

b. Historical Background

In an early effort to grapple with this issue, ABA Standing Committee on Ethics and Professional Responsibility Opinion 92-368 concluded that a lawyer who receives misdirected communications from another lawyer "should notify the sending lawyer of their receipt and should abide by the sending lawyer's instructions as to their disposition." A decade later, the ethics committee of the New York County Lawyers Association ("NYCLA") agreed, concluding:

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.

NYCLA, Formal Op. 730 (2002). Opinion 730 acknowledged that there was then "no Disciplinary Rule or Ethical Consideration governing a lawyer's ethical obligations upon receipt of inadvertently disclosed privileged information," nor were there any formal ethics opinions interpreting the New York Lawyer's Code of Professional Responsibility³ that were directly on point. Relying heavily on ABA Opinion 92-368, which it adopted and incorporated by

³ The predecessor to the Rules.

reference, the Opinion said that its conclusion “supplements and enhances the Code’s existing requirement that lawyers preserve the confidences and secrets of their own clients.”

At around the same time, in February 2002, the ABA adopted Model Rule 4.4(b). Instead of codifying Opinion 92-368, Model Rule 4.4(b) instructs a lawyer who receives privileged information that was inadvertently sent to “promptly notify the sender.” The following year, the City Bar addressed the issue in Formal Opinion 2003-04 (April 2, 2003). The Opinion stated that “[g]uidance on this subject is particularly important given that the Code has no specific rule addressing the issue.” Formal Opinion 2003-04 concluded that as a general rule, a lawyer who receives an inadvertent communication containing confidences or secrets should “promptly notify the sender and refrain from further reading or listening to the communication and should follow the sender’s directions regarding destruction or return of the communication.” The Opinion concluded, however, that “a blanket proscription on use of inadvertent disclosures in all situations extends too far,” stating:

Accordingly, we acknowledge that there are limited circumstances where ethical rules alone do not bar use of such information, particularly where, as more specifically set forth below, the receiving attorney has a good faith basis to argue that inadvertent disclosure has resulted in waiver of a privilege or where the receiving attorney has been exposed to confidential information prior to knowing or having reason to know that the communication was misdirected.

Specifically, Formal Opinion 2003-04 concluded that an exception to the general rule should apply if “the receiving attorney believes in good faith that the communication appropriately may be retained and used.” In that circumstance, the receiving attorney may “submit the communication for in camera consideration by a tribunal.” In addition, “[w]here the receiving attorney has been exposed to content of the communication prior to knowing or having reason to know that the communication was misdirected, the attorney is not barred, at least as an ethical matter, from using the information,” provided the “receiving attorney promptly notif[ies] the sending attorney of an inadvertent disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary to prevent any further disclosure.”

In its Feb. 1, 2008 report to the Court of Appeals, the State Bar recommended the adoption of Rule 4.4(b) based on the recommendation of the State Bar’s Committee on Standards of Attorney Conduct (COSAC). COSAC was aware of the ABA’s Opinion 92-368 as well as of the City Bar and NYCLA opinions, and referred to them in its September 30, 2015 report to the State Bar. However, it decided to propose adoption of the ABA rule—which merely instructs a lawyer who receives privileged information that was inadvertently sent to “promptly notify the sender”—without attempting to codify the circumstances under which additional instructions contained in the earlier opinions might apply, i.e., refraining from further review of the document, and abiding by the sender’s instructions regarding destruction or return of the communication. The Reporter’s Note explains: “A disciplinary rule that would take into account all of the circumstances in which a lawyer should be able to read, retain, and [make] use

of the information contained in the inadvertently sent document would be too complex and would likely result in a rule too difficult to implement and enforce.”⁴

After the adoption in 2009 of Rule 4.4(b) of the Rules of Professional Conduct, the City Bar withdrew so much of Formal Opinion 2003-04 as was inconsistent with the Rule. *See* NYCBA Formal Op. 2012-01 (April 24, 2012).⁵ Without elaborating further, the Opinion stated:

[T]here may arise circumstances under which a lawyer, having considered Rules 1.2 and 1.4, determines that conduct that would be consistent with Formal Opinion 2003-04, such as destroying or not reviewing or using the communication, is right under the circumstances. Rule 4.4(b) and the present Formal Opinion should not be construed as per se prohibiting a lawyer from making that determination.

