# How Attys Should Handle Unsolicited Privileged Information

By **Hilary Gerzhoy, Charles Loeser and Lauren Snyder** (December 16, 2021)

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You receive a package in the mail from an anonymous source. The cover letter reads, "To Whom It May Concern, please find information relevant to your case." The enclosed packet contains privileged material about your opponent in ongoing litigation. Are you obligated to notify your opponent? Can you use the material?

Most attorneys are familiar with the rules governing inadvertent disclosure — every discovery response includes a disclaimer about returning inadvertently produced material. But what about intentional disclosure? Unfortunately, the answer depends on your jurisdiction.

In November, the California Court of Appeal, Fourth Appellate District, ruled in Providence Industries LLC v. LuLaRoe LLC that Reed Smith LLP — which found itself on the receiving end of intentionally disclosed, but arguably privileged, material — had a duty to notify the opposing party. Luckily the firm accurately predicted what the court would say about it.

**Providence Industries**

In 2018, Providence Industries sued LuLaRoe — a multilevel marketing retailer of women's clothes — for more than $48 million the clothing supplier claimed in unpaid bills. The lawsuit, filed in the Superior Court of California in Riverside County, garnered significant media attention for some of its more salacious allegations.

Providence Industries had been LuLaRoe's primary clothing supplier. The suit claimed that, instead of paying its bills, LuLaRoe's founders used the company's dwindling revenue to fund their lavish lifestyle. A series of follow-on suits accused LuLaRoe of being a pyramid scheme.

Several months after filing the complaint, Reed Smith LLP, which had been serving as Providence's outside counsel, received a series of anonymous letters. A Reed Smith administrative assistant scanned the letters, saved them to the client's electronic file, and emailed them to the litigation team handling the case as well as to Providence's in-house general counsel.[1]

The first three letters appeared to the reviewing Reed Smith lawyers as nothing more than "the musings of a disgruntled person who was following the case."[2] The final letter, however, appeared to contain confidential information.

After consulting the California State Bar's ethics hotline, the Reed Smith lawyers disclosed all four letters to opposing counsel.[3] Reed Smith notified counsel for LuLaRoe that the letters were being sent because Providence Industries might use the information contained in them in discovery.[4]

Counsel for LuLaRoe asserted privilege over the letters, and motion practice ensued. The court agreed with LuLaRoe and ordered Reed Smith and Providence Industries to return the privileged information and destroy all copies.[5]

Several months later, LuLaRoe unsuccessfully moved to disqualify Reed Smith. LuLaRoe appealed. The California Court of Appeal affirmed, holding that, contrary to LuLaRoe's stance, the first of the four letters did not put Reed Smith on notice that it was in possession of potentially privileged information.[6]

Had that letter contained "obviously" privileged material, Reed Smith would have been prohibited under California precedent from reviewing any of the subsequent communications, and it would have triggered an immediate duty to notify opposing counsel.[7] Failure to adhere to those steps can result in disqualification.[8]

Instead, the court held that it was only the last of the four documents that contained potentially privileged information and, upon receiving it, the Reed Smith attorneys did exactly what the law required: notified the opposing party.

Was the court in the LuLaRoe case correct? What do the ethics authorities say about how a lawyer should respond to receiving privileged or confidential information? Below, we examine the American Bar Association's and the, often conflicting, state guidance.

**ABA Opinions**

The American Bar Association's Model Rules of Professional Conduct, which serve as a blueprint for many states' rules of professional conduct, address inadvertent production of documents. Model Rule 4.4(b) provides:

> 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.[9]

What a lawyer must do after notification is "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."[10] This rule "recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers."[11]

But neither the rule nor the comments address what to do when, as in Providence Industries, a lawyer receives unsolicited privileged or confidential material that has been intentionally produced by a third party. Indeed, Comment 2 explicitly states that:

> 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.[12]

There are, however, two ABA formal opinions directly on point.

The first, decided in 1994 before Rule 4.4(b) had been adopted, determined that, although the Model Rules did not offer explicit guidance, a lawyer who received unsolicited privileged or confidential material would satisfy her professional responsibility obligations if she (1) refrained from reviewing the materials which are privileged or confidential any further than necessary to determine how to appropriately proceed; (2) notified the adverse party or party's lawyer that the receiving lawyer possessed such documents; and (3) followed the instructions of the adverse party's lawyer; or, (4) should there be a dispute about the use of

the materials, refrained from using them until a court determined they could be used.[13]

At the time the opinion was issued, the ABA noted that the several states that had addressed this issue had reached a different conclusion — that the receiving lawyer had no obligation to disclose to the court or the adverse party that she possessed this information.[14]

In 2006, four years after the ABA adopted Rule 4.4(b) and its accompanying comments, the ABA changed course.

The ABA withdrew Formal Opinion 94-382, explaining that "[t]he opinion found no basis in the Rules for requiring the lawyer to return the materials to their rightful owner or even forbid their use" and that the opinion had been influenced by other principles of law, such as the inviolability of the attorney-client privilege and the law governing bailments and missent property, which were beyond the scope of the Model Rules.[15]

The ABA also noted that Rule 4.4(b) merely requires a lawyer who receives an inadvertently sent document to notify the sender; it does not require the lawyer to refrain from reviewing the materials or abiding by the sender's instructions.[16]

Finally, and perhaps most importantly, the ABA explained that Rule 4.4(b) does not even apply to the situation at hand — when a lawyer receives unsolicited confidential or privileged materials from a third party — because it only applies to materials sent inadvertently.[17]

So, what does that mean for the lawyer who receives unsolicited materials? If the ABA Model Rules do not apply, where else should the lawyer turn?

