



211 East Water Street | Suite 400
Kalamazoo, Michigan 49007

Telephone 269 / 382-2300 | Fax 269 / 382-2009 | www.varnumlaw.com

John W. Allen

Board Certified Civil Trial Advocate (NBTA)
American Board of Trial Advocates (ABOTA)
Family Law Practice Certificate (ICLE)
Admitted in Illinois, Indiana, Michigan, Minnesota, Wisconsin and Florida

Direct: 269 / 553-3501
Mobile: 269 / 491-0056
jwallen@varnumlaw.com

September 16, 2018

Michigan Supreme Court
Clerk's Office
PO Box 30052
Lansing, MI 48909

Email: MSC_Clerk@courts.mi.gov

Re: Comments and Proposals relating to:
PROPOSALS TO AMEND THE MRPC (ADM File No. 2017-29);
Proposed Amendments of Rule 4.4(b) and Comments
Inconsistency with MCR 2.302(B)(7)

To the Michigan Supreme Court:

I am a Michigan lawyer with Varnum LLP (Varnum Attorneys). In the past, I have served as Chair of the State Bar of Michigan Special Committee on Grievance, and have served as the Chair of the State Bar of Michigan (SBM) Standing Committee on Professional and Judicial Ethics (the "Ethics Committee").

I also served on the ABA Ethics 2000 Advisory Committee, and have chaired the Ethics and Professionalism Committee of the ABA, Trial Tort and Insurance Practice Section. For several years, I have had the honor of serving as Chair and Moderator of the annual ICLE Ethics Panel and Seminar.

This letter contains the views of me only, not those of the Firm, ICLE, the State Bar of Michigan, the ABA, nor their Committees.

INTRODUCTION AND SUMMARY

The proposal of ADM File No. 2017-29 contains issues that deserve clarification. First, it is inconsistent with the current wording of MCR 2.302(B)(7). Second, through the wording of the Comment, it attempts to change the requirements of MRPC, and to establish a standard of professional care. That is not appropriate.

Inconsistency with the Current Wording of MCR 2.302(B)(7)

ADM File No. 2017-29 is worded such that ANY receipt of likely inadvertently produced information (of any kind) subjects the recipient lawyer to a mandatory duty to notify the sender, regardless of any notice from the sender that the disclosure was inadvertent.

Michigan Court Rule 2.302(B)(7) (adopted by Order 12/16/08, Eff. 1/1/09, ADM File No. 2007-24, is very different as to privileged or work product material, and triggers duties of the recipient **only after first being notified by the sender**. It provides:

"(7) Information Inadvertently Produced. If information that is subject to a claim of privilege or of protection as trial-preparation material is produced in discovery, **the party making the claim may notify any party that received the information** of the claim and the basis for it. **After being notified**, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved."
(Emphasis added.)

One likely purpose of the court rule's pre-condition of notice by the sender is so that the recipient is not duped into committing some violation of the opponent's privilege by the sender's intentionally sending protected information. The recipient's mere review of that material could have dire consequences in the litigation for both the receiving lawyer and the receiving lawyer's client. See the attached article, "The Recipient's Dilemma- Inadvertent Disclosure of Privileged Information," *The Brief*, Winter 2002, ABA Tort Trial & Insurance Practice Section.

This inconsistency between MRPC 4.4(B) and MCR 2.302(B)(7) is also noted in the Staff Comment in the May 23, 2018 Notice of ADM File No. 2017-29.

Whatever solution the Supreme Court chooses, both MRPC 4.4(B) and MCR 2.302(B)(7) should be consistent. If the proposed amendment to MRPC 4.4(B) is adopted as in ADM File No. 2017-29, then MCR 2.302(B)(7) should be likewise amended to state the same rule of conduct, without any requirement that the sender's first notifying the receiving lawyer. In the alternative, the court could add such a "after being notified by the sender" requirement to MRPC 4.4(B). The latter alternative may be more preferable, but, as described in the attached article, the recipient is still presented with a dilemma of just how to handle such material.

