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FEATURED TOPIC
**A LAWYER'S OBLIGATION TO PREVENT THE INADVERTENT DISCLOSURE OF
CONFIDENTIAL CLIENT INFORMATION**

We've all had the experience before. You hit send on an email and the second you hear that whirr indicating the message has been transmitted, it hits you. You sent your message to the wrong person. Often, the consequence is just mild embarrassment. Sometimes, it is much, much more than that.

On August 13, 2021, *Above the Law* reported that a partner at a prominent U.S. law firm made the big kind of mistake. The unfortunate lawyer inadvertently sent a confidential strategy document to an adversary. Such an error is not only embarrassing and a potential disaster for lawyer-client relations, it may also lead to disciplinary problems.

The ethical problems facing a lawyer who inadvertently discloses client confidential information are covered by KRPC 1.6(c) and MRPC 4-1.6(c). Both require lawyers to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client." Comments 26 to KRPC 1.6 further explain:

Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply

with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with non-lawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

KRPC 1.6, Comments 26 & 27; MRPC 4-1.6, Comments 15 and 16.

The basics of Rule 1.6(c) are known to every lawyer. Lawyers have an obligation to make “reasonable efforts” to ensure that they do not inadvertently disclose confidential information. These efforts can range from using locked filing cabinets to maintaining adequate digital security measures to prevent hackers from illicitly accessing their digital devices. They include teaching law firm staff the rules relating to client confidentiality and ensuring that they follow them in practice. But there is a more specific danger of inadvertent disclosure of client confidential information that relates specifically to digital communications devices—one that continues to pose problems for lawyers.

Some of the readers of this article will be old enough to remember the introduction of fax machines into law practice and the way it simplified and speeded up document transmission. These early fax machines used a telephone line to transmit digital images. As a convenience factor, most fax machines included a “speed dial” function with which one could simply press a single button to transmit documents to a pre-programmed, frequently used number. Unfortunately, this convenience feature also introduced the danger that, by pressing the wrong button, one might transmit documents to

an unintended recipient and thereby inadvertently disclose confidential client information to the wrong—and on occasion, adverse—party.

While stand-alone fax machines are not as common in law offices today, they are not completely absent. And most lawyers today do send documents over email with programs that auto-fill recipients email addresses and permit individuals to “reply all”—features that present a similar danger of inadvertent disclosure of client confidential information. To prevent such an unfortunate occurrence, lawyers using digital devices to transmit documents containing client confidential information should be sure either to disable these potentially dangerous features or warn users to take extra care to make sure that documents are being sent to the proper recipient. In the case of inadvertent disclosure of documents, just a little extra effort will reduce the chances of a major problem.

The other side of the inadvertent disclosure of documents containing client confidential information is the ethical obligations on a lawyer who receives such documents. The current rule, set out in KRPC 4.4 (b), reads:

A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

MRPC 4-4.4(b) is the same.

While this rule is straight forward and imposes a relatively light burden on the recipient, the rule is the result of a number of years of attempts to formulate both an effective and a fair rule. Comments 2 and 3 to Rule 4.4 help a lawyer understand the potential issues that arise under Rule 4.4(b):

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or

electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] 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.

Unfortunately, Comments 2 and 3 leave many of the questions they pose unanswered to the extent that they refer lawyers to "other" laws that may be applicable. It is important to recognize that court rules, both state and federal, may well affect how lawyer must deal with receipt of an inadvertently sent document.

The takeaway from this discussion about inadvertent disclosure of client confidences, particularly when dealing with documents, is that lawyers should make efforts to prevent such disclosures even to the extent of disabling features of otherwise useful programs. If a lawyer receives such a document she should study Rule 4.4(b) and Comments 2 and 3 carefully and be sure her response to the receipt not only complies with the *Rules of Professional Conduct*, but also to other applicable court rules and laws.

An excellent, albeit somewhat old, article on these issues and the history of how courts and disciplinary authorities have dealt with it is James M. Altman, "Inadvertent Disclosure and Rule 4.4(b)'s Erosion of Attorney Professionalism," available online at <https://www.techethics.com/james-m-altman-inadvertent-disclosure-and-rule-4-4bs-erosion-of-attorney-professionalism/>.

