



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I just received an email from an opposing lawyer with whom I've been negotiating a deal. It looks like he may have inadvertently hit "reply" rather than "forward," as he appears to be talking to a business person at his client.

Before I realized that it was not meant for me, I read his recommendation that the client accept our offer, given problems with the validity of certain patents on assets involved. I'm confused on my obligations – at one time there was an ABA opinion that I think said I couldn't keep or use this information. Is that still the rule? Am I supposed to destroy or delete this now? Do I tell him I received it? Can I and should I pass the info along to my client (it's pretty material to their deal)?

A: You have a good memory—at one time this would have been covered by ABA Formal Ethics Op. 92-368 (1992), which was superseded by Model Rule 4.4(b). ABA Formal Ethics Op. 06-440 (2006). Rule 4.4(b) requires the lawyer to promptly notify the sender, leaving what happens next to law outside the Model Rules. Comment 3 to the Rule does allow the lawyer to return the document or delete an electronically stored document as "a matter of professional judgment ordinarily reserved to the lawyer" where the lawyer is not otherwise required by applicable law to do something else.

In litigated matters, the "what's next" issues are often dealt with in procedural codes, e.g., see "clawback" provision of Fed. R. Civ. P. 26(b), or provided for in pretrial orders concerning discovery. In addition, some states have modified their versions of Rule 4.4(b) to provide more specific direction or limitation. Examine the version of Rule 4.4(b) and any other law applicable to your situation, promptly provide the Rule 4.4(b) notice to your opponent. That gives your opponent the opportunity to confirm the inadvertent disclosure and seek protection of the information before you disclose it, and to raise with you any consequences that may ensue. If they take no action, that will likely waive any protection from disclosure to your client and give you some peace of mind as well.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.