Using the Comment to Define the MRPC Requirements

ADM File No. 2017-29 also proposes a final paragraph to the Comment:

Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was

inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

The inconsistency of this paragraph with MCR 2.302(B)(7) is also noted in the Staff Comment in the May 23, 2018 Notice of ADM File No. 2017-29. It also highlights the risks inherent in attempting to define the requirements of lawyer conduct and professional standards of care in the Comment, as opposed to in the Rule, itself. Such attempts should be avoided.

Since their inception in the 1980s, the ABA Model Rules of Professional Conduct have always been accompanied by a "Preamble and Scope," which has included:

"The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."

The Michigan Supreme Court has historically and consistently followed this same principle.

"This Court allows publication of the Comments only as 'an aid to the reader,' but they are not 'authoritative statement[s].' The rules are the only authority."
Grievance Administrator v Deutch, 455 Mich 149, 164; 565 NW2d 369 (1997).
(Emphasis added.)

There are good reasons for the historical distinctions between the wording and language of the Rules, as distinguished from the Comments, which support why the language of the Comments is not appropriate for use as a basis for professional discipline, nor as an attempt to set standards of professional practice.

In Michigan, MRPC is a strict liability, quasi-criminal disciplinary code; mitigating factors (past conforming conduct, no injury, lack of intent) affect only punishment, not culpability. See *In re Woll*, 387 Mich 154, 161, 194 NW2d 835 (1972).

Moreover, amendments to MRPC and their Comments must also be considered in light of the reality that the MRPC are used in Michigan, as well as almost every other state, either directly or indirectly, as a platform for malpractice claims and other civil litigation such as fee disputes. Cf., *Beattie v. Firnschild*, 152 Mich App 785 (1986); *Lipton v. Boesky*, 110 Mich App 589 (1981) (rebuttable presumption of negligence); *Restatement of the Law Third, The Law Governing Lawyers*, §52. In the 21st century, Michigan lawyers are far more likely to encounter the MRPC and their Comments in a civil, rather than disciplinary, context.

In the most recent amendments to the ABA Model Rules of Professional Conduct, the newly-revised Scope, part [20] makes the concession that "since the Rules do establish standards

of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." The Restatement takes a similar position. Restatement (Third) of the Law Governing Lawyers, § 52(2) & Comment f (2000) (violation "may be considered by a trier of fact as an aid in understanding an applying" the duties of competence and diligence required to meet standard of care).

Even though the more recent amendments to the Michigan Rules of Professional Conduct have retained (in the Comment and "Preamble" to MRPC 1.0 (Scope and Applicability of Rules and Commentary) the admonition that the MRPC "are not designed to be a basis for civil liability," nevertheless the MRPC continue to define the "standard of care" for lawyers in civil lawyer professional liability cases. The changes proposed hold the real potential to increase civil claims, and also to create new ones which do not now exist.

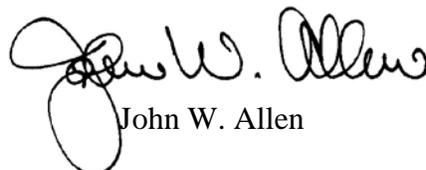
In addition, there is legitimate concern that changes that use terms such as "reasonable" in the Rules and their Comments will make it even more difficult to obtain summary disposition or summary judgment based on the lawyer's proven conformity with the Rules' requirements.

This is not merely theoretical, nor minor. It holds the prospect of vastly increasing the already growing number of not only lawyer liability claims, but also the increasing genre of Attorney Grievance Commission (AGC) complaints, and Attorney Discipline Board (ADB) proceedings, which, at base, are really civil disputes. It will increase the cost of those discipline proceedings and thus the Bar dues requirements to finance them. It will also increase the cost of lawyer professional liability insurance to all lawyers, and thus increase the cost of legal services to all persons. Most importantly, it will divert scarce AGC/ADB resources from those truly serious cases more deserving of their attention.

