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HeadNotes

With great pleasure the editors announce that New York City financial services attorney C. Evan Stewart has been honored with the 2016 Sanford D. Levy Award by the New York State Bar Association's Committee on Professional Ethics. For more than ten years, Mr. Stewart's timely, insightful and witty articles on issues of legal ethics have graced the pages of the *Journal*, and we are particularly pleased that Committee Chair Marjorie Gross cited these articles as key factor in Mr. Stewart's selection. Mr. Stewart is a senior partner in the New York City office of Cohen & Gresser LLP, focusing on business and commercial litigation, and also has taught as an adjunct law professor at Fordham Law School and as a visiting professor at Cornell University.

Named for Sanford D. Levy, a former member of the Committee on Professional Ethics, the award was presented March 16 in Manhattan. Since 1982, it has been presented to an individual or institution that, in the opinion of the Committee, has contributed most to understanding and advancement in the field of professional ethics. Previous recipients of this prestigious award include the late former New York State Chief Judge Judith S. Kaye; Professor Stephen Gillers (New York University School of Law); Professor Thomas D. Morgan (George Washington School of Law); Roger C. Cramton of Ithaca (Cornell University Law School); and, in 2015, author and distinguished Professor Roy D. Simon.

And while we're on the subject of awards, the editors congratulate Frederick G. Attea as the 2016 recipient of the Business Law Section's David S. Caplan Award for Meritorious Service. Mr. Attea, a corporate lawyer at Phillips Lytle LLP, Buffalo, concentrates his practice on mergers and acquisitions, securities law, corporate governance and legal compliance programs. He has been a member of the NYSBA since 1965 and has served as a member of the House of Delegates, Chair of the Business Law Section, and Chair of the Corporations Law Committee, and is currently Chair of the recently organized Not-For-Profit Corporations Law Committee.

The Section established the Award in 2014 in order to recognize the importance and value of the many hours of volunteer service provided to the Section and its Committees by its members. The award is named in honor of Mr. Caplan, former Chair of the Technology and Venture Law Committee, who, despite his personal physical challenges, was always willing to volunteer his time, his effort, and his ideas for the benefit of the Section. Prior recipients of the Award are Samuel F. Abernethy (2015) and David L. Glass (2014).

The Caplan Award is presented annually at the Annual Meeting of the Business Law Section held in conjunction with the Annual Meeting of the New York State Bar Association. The recipient of the award is selected by a committee consisting of the three most immediate past chairs of the Section, and members of the Section's Executive Committee will also be invited to submit nominees. Members of the Section are invited to submit nominations to the committee; elsewhere in this issue there is an announcement of the Award with information on how to do so.

And finally, the editors are pleased to announce the winners of the Section's annual Student Writing Competition for 2015. First and second prizes are shared equally by Mr. Matthew Mobilia and Ms. Amanda Godkin, both of whom received the JD degree from Albany Law School in 2015, for their co-authored article "Emerging Equities in Paying for Municipal Services —The Problem with the Real Property Tax," which appeared in the Summer 2015 issue of the *Journal*. In an eye-opening analysis, the authors provide considerable insight into why New York has one of the highest tax burdens in the country, and how the burden might be more equitably shared by the many tax-exempt institutions that benefit from the municipal services funded by those taxes. Third prize is awarded to Ms. Amanda Evans, a candidate for the JD degree at Richmond Law School, for her article "Successfully Advocating for Gender Parity on Corporate Boards," which also appeared in the Summer 2015 *Journal*. Elsewhere in this issue is information on how to submit articles for the Competition. Any article written by a student enrolled in a degree program at an accredited law school at the time the article was written is eligible.