NEW AUTHORITY
**PROFESSIONAL RESPONSIBILITY:
CURRICULUM LAW STUDENTS ARE LEARNING TODAY**

This August has been a relatively quiet month in terms of new cases and advisory opinions. In light of the paucity of exciting new authority, I thought that I would take this opportunity to respond to a question that I am asked with some frequency. I am often asked what I actually teach in my basic professional responsibility class these days. Over the forty years that I have taught PR, the subject has expanded enormously, and the amount of material that students must master for the MPRE has also increased. As a PR teacher, I must adjust my syllabus each semester to take these changes into account. I do not assign secondary literature to my students; there is simply too much other necessary material that they must learn in the two-hour PR course. In fact, I spend most of the course going over the Rules, the comments thereto, advisory opinions I think essential both for general knowledge of the field and an adequate background to take the MPRE.

The following is the syllabus to the PR course that I am teaching in Fall 2021. I hope that readers find it of interest both as to what current law students must learn and as a very basic guide to the subject.

[Access Syllabus Here](#)

ETHICS & MALPRACTICE RESEARCH TIP
NEW ARTICLES DRAWN FROM THE
CURRENT INDEX OF LEGAL PERIODICALS

1. A.T. Gueinziu & E. Ikeno, "Legal Representation for Abused and Neglected Youth," 45 Mitchell Hamline L. Rev. 1234-1340 (2019).

This article discusses the issues that surround providing legal representation to youth in child welfare proceedings.

2. C. Pede, "Remarks on Being a Good Lawyer," 52 Tex. Tech L. Rev. 837-846 (2020).

Lt. General Charles Pede is the retired Judge Advocate General of the U.S. Army. He is a distinguished lawyer and officer, and his words are worth reading.

3. E. Webster, "The Prosecutor as a Final Safeguard against False Convictions: How Prosecutors Assist with Exoneration," 110 J. Crim. L. & Criminology 245-306 (2020).
4. I.M. Haight, "Digital Natives, Techno-Transplants: Framing Minimum Technology Standards for Law School Graduates.," 44 J. Legal Prof. 175-222 (2020).

Although this article deals specifically with law schools, it is important reading for every lawyer in terms of the evolving responsibilities lawyers have in terms of digital literacy.

5. Prevatte, "Recent development. Recent Ethics Opinions of Significance.," 44 J. Legal Prof. 313-320 (2020).
6. J. Connolly, "Recent development. Recent Law Review Articles concerning the Legal Profession.," 44 J. Legal Prof. 321-334 (2020).

These two articles highlight important recent opinions and articles in legal ethics.

BLAST FROM THE PAST
AN EXCERPT FROM EMIL BLUM AND SIGMUND ALEXANDER'S
WHO LIES?: AN INTERROGATION

This month's "Blast from the Past" comes from a little known book by Emil Blum and Sigmund Alexander, *Who Lies?: An Interrogation*. The volume contains a number of vignettes dedicated to various occupations, including physicians, merchants, professors, bankers, editors, preachers, and, of course, lawyers.

"I want to get rid of my wife without having to pay her alimony."

"Oh?" exclaimed the lawyer, scornfully, "that means you want to cheat her twice, and want me to help you."

"That's a pleasant way of putting it. However, do as I say and you can name your own price."

"No price would pay me for such an injustice."

"You forget the notoriety that such a case, from the social circle in which we move, is sure to win for you as counsel for the prosecution, and the probable increase of practice that will follow."

"And you forget, sir," said Gay, "that I am an honest man."

"Oh, if you look at it in that way ----"

"I do."

"That settles it. A puritanical lawyer is something of a curiosity, but hardly a suitable legal adviser. You're sort of a Roundhead, and as my sympathy is with the Cavaliers, you will not be troubled further by me, either in this matter no any other." And Mr. Golden left the office.

Emil Blum, *Who Lies?: An Interrogation* 122-123 (1892).