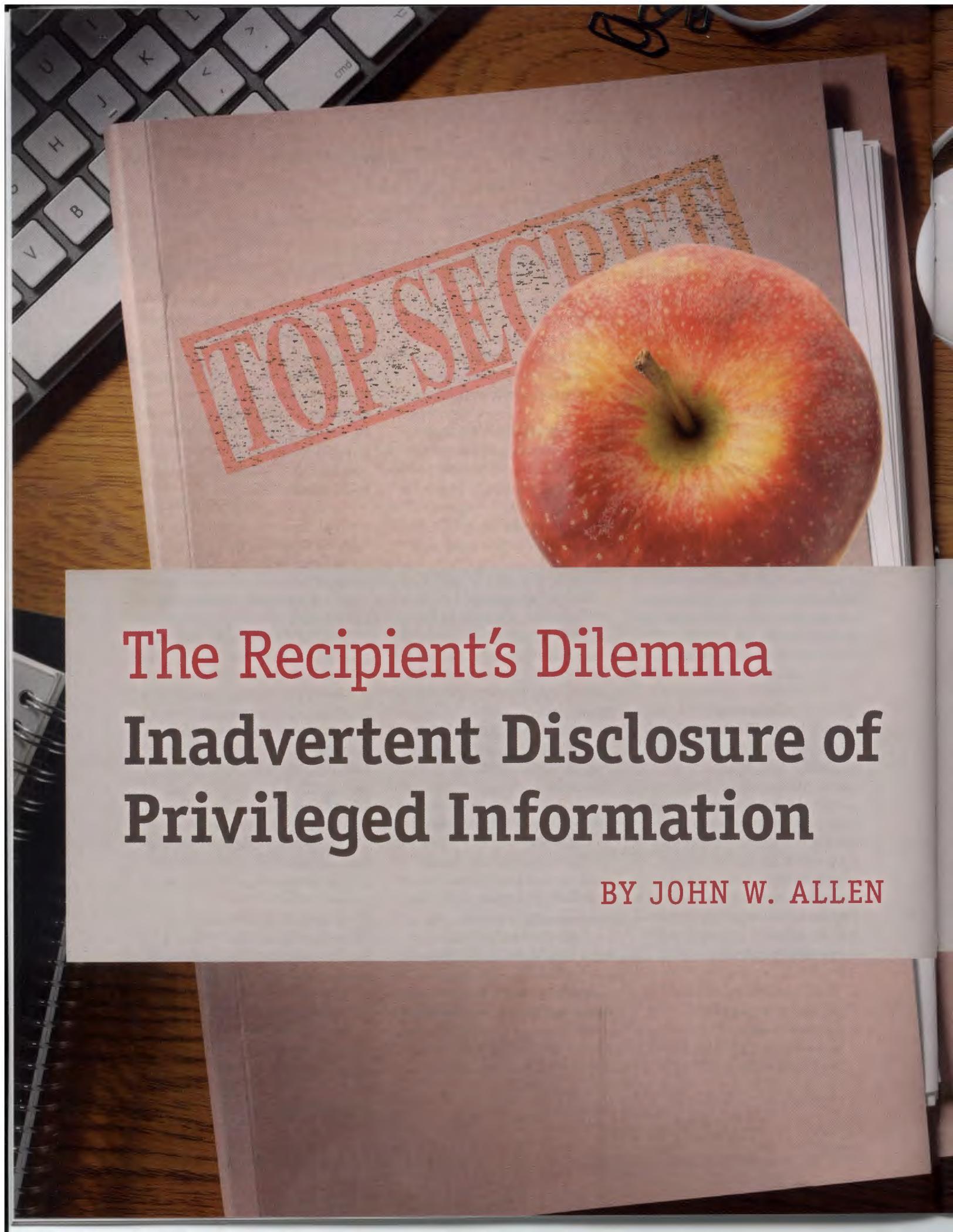
An MRPC Comment is not the vehicle to impose lawyer standards of care. If we think our only tool is a hammer, then we sometimes wrongly see every issue as a nail. MRPC and its Comments are not the cure for everything. Attempting to set standards of care with the MRPC and its Comments, is like trying to teach driver education by using only speeding tickets. Lawyer competence is better addressed by training, continuing education, and specialized programs such as certification.