Honoring Mr. Stewart as recipient of the Levy Award, we lead off this issue with his latest contribution. In "Finders Keepers, Losers Weepers?" Mr. Stewart poses the question: what are lawyers supposed to do when they inadvertently come into possession of material mistakenly delivered by an opposing party? The question is, of course, not rhetorical. An ABA Model Rule adopted in 2002, and later in New York, seems clear: the attorney's duty is simply to notify the sender. Seemingly, the Rule is a model of clarity, and earlier interpretations requiring the attorney to do more were withdrawn by the ABA. But as always, there's a catch—or more than one. For one thing, numerous jurisdictions still follow the earlier rules. For another, the Rule itself is subject to numerous interpretive comments. In his usual clear and witty fashion, Mr. Stewart leads us through the thicket.

An ongoing area of controversy in franchise law is the degree to which the franchisor can control the franchisee. In the case of automobile dealers in New York, the State's

Finders Keepers, Losers Weepers?

By C. Evan Stewart

On May 26, 1963, Elvis went into RCA Victor's Studio B in Nashville and recorded Dory Jones and Ollie Jones's "Finders Keepers, Losers Weepers":

> The loser has to pay the score
> He lost you and I found you
> And I'm keeping you for ever more.[1]

That idea might apply to love, Elvis-style ("a hunk, a hunk of burning love"),[2] but does it also apply to lost documents and lawyers' ethical obligations in that context?

If You Just Look at the Rule...

ABA Model Rule 4.4(b) addresses what lawyers are supposed to do, as a matter of ethics, when they come into possession of materials mistakenly delivered by an opposing party: "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 was inadvertently sent shall promptly notify the sender." Before 4.4(b) was adopted by the ABA in 2002,[3] there was no Model Rule governing inadvertent disclosure. Notwithstanding, in 1992, the ABA issued Formal Opinion 92-368, which declared that a lawyer receiving attorney-client privileged materials or other confidential information had three ethical duties: (i) refrain from reading the document; (ii) notify the sender of the document; and (iii) obey the direction(s) of the sender as to next steps (e.g., return, destroy, etc.). That guidance was reinforced two years later in ABA Formal Opinion 94-382.

Three years after Model Rule 4.4(b) was issued, the ABA expressly withdrew Formal Opinion 92-368 (*see* ABA Formal Opinion 05-437), and the next year, it expressly withdrew ABA Formal Opinion 94-382 (*see* ABA Formal Opinion 06-440). While both earlier (and now withdrawn) opinions had been concerned with, *inter alia*, "protection of confidentiality, the inviolability of the attorney-client privilege,...and general considerations of common sense, reciprocity, and professional courtesy," the ABA (in withdrawing the earlier opinions) stated that while such "considerations" "may guide a lawyer's conduct," "[t]hey are not...an appropriate basis for a formal opinion [by the ABA], for which we look to the Rules themselves." And since Model Rule 4.4(b) only requires notification, and nothing more, that was (and is) that. Formal Opinion 06-440 also made clear that, besides the notification-only requirement, the receiving lawyer was free to (i) review the document, and (ii) not abide by any instructions from the sender.

When New York State adopted its most recent iteration of attorney ethical rules in 2009, it adopted the language and substance of ABA Model Rule 4.4(b).[4] Thereafter, the Association of the Bar of the City of New York's Committee on Professional Ethics issued Formal Opinion 2012-1. That opinion mirrored ABA Formal Opinion 06-440, permitting an attorney to review the document and disregard the instructions of the sender; furthermore, it also expressly withdrew a prior opinion (Formal Opinion 2003-04), which required additional obligations beyond those that are set forth in Rule 4.4(b).

According to a leading legal academic who played a key role in drafting the New York State rules, Rule 4.4(b) is a "model of clarity";[5] compliance with it, therefore, should be quite straight forward. But wait, there is a catch; indeed, there is more than one.