**State Ethics Opinions**

The ABA is not alone in declining to interpret Rule 4.4(b) to require notification when a party receives unauthorized, unsolicited confidential or privileged materials. The North Carolina State Bar, for one, analyzed a case in 2012 in which a company's lawyer was reviewing an employee's emails on a company computer, and the company's lawyer discovered documents between the employee and his lawyer.[18]

While the question of whether the employer's lawyer could review the documents depended on a number of factors, the opinion squarely held that the employer's lawyer did not have to notify the employee's lawyer that it had copies of the email messages in its possession, reasoning that Rule 4.4(b) was inapplicable because the email was not "inadvertently sent."

Yet other states — despite having language that mirrors ABA Model Rule 4.4(b) — have chosen to construe the rule more broadly than the ABA. The Supreme Court of Maine, in the 2009 Fiber Materials Inc. v. Subilia decision, for example, sharply criticized a company's choice to use and quote at length from a memo from a law firm stamped "ATTORNEY/CLIENT PRIVILEGE" that the company had retrieved from an employee's company computer.[19]

The court, citing Maine Rule of Professional Conduct 4.4(b)'s prohibition on the use of material that "may have been inadvertently disclosed," said that plaintiff's use of the information "reflected a dismissive attitude and preemptive approach to [defendant's] claim of privilege."[20] In a concurrence, one of the justices noted that because the disclosure was not inadvertent, Rule 4.4 did not apply, and the court "should not criticize conduct that,

upon fuller examination, may be viewed as having violated no ethical rules."[21]

Similarly, the court in Providence Industries extended precedent that on its face applies to materials "provided or made available through inadvertence" to include those distributed intentionally.[22] Regardless of whether the materials were sent intentionally, the California court held that lawyers who receive apparently privileged materials must "refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possess material that appears to be privileged."[23]

Nevada, New York and Illinois have followed suit. The Nevada Supreme Court requires a lawyer to notify opposing counsel when he or she receives documents anonymously or from a third party unrelated to pending litigation, irrespective of inadvertence.[24] Even though the court in the 2011 Merits Incentives LLC v. Eighth Judicial District Court of State decision recognized that Rule 4.4(b) applies only to inadvertent disclosure, the court nonetheless held that the logic extends to intentional disclosure.

In the 2005 Knitting Fever Inc. v. Coats Holding Ltd. decision in the U.S. District Court for the Eastern District of New York, the plaintiffs obtained documents from "an undisclosed ... employee" of defendants, and the federal court held that plaintiffs' counsel had "a clear ethical responsibility to notify [defense] counsel and either follow the latter's instructions with respect to the disposition of the documents or [to] refrain from using them pending ruling by the [c]ourt."[25]

And in the U.S. District Court for the Northern District of Illinois, a magistrate judge commented in the 2010 decision Chamberlain Group Inc. v. Lear Corp. that he "fail[ed] to see why this same duty to disclose [in cases of inadvertent disclosure] should cease where confidential documents are sent intentionally and without permission."[26]

**Practical Tips**

So, what should a lawyer do when he or she receives apparently confidential or privileged materials? Even though Rule 4.4(b) may not, by its terms, apply to intentional or authorized — rather than inadvertent — disclosure, lawyers should confirm how courts and ethics authorities in their states interpret the rule.

Based on the legal landscape, it is best to refrain from reviewing, using or sharing the materials until there is an opportunity to consult any applicable protective order as well as court rules, rules of evidence, and other rules governing the proceeding.

We also recommend promptly consulting ethics professionals like in-house advisers and state bar ethics hotlines. When in doubt, the safest bet is to notify opposing counsel and resist the temptation to use the material absent assurances that the court in which you find yourself would permit the use.

Even better, consider addressing this issue early in a case, either at the initial scheduling conference or when negotiating the protective order that will govern discovery.

Protective orders typically contemplate inadvertent disclosure but rarely provide guidance on how parties should handle intentional disclosure. Spelling out how the parties should handle any disclosure of confidential or privileged material — inadvertent or intentional — will reduce uncertainty and ensure parties have a road map for what to do.

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[1] Providence Indus. LLC v. LuLaRoe LLC , No. E075513, slip op. at 2 (Cal. C. App., 4th. Nov. 5, 2021).

[2] Id. at 3.

[3] Id. at 3–4.

[4] Id. at 5.

[5] Id. at 6.

[6] Id. at 10. That initial letter contained handwritten notes that were later revealed to be an attorney's.

[7] Id. at 6.

[8] Id. at 9.

[9] Model Rules of Pro. Conduct r. 4.4(b) (Am. Bar Ass'n 2021).

[10] Model Rules of Pro. Conduct r. 4.4 cmt. 2 (Am. Bar Ass'n 2021).

[11] Id.

[12] Id.

[13] ABA Comm. on Ethics & Pro. Resp., Formal Op. 94-382 (1994).

[14] Id.

[15] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-440 (2006).

[16] Id.

[17] Id.

[18] North Carolina State Bar Ethics Comm., 2012 Formal Ethics Op. 5 (2012).

[19] Fiber Materials, Inc. v. Subilia , 974 A.2d 918, 927–28 (Me. 2009).

[20] Id. n.16.

[21] Id. at 929.

[22] State Comp. Ins. Fund v. WPS, Inc. , 70 Cal. C. App. 4th 644, 656–57 (1999).

[23] Id.

[24] Merits Incentives, LLC v. Eighth Jud. Dist. Ct. of State, ex rel. Cty. of Clark , 127 Nev. 689, 697 (Nev. 2011)

[25] Knitting Fever, Inc. v. Coats Holding Ltd. , No. 05CV1065, 2005 WL 3050299, *1, *4 (E.D.N.Y. Nov.14, 2005).

[26] Chamberlain Grp., Inc. v. Lear Corp. , 270 F.R.D. 392, 398 (N.D. Ill. 2010).