This is why any proposed changes should be in the MRPC only, not in the Comment. And it is also why the changes to MRPC should be consistent with MCR.

God Bless America,



John W. Allen

A photograph of a desk with a keyboard, a folder, and an apple. The folder has a 'TOP SECRET' stamp. The apple is red and yellow. The keyboard is black and white. The desk is wooden.

TOP SECRET

The Recipient's Dilemma Inadvertent Disclosure of Privileged Information

BY JOHN W. ALLEN



Receiving inadvertently disclosed privileged information presents a decidedly two-sided coin. The false joy of discovering the often highly probative value of unintended evidence can be quickly offset by the threat of disqualification for failure to abide by the ethical and procedural rules governing such unexpected events. To complicate matters, in some jurisdictions those ethical and procedural rules are at odds and inconsistent with each other. This article describes the various rules and ethical opinions that govern inadvertent disclosures of privileged information, reiterates the importance of maintaining the attorney-client privilege, touches upon some scenarios where sanctions may well occur, and suggests procedures to both comply with the rules and to protect the privilege to which every client—yours and your opponent’s—is entitled.

The Federal and State Rules

The Federal Rules of Civil Procedure (Federal Rules) and many state court rules have adopted a nearly identical procedure for handling inadvertent disclosures of privileged information. Federal Rule 26(b)(5)(B) provides:

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

Similarly, Michigan Court Rule 2.302(B)(7) reflects the approach found in many states:

(7) *Information Inadvertently Produced.* If information that is subject to a claim of privilege or of protection as trial-preparation material is produced in discovery, *the party making the claim* may notify any party that received the information of the claim and the basis for it. *After being notified*, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved (emphasis added).

First, note that the “claim of privilege” is not restricted to attorney-client privilege and that many privileges are recognized in both the federal and state law. Also note that the duty of initial notice is on the *producing/sending* party, not the receiving party. Based on the Rules of Civil Procedure alone, one might conclude that the recipient has no duty whatsoever when receiving apparently privileged material under circumstances that indicate that the disclosure may have been inadvertent. Thus, a recipient might wrongly conclude that nothing need be done until the sender notices the error and notifies the recipient. This would be wrong. Sometimes, the full answer is not in the civil procedure rules alone. To get a more complete picture, one must also review the applicable rules of professional conduct and pertinent ethics opinions.



TIP

The false joy of discovering the often highly probative value of unintended disclosure may be quickly offset by the threat of disqualification for failure to abide by the ethical and procedural rules governing such unexpected events.

The Model Rules and Ethics Opinions

The American Bar Association (ABA) ethics opinions and the Model Rules of Professional Conduct (Model Rules) display a somewhat tortured history of how to handle inadvertently disclosed privileged information. On November 10, 1992, the ABA Ethics Committee issued Formal Opinion 92-368, "Inadvertent Disclosure of Confidential Materials," in which it opined that a lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or that otherwise could be deemed confidential, under circumstances where it is clear that those materials were not intended for the receiving lawyer, should refrain from examining the materials, notify the lawyer who sent them of receipt of the materials, and abide by the instructions of the lawyer who sent them.

In February 2002, the ABA Model Rules were amended pursuant to the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct. The amendment to Rule 4.4, "Respect for Rights of Third Persons," not only directly addressed the precise issue discussed in Formal Opinion 92-368 but narrowed the obligations of the receiving lawyer. The amendment added Rule 4.4(b), which states that

[a] lawyer who receives a document relating to the representation of the lawyer's client and

knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Rule 4.4(b) thus only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. It does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer. Comment [2] to Rule 4.4 explains that

[w]hether 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 of whether the privileged status of a document has been waived.