The Multi-Jurisdictional Issue

First off is the fact that numerous jurisdictions do not follow the ABA's (and New York's) lead on this ethical standard. For example, a number of states require exactly what the ABA suggested in 1992: (i) stop reading the document; (ii) notify the sender; and (iii) abide by the sender's instructions.[6] Other states require something a little less than those three steps.[7] And while some states do in fact follow the ABA and New York,[8] still other states have no Rule 4.4(b) at all.[9] This disparate kettle of fish tees up an ethical quandary for any lawyer who has clients beyond just the four corners of the state in which she is licensed: how does she comply with these very different ethical obligations vis-à-vis inadvertent disclosure?[10]

And Then There Are the Comments

Beyond Rule 4.4(b) itself, all of the New York Rules have Comments. As a general matter, these Comments "are intended as guides for interpretation" *only*; the "text of each Rule is authoritative."[11] With respect to Rule 4.4(b), two key Comments have hidden in them two huge *red flags*.[12] In the fourth sentence of Comment 2, for example, the Rule drafters wrote the following:

> Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to **court-imposed sanctions, including disqualification and evidence-preclusion.**

And in the third sentence of Comment 3, the Rule drafters wrote the following:

> **[S]ubstantive law** or **procedural rules** may require a lawyer to refrain from reading an inadvertently sent document, or

to return the document to the sender, or both.

Thus, if all one reads is the "authoritative" Rule, but not the *red flagged* Comments, the unsuspecting (but Rule-compliant) lawyer might be "ethical," but she could be facing some pretty unhappy consequences for blithely following the Rule.[13]

What If the Materials Are Privileged?

A few years ago the legal powers that be (with the assistance of Congress) made some changes to protect lawyers who are imperfect in dealing with the production of documents and emails.[14] First, the Federal Rules Advising Committee adopted Fed. R. Civ. P. 26 (b)(5) (and analogs to it in Rules 16, 33, 34, and 37); and Congress thereafter adopted Rule 502(b) of the Federal Rules of Evidence. The rules codify that an "inadvertent disclosure" of privileged material does not operate as a waiver so long as (i) the privilege holder took "reasonable steps to prevent disclosure;" and (ii) the privilege holder took "reasonable steps to rectify the error." Whether this "reasonableness" approach has led to the promised land is unclear.[15]

As part of these "reforms," Fed. R. Civ. P. 26 (b)(5) put specific obligations onto the receiving lawyer once she is made aware of the production of privileged information: (i) she "must promptly return, sequester, or destroy" the material(s); (ii) she "must not use or disclose the information until the claim is resolved"; and (iii) she "must take reasonable steps to retrieve the information if the [receiving] party disclosed it before being notified." About half of the states have imposed similar obligations on litigating lawyers in their jurisdictions;[16] importantly, for readers of this distinguished *Journal*, New York State does *not* have the same or similar obligations in the Civil Practice Law and Rules.[17] So New York litigators in New York federal courts would seem to have *very* different responsibilities with regard to inadvertent production than they would in New York State courts.[18]

In addition, the above-mentioned federal protocols have left some open issues for all lawyers governed thereby. [19] For example, does the receiving lawyer have an affirmative obligation to notify the sender or may she wait until she is "notified" of the inadvertent disclosure? And can the receiving attorney read the inadvertent privileged material and/or share it with her client?[20] Finally, what about privileged or confidential information that is overheard? (None of these rules seem to cover that scenario.)

How Have the Courts and Bar Authorities Dealt with This Evolving Situation?

Perhaps not surprisingly, the jurisprudence enforcing these protocols differs depending upon time and jurisdiction. Let us first look at New York.