In the same vein, a commentator has observed that the last sentence of Comment [3] to Rule 4.4(b) (“But 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”) appears to create a “safe harbor” or “zone of impunity” for “an ethically minded Receiving Lawyer” who wants to “reject a legally permissible course of action that would benefit a client on the grounds of a higher professional duty.”⁶

II. Obligations Regarding the Use of Information Inadvertently Sent by Another Person

Rule 4.4(b) requires a lawyer who receives an inadvertently sent document to promptly notify the sender. The rule leaves any further legal obligations or restrictions to substantive or procedural law or rules, agreements between the parties, judicial decisions and/or court orders. As Comment [3] to Rule 4.4(b) makes clear, absent other controlling authority, an attorney who complies with the Rule’s requirement of prompt notification does not violate the Rules by subsequently using the information to her client’s advantage, whether or not the circumstances fall within the exceptions set forth in Formal Opinion 2003-04. This does not, however, insulate

⁴ Since then, some commentators have suggested amending Rule 4.4(b) to address the issues on which it is silent, rather than leaving it to case law development. *See, e.g.*, James M. Altman, “Model Rule 4.4(b) Should Be Amended,” <https://www.bryancave.com/images/content/2/3/v2/2371/Altman-article-from-TPL-21-1-reprint.pdf>. (All websites cited in this letter were last visited on May 14, 2019.)

⁵ New York Rule of Professional Conduct 4.4(b), as adopted, does not require the receiving lawyer to refrain from further reviewing the document or to abide by the sender’s instructions to destroy or return the document but, rather, leaves these matters up to applicable laws, rules, agreements, judicial decisions, and the lawyer’s legal and ethical judgment—thereby rendering moot the guidance in earlier ethics opinions that mandated such acts.

⁶ *See* James M. Altman, Inadvertent Disclosure and Rule 4.4(b)’s Erosion of Attorney Professionalism, NYSBA Journal (November/December 2010) (arguing that effort to identify a safe harbor is misconceived “because it ignores that lawyers who want to reject” such a permissible course of action “may need to justify their conscientious choice through recourse to mandatory disciplinary rules that in effect provide protection from client pressure and malpractice liability.”)

the lawyer from the possible imposition of sanctions, including disqualification and evidence-preclusion, in cases pending before a tribunal, insofar as the lawyer, acting in an area of legal uncertainty, fails to anticipate an adverse judicial ruling.

There remains the question whether an attorney may choose to *refrain* from using beneficial information when refraining would *disadvantage* the client and there is no agreement, order, law, rule or controlling authority on point. On this issue, Rule 4.4(b) is silent. Formal Opinion 2012-01 opined that Rule 4.4(b) should not be construed as a per se bar on making that choice, but offered no further guidance on the matter. We offer further guidance here based on our interpretation of other Rules.⁷

For purposes of this discussion, we assume that the lawyer has reviewed the contents of the communication to an extent at least sufficient to determine that using it might benefit the client. Therefore, we do not address a lawyer's ethical obligations if the lawyer knows before reading the communication that it was inadvertently sent. In some cases, a lawyer will realize, independently of a document's contents, that it was sent to the lawyer by mistake. As noted in Formal Opinion 2012-01, nothing in Rule 4.4(b) requires a lawyer to review such a communication; further, judicial decisions or other law may forbid doing so.