Comment [3] goes on to state that

[s]ome lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Thus, because the conclusion of Formal Opinion 92-368 was in conflict with amended Rule 4.4, the ABA Ethics Committee withdrew the earlier opinion in 2005 by issuing ABA Formal Opinion No. 05-437. Unfortunately, by that time—and even after that—many states adopted their own versions of the revised Model Rules that reflected the stance taken by the

earlier ethics opinion, thus continuing to place a duty of notice on the recipient.

Thus the states have adopted varying approaches to the Model Rules. Some, like New York, have adopted the ABA version of Model Rule 4.4(b), placing a duty only on the receiving counsel. States such as Michigan and Florida have declined to do that and have no Model Rule 4.4(b) equivalent. Yet, earlier ethics opinions in Michigan—for example, Opinion CI-970 from 1983—now have no vitality, given the more recent Michigan Court Rule 2.302(B)(7) amendment, described above. Still other states, as illustrated by Colorado Rule 4.4(b) and (c), have adopted both approaches, incorporating both the Model Rule duty of notice on receiving counsel and the Federal Rules approach of placing a duty on the counsel who sent the materials. The Colorado rule provides:

Rule 4.4. Respect for Rights of Third Persons

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) 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.
- (c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and

John W. Allen is a partner in the Kalamazoo, Michigan, office of Varnum LLP. He focuses his practice on business and commercial litigation, and he also teaches trial practice to other lawyers. Allen can be reached at jwallen@varnumlaw.com.

who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

Limiting Accidental Waiver

Most courts are reluctant to endorse any theory of "accidental" waiver. The attorney-client privilege is too valuable a right to be discarded cavalierly. Its value not only benefits a specific client but society as a whole. The attorney-client privilege and work product protections confer enormous value on our society, meriting the title of the "greatest engine of law enforcement."

Dating back to the reign of Elizabeth I of England, the underlying rationale of this privilege is that legal compliance is enhanced by persons and businesses being able to seek and rely upon confidential legal advice from their lawyers. And it works. Ask any experienced lawyer, and each will tell you of his or her early career astonishment at the candor with which clients communicated facts to the lawyer, and the even greater gratification of seeing clients obey the lawyer's advice to comply with the law—even if doing so was expensive, unpleasant, and unwanted by the client. In America, this happens thousands of times each day, and it results in the highest degree of voluntary legal compliance on the planet, all without any direct government involvement and without spending a single tax dollar.

Judges understand the great value of the attorney-client privilege and protect it jealously. Any waiver of the attorney-client privilege or work product protections derogates from a culture of confidential

communication, which forms the principal incentive to seek and obtain legal advice. Therefore, any waiver, even if arising out of accidental or inadvertent conduct, holds a large potential for damaging the privilege and thus decreasing legal compliance in general. Any revelation of confidential attorney-client communications—even by voluntary waiver—derogates from the candor

The sanction for inadvertent disclosure frequently includes disqualifying the receiving lawyer—and entire firm—from further work in that matter.

that is essential to the effective operation of this privilege in achieving voluntary legal compliance.

To evaluate privilege waivers by inadvertent conduct, federal courts now use a balancing test contained within the recently amended Federal Rule of Evidence 502(b). That Rule now provides:

(b) *Inadvertent disclosure.*

When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

1. the disclosure is inadvertent;
2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Thus the producing/sending lawyer must act promptly if a notice is received from the receiving lawyer and must take the steps specified in Federal Rule 26(b)(5)(B).

Sanctions for Violation

Some courts have concluded that, regardless of the provisions of the Federal Rules, a receiving lawyer nevertheless has a duty to notify the sender that materials may have been inadvertently disclosed. Frequently, the sanction is severe and includes disqualifying the receiving lawyer and that lawyer's entire firm from any further work in that mat-

ter. Such disqualifications are rarely well received by the disqualified lawyer's client, who usually wants reimbursed the fees already paid, and chooses not to pay any more.

Such sanctions occurred in *Maldonado v. New Jersey*.¹ In this employment discrimination case, the plaintiff found a letter in his workplace mailbox, reviewed it, and then handed it over to his attorney. Prejudice existed due to the significance of the letter's contents, which contained the defendants' case strategy. However, the court found that Maldonado was not culpable of sanctionable conduct because no evidence existed that he committed a deliberate or bad faith act.² The court concluded that the proper thing to do when he received a letter that was not addressed to him would have been to return it to the named recipient or author. Instead, given the alleged environment at work and Maldonado's level of legal understanding, the court found it understandable that he gave the letter to his attorney. But the court also observed that "Maldonado's

attorney is the safety-net in this situation, and is charged with certain ethical obligations as it relates to the privileged materials.³

The court went on to conclude that plaintiff's counsel did not properly perform their "safety net" function. The court criticized plaintiff's counsel because of the following facts:

- Maldonado's present counsel had access to privileged material for several months before giving notice to the producing party or lawyer;
- plaintiff's counsel reviewed and relied on the letter in formulating Maldonado's case;
- the letter was highly relevant and prejudicial to the defendants' case;
- plaintiff's counsel did not adequately notify opposing counsel of their possession of the material;
- the defendants took reasonable precautions to protect the letter and could not be found at fault for its disclosure; and
- Maldonado would not be severely prejudiced by the loss of his counsel of choice.⁴

The result was that plaintiff's counsel were disqualified from the case.

Maldonado may be criticized as outdated because it is based on the rationale of the now-rescinded ABA Formal Opinion 92-368. But the key is actually New Jersey Ethics Rule 4.4(b), which remains as it was in 2004 when *Maldonado* was decided, and reads:

(b) A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop

reading the document, promptly notify the sender, and return the document to the sender.

This is still the law in New Jersey and in many other jurisdictions.

Responding to Inadvertent Receipt

If documents that you believe may be privileged are inadvertently sent to you, follow the steps outlined below to comply with the rules and to protect any privilege attached to the documents.

- *Stop reading the documents immediately.*
- Draft a memorandum regarding the facts of revelation of the documents and describe them briefly. In writing this memo, do not look at the detailed contents of the documents.
- Sequester and secure the documents, and memorialize them, preferably using personnel not working directly on the same client matter. One method used with paper documents is to turn the documents over, with the blank side showing, and add serial numbers to them. Their container or envelope needs a label and to be sealed, and a chain-of-custody log needs to be created.
- Draft a letter to the sending attorney giving notice of the revelation, in compliance with the applicable court rule, demanding an immediate response regarding any claim of privilege, with a description of the required privilege log. Do not waive the right to demand that the documents be produced, and do not concede the privilege claim, as delineated

in Federal Rule 26(b)(5)(A) (i) and (ii). With the letter to the sender, provide a form of the privilege log to obtain information relevant to challenging the privilege claim. Send a copy of the form to your client, so the client knows what is happening.

- Inform the sending attorney that you are submitting the material to the court, under seal, and requesting that the court rule on it at a hearing unless the defendant waives the privilege before then. Offer the opportunity to inspect the documents under supervision.
- Draft and send a pleading notifying the court of the documents, filing them under seal. Do this promptly after receipt of the documents.
- After the court reviews the materials, even if the judge determines them to be privileged, that does not necessarily end the issue. Even if the materials were privileged, that privilege may have been waived by the producing party's conduct, as the discussion of Federal Rule of Evidence 501 above suggests.

Conclusion

Just because your opponent inadvertently sends you a privileged document, you do not necessarily have the right to read it. Prudence, and a high regard for the privilege, causes the wise lawyer to proceed carefully and to assure compliance with both court rules and ethical rules before proceeding. ■

Endnotes

1. 225 F.R.D. 120 (D.N.J. 2004).
2. *Id.* at 136.
3. *Id.* at 135.
4. *Id.* at 141.