- New York and "Finders Keepers":
  - *Matter of Weinberg*, 517 N.Y.S. 2d 474 (1st Dept. 1987). Court approved the sanction of disqualification where an attorney acquired privileged information through the improper use of discovery devices.
  - *Lipin v. Bender*, 597 N.Y.S. 2d 340 (1st Dept. 1993). Court approved the sanction of disqualification where an attorney used documents containing an adversary's work product that had been improperly obtained.
  - *American Express v. Accu-Weather, Inc.* 1991 WL 346388 (S.D.N.Y. June 25, 1996). Court sanctioned attorneys who ignored sending counsel's instructions to return a not-yet-opened package of documents which contained a privileged communication. [*Note*: The court relied upon ABA Opinion 92-368.]
  - *United States v. Rigas*, 281 F. Supp. 2d 733 (S.D.N.Y. 2003). Defense counsel application for an order authorizing them to retain and use the government's work product inadvertently produced in discovery was denied. [*Note*: The court relied on ABA Opinion 92-368 in rejecting defense counsel argument that they were being punished for promptly notifying the government lawyers and not reviewing the materials: "The Court finds this argument wholly unpersuasive. Attorneys, of course, bear responsibility for acting in accordance with ethical norms of the legal profession."].[21]
  - *People v. Terry*, 1 Misc. 3d 475 (County Ct., Monroe Co. 2003). The court precluded a prosecutor from using documents inadvertently sent by defense counsel.
  - *Galison v. Greenberg*, 2004 NY Slip Op. 51538 (Sup. Ct. N.Y. Co. 2004). Citing, *inter alia*, the New York City Bar's Formal Opinion 2003-04, the court cautioned that any attorney who receives information the attorney knows or should reasonably know contains privileged information must be aware of her ethical obligations and promptly adhere to them "in order to avoid sanctions."
  - *MNT Sales, LLC v. Acme Television Holdings, LLC*, Index No. 602156/2009, NYLJ, p. 42, col. 5 (Sup. Ct. N.Y. Co. April 29, 2010). The court held that the "spirit" of the New York City Bar's Formal Opinion 2003-04 had been violated by the plaintiff's lawyer, who had been asked to destroy an inadvertent email and had then refused to do so. As a sanction to "remediate the egregious conduct," the court denied the plaintiff's motion to be allowed to use the email.
- Other Jurisdictions and "Finders Keepers":
  - *In re Richard E. Lee*, 06-DB-22 (Louisiana Attorney Disciplinary Board, April 2, 2007). Discipline was

not ordered because the inadvertently disclosed document did not appear (on its face) to be privileged or confidential.

- *Rico v. Mitsubishi Motors Corp.*, 171 P.3d 1092 (Cal. 2007).[22] The court held than an attorney may read only as much as necessary to determine if documents are privileged; once it is so determined, the attorney must notify opposing counsel immediately and attempt to resolve the situation promptly, either by agreement or by seeking judicial intervention. In this case, where one of the plaintiffs' attorneys used his opponent's work product and also shared it with his expert and co-counsel, the court disqualified the plaintiffs' attorneys and their experts.[23]

- *Burt Hill Inc. v. Hassan*, 2010 BL 19879 (W.D. Pa. Jan. 29, 2010). The court questioned the ethics advice a law firm had received—that it could keep and use its opponent's confidential documents that had been received from an anonymous source.

- *Merits Incentive LLC v. Eighth Judicial District Court*, 262 P.3 720 (Nev. 2011). The court denied a motion to disqualify a law firm that received confidential information about an opponent from an anonymous source. The court noted that the firm had followed the notification requirement of Rule 4.4(b), even though the rule deals with inadvertent disclosure and *not* intentional but unauthorized disclosure.

- *Lund v. Meyers*, No. CV-12-0349-PR (Arizona Sup. Ct. July 16, 2013). Attorneys moved to disqualify opposing counsel because they had "read, kept, and distributed" privileged documents inadvertently produced. The litigated issue to the Supreme Court was the interplay between Rule 4.4(b) and Arizona's Rule of Civil Practice 26.1(f)(2): the procedure for providing documents to the trial court, their status during that process, and when any in camera review for privilege should take place.

- *Jablow v. Wagner*, 2015 BL 103103 (N.J. Super. Ct. App. Div. April 18, 2015). The plaintiff's lawyer, who kept and used for several months his opponent's privileged documents—which he had received from an anonymous source—was properly disqualified for breaching his duties under Rule 4.4(b).

- *Foss Mar. Co. v. Brandewiede*, 2015 BL 297104 (Wash. Ct. App. Div. 1, Sept. 17, 2015). Washington trial courts must apply a four-factor test in determining whether to disqualify an attorney who receives her opponent's privileged information: (i) prejudice to the sender; (ii) sender counsel's fault (or lack thereof); (iii) receiving counsel's knowledge that the materials are in fact privileged; and (iv) whether lesser sanctions are appropriate. The lower court's disqualification of the receiving lawyer was remanded expressly to apply the four factors before entering any disqualification order.

So What Is Next?

Many who have looked at this indisputably confused state of affairs have argued that the ethics gurus should go back and re-articulate, at a minimum, the standards articulated pre-Rule 4.4(b) in Formal Opinions 92-368 and 94-382.[24] And in July of 2011, New York's Committee on Attorney Professionalism proposed something along these lines to the State Bar's Committee on Attorney Standards and Conduct. But there was significant pushback to going that route—on the ground that such a step "would be a step backwards"; according to one commentator, "[a] profoundly important argument for limiting the scope of lawyers' ethical obligations in these situations is the unfairness of making the 'innocent' lawyers who receive such communications potentially subject to professional discipline in situations" not of their making.[25] Thus, according to the pushback argument, "vagueness is preferable to…any broader rule."[26]

For me, I am not sure who is right in the aforementioned debate (which, as things currently stand, is unresolved). What I do know is that this is one mighty big and tricky area. Hopefully, readers of this distinguished *Journal* will now be forewarned of the dangers that lurk if they ever get air-dropped into one of these unfortunate situations.

Endnotes

1. *See* "Elvis for Everyone" (RCA Victor August 1965) (reached number 10 on the Top Pop Albums chart). While completing this article I discovered that fourteen years ago a law student at Temple had used this same title (albeit without involving Elvis) for a student note on the same subject: *See* David Stanoch, " 'Finders Keepers, Losers Weepers?': Clarifying a Pennsylvania Lawyer's Obligations to Return Inadvertent Disclosures, Even After a New ABA Rule 4.4(b)," 75 *Temple L. Rev.* 657 (2002). Professor Emeritus Joseph J. Simeone of the Saint Louis University School of Law has also used this title, albeit on a different topic: " 'Finders Keepers, Losers Weepers': The Law of Finding 'Lost' Property in Missouri," 54 *Saint Louis Univ. L.J.* 167 (2009) (again, however, with no reference to the King of Rock and Roll).
2. "Burning Love" (written by Dennis Linde) (RCA Studios August 1972). Elvis's cover of this song (originally sung by Arthur Alexander) was his last #1 hit (Cashbox's Top 40 Charts).
3. In 2012, the ABA amended the rule to specifically reference "electronically stored information."
4. To date, New York State has not amended the rule to specifically reference "electronically stored information."
5. *See* R. Simon, *Simon on New Rules: Rules 4.1 through Rule 8.6* (December 2009).
6. E.g., District of Columbia, Iowa, Kentucky, Louisiana, New Hampshire, New Jersey, Maine.

7. E.g., Alabama, Arizona, Colorado, Maryland.

8. E.g., Florida, Indiana, Kansas, Minnesota, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Washington, Wisconsin.

9. E.g., California, Georgia, Hawaii, Illinois, Massachusetts, Michigan, Missouri, South Dakota, Texas, Vermont, Virginia, West Virginia, Wyoming.

10. *See* C.E. Stewart, "Lawyers and the Border Patrol: The Challenge of Multi-Jurisdictional Practice," *NY Business Law Journal* (Summer 2011). Just how idiosyncratic the disparate jurisdictions can be was recently highlighted by Opinion 1871, issued on July 24, 2013 by the Virginia State Bar Standing Committee on Legal Ethics. In that opinion, the Virginia bar authorities wrote that an attorney who receives privileged materials inadvertently is *not* ethically obligated to return the materials to the sender if "the confidential information [was] received in the discovery phase of litigation" rather than "[o]utside of the discovery process."

11. *See* N.Y. Rules of Professional Conduct Preamble, 13.

12. "Huge," of course, is one of Donald Trump's favorite words. *See* Jimmy Fallon and Donald Trump —Huge Huge Huge —YouTube (September 18, 2015).

13. This calls to mind the searing lesson taught