Even when inadvertently sent information appears to be useful to the client, and the law appears to permit its use, a lawyer may be disinclined to use the information for any of several reasons. For example, as a matter of professionalism, the lawyer may perceive that there is a "higher professional duty" to refrain from exploiting the inadvertent disclosure⁸ or that professional courtesy precludes its use. There may be countervailing strategic considerations, such as an interest in avoiding antagonism that may undermine the possibility of a favorable settlement, or an interest in avoiding the trial court's negative reaction. The lawyer may seek to avoid the time and expense of collateral litigation over the permissibility of using the information, even if the lawyer expects to prevail. The lawyer may seek to avoid the cost and embarrassment of a disciplinary complaint or sanctions motion, even if it would not be meritorious.

As discussed below, in determining whether to seek to use inadvertently sent information to the extent the law permits, a lawyer must take account of the mandates of Rules 1.1, 1.2 and 1.4. Rule 1.1(c)(1) provides in pertinent part that a lawyer shall not intentionally "fail to seek the objectives of the client through reasonably available means permitted by law and these Rules." Rule 1.2(a) provides that "[s]ubject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." Rule 1.2(e) adds that a lawyer "may exercise professional judgment to waive or fail to assert a right or position of the client," but only "when doing so does not prejudice the rights of the client." Rule 1.2(g) states that a

⁷ This Committee gives opinions only on questions of legal ethics under the Rules and does not opine on the scope and application of other law. Therefore, we do not consider whether other law (such as, in a criminal case, a defense lawyer's constitutional duty to provide effective legal representation) might impose an obligation to review and assess whether inadvertently sent information may be used to benefit the client. We make no suggestion here that such a legal obligation does or does not exist.

⁸ See Altman, *supra* note 4.

lawyer does not violate the Rules of Professional Conduct “by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.”

a. Consultation with the Client

If using the inadvertently sent information would reasonably be expected to advance the client’s objectives, and if no applicable law, procedural rule, judicial decision, court order, or agreement between or among the parties dictates otherwise, Rule 1.2(a) requires the lawyer to consult with the client concerning the matter, in accordance with Rule 1.4. Rule 1.4(a)(2) requires the lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” Rule 1.4(a)(3) further requires the lawyer to keep the client reasonably informed about the status of the matter. Rule 1.4(a)(5) requires the lawyer to advise the client about any relevant limitations on the lawyer’s conduct when the lawyer knows the client expects assistance that is not permitted by the Rules. And Rule 1.4(b) requires the lawyer to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Assuming that the law allows the lawyer to disclose the information to the client, whether the lawyer must do so depends on the reasonableness standard set forth in Rules 1.2 and 1.4.

An example of inadvertently sent information that might require such consultation with a defendant-client would be a document or theory that, before disclosure, was unknown to the client, and that would, if used in litigation, defeat the client’s liability. Such a document or theory would be highly significant to achieving the client’s objectives of obtaining a favorable outcome in the litigation. Assuming that the lawyer has a good-faith basis for arguing that the document may be used (*e.g.* in the case of a privileged document that the privilege has been knowingly waived), and barring any prohibition imposed by law or court order on doing so, a lawyer who receives such inadvertently sent information should, under Rules 1.1, 1.2 and 1.4, notify the client and discuss the matter in sufficient depth to enable the client to express an informed view about whether to use the information. The lawyer should explain Rule 4.4(b)’s notification requirement and that the lawyer and client will be bound by any court order governing the use of the information. Likewise, the lawyer should advise the client of any other controlling law limiting the information’s use, including any obligation on the client not to use or disclose the information until a claim of privilege or work product protection is resolved. Rule 4.4(b) does not require the receiving lawyer to advise the sender about any consultation with the client; on the contrary, the consultation is generally subject to the confidentiality obligation of Rule 1.6.

Not all inadvertently sent information will reasonably be expected to have significance to achieving the objectives of the representation. The document may contain information that is obviously irrelevant to the matter, such as financial records from an unrelated transaction. Even if relevant, the information may be of peripheral value and unlikely to affect the objectives of the representation. An example of such information might be a document that would be relevant solely to impeach a witness on a collateral matter and that could not, if the witness were to deny the fact on cross-examination, be introduced to prove up the contradiction.⁹ Or, the document

⁹ *See, e.g.*, Fed. R. Evid. 608(b).

may be highly relevant but nonetheless clearly privileged, and facts known to the lawyer might lead the lawyer to conclude that a good-faith argument could not be made that there was a knowing waiver of privilege.¹⁰ Whether particular information is likely to be significant to achieving the objectives of the representation is a fact-specific inquiry. If the lawyer concludes that the information cannot reasonably be expected to have some significance to achieving the objectives of the representation, then Rule 1.2(a) and 1.4(a)(2) may not require consultation with the client at all.

b. Use of the Information

If, after consultation, the client directs the lawyer to use the inadvertently sent information, the lawyer must determine whether and to what extent to abide by that directive. The lawyer's determination will be informed by, among other things, whether using the information would risk violating other law, rules, judicial decisions, court orders or agreements between the parties, or would risk incurring possible sanctions by a tribunal. A lawyer is not required to engage in legally questionable conduct for the client's benefit or to assume the risk of of a professional sanction and therefore, when the law is unclear, the lawyer may decline to use inadvertently sent information or insist on seeking a judicial ruling before doing so. ABA Standing Comm. on Ethics and Prof. Resp. Op. 11-460 (2011) ("ABA Op. 11-460") ("When the law governing potential disclosure is unclear, the lawyer need not risk violating a legal or ethical obligation.").

Absent such a legal risk, the client's desire to use the information should be treated as controlling where the failure to use it would constitute a failure "to seek the objectives of the client through reasonably available means permitted by law and these Rules," *see* Rule 1.1(c), or would "prejudice the rights of the client." *See* Rule 1.2(e). The lawyer and client should also consider whether reasonable alternative means exist to obtain the information in admissible form from another source, and, if so, the associated time and expense.

This conclusion is consistent with Comment [3] to Rule 4.4, which states 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." This Comment relates to a lawyer's obligations under Rule 4.4(b). It does not address, and of course cannot override, a lawyer's obligations under Rules 1.1(c) and 1.2(e) which, as noted, may require the lawyer to review and/or use inadvertently sent information in limited circumstances.

If the lawyer reasonably determines that Rules 1.1(c) and 1.2(e) do not require the lawyer to use the inadvertently sent information, then the lawyer may refrain from doing so—provided the lawyer's decision is consistent with the lawyer's competent and diligent pursuit of the client's objectives. However, the lawyer may not, for example, refrain from seeking to use

¹⁰ For example, applying the legal standards for determining whether an inadvertent disclosure constitutes a waiver of the attorney-client privilege, the lawyer may conclude that a non-frivolous argument for a waiver of privilege cannot be advanced. *See, e.g., Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985). In *Lois Sportswear*, the document could not reasonably be expected to be of use in achieving the objectives of the representation.

beneficial information solely as a professional courtesy, or solely in hopes that the lawyer may personally benefit from a favor to the other party's lawyer.¹¹

As noted, the above discussion assumes that no other law, procedural rule, agreement, judicial decision or court order is controlling. In some circumstances, judicial authority in the jurisdiction may be unclear or silent regarding a lawyer's obligation to refrain from using inadvertently sent information.¹² It bears emphasis that a lawyer may proceed cautiously based on a good-faith determination that relevant judicial opinions could be construed as imposing constraints on the use of such information, or that even in the absence of relevant authority the court would conclude that the lawyer's proposed use of inadvertently sent information is impermissible. Likewise, when the lawyer reasonably perceives a risk of discipline, sanctions or other liability for using the information, the lawyer may refrain from using the information despite the client's desire to use it. *See* ABA Op. 11-460, *supra*. A lawyer concerned about such a risk should consult with the client about whether to seek a court ruling or other guidance that might obviate the risk.

If, after consultation about the risk of using the inadvertently sent information, the client continues to direct the lawyer to use the information, the lawyer may be permitted, or required, to withdraw from the representation. *See* Rule 1.16(c)(4) (permitting withdrawal where "the client insists upon taking action with which the lawyer has a fundamental disagreement"); Rule 1.16(b)(3) (requiring withdrawal where the client discharges the lawyer); *see also* Rule 1.2 Cmnt. [2] (noting that Rule 1.2 "does not prescribe" how disagreements between lawyer and client about the means of accomplishing the client's objectives should be resolved; if the lawyer, after consultation with the client "has a fundamental disagreement with the client," the lawyer may withdraw from representation.) (citing Rules 1.16(c)(4) & 1.16(b)(3)).

CONCLUSION

Rule 4.4(b) requires a lawyer who receives a document related to the representation of the lawyer's client, and who knows or reasonably should know that it was inadvertently sent, to

¹¹ On the other hand, good faith concerns that using the information could lead to costly collateral litigation, or could put the lawyer and client in an unfavorable light in the court's eyes, or could harm the settlement process, might – depending on the facts – constitute a basis to refrain, in the exercise of professional judgment, from using the information. The lawyer should confer with the client concerning the reasons for such a decision. *See* Rule 1.4(a)(2).

¹² We are aware of one trial court decision in New York prohibiting the use of inadvertently produced information under Rule 4.4(b). *See O'Connor v. Lewis*, No. 11-13553, 2013 WL 3961675 (N.Y. Sup. Ct. July 19, 2013). However, the decision is unclear whether the receiving party complied with the notification requirement in Rule 4.4(b). Additionally, the decision relied on Formal Opinion 2003-4, which had been withdrawn the prior year. In *Broxmeyer v. United Capital Corp.*, No. 10581/07, 2012 WL 12045242 (N.Y. Sup. Ct. Aug. 2, 2012), the court prohibited subsequent use of the inadvertently sent information, but noted there was no evidence the receiving party had promptly notified the sender. A number of courts have allowed the use of inadvertently sent information where the receiving party complied with Rule 4.4(b). *See Stinson v. City of New York*, No. 10 Civ. 4228 (RWS), 2014 WL 5090031 (S.D.N.Y. Oct. 10, 2014) (permitting the plaintiff to use the knowledge acquired before the plaintiff had been notified it was confidential); *SEC v. LEK Sec. Corp.*, No. 17-CV-1789 (DLC), 2018 WL 417596 (S.D.N.Y. Jan. 16, 2018) (citing with approval so much of Comment [3] to Rule 4.4(b) as states that the Rule does not subject a lawyer to professional discipline for reading and using inadvertently sent information).

promptly notify the sender. Although substantive law, procedural rules, judicial decisions, court orders, and/or agreements between the parties may impose additional obligations, Rule 4.4(b) does not in itself prohibit the receiving lawyer from using inadvertently sent information. If using the inadvertently sent information would reasonably be expected to advance the client's objectives *and* the law permits its use, then Rules 1.2(a) and 1.4 direct the lawyer to consult with the client about the risks and benefits of using the information. The client's desire to use the information should be treated by the lawyer as controlling when the failure to do so would constitute a failure "to seek the objectives of the client through reasonably available means permitted by law and these Rules" under Rule 1.1(c), and/or would "prejudice the rights of the client" under Rule 1.2(e). This determination may depend on whether reasonably available alternative means exist for obtaining the information in admissible form from independent sources, and how much time and expense would be involved in those efforts. If the lawyer reasonably determines that Rules 1.1(c) and 1.2(e) do not require using the inadvertently sent information, then the lawyer may refrain from using it, provided that the lawyer's decision is consistent with the lawyer's duties to competently and diligently seek the client's objectives in the representation. If the potential significance of the information is unclear, or if other law governing the use of such information in the jurisdiction is uncertain, a lawyer may refrain from using the information even over the client's objection. Finally, if the lawyer and the client have a fundamental disagreement over whether to use the inadvertently disclosed information, the lawyer may be permitted or required to withdraw from the representation depending on the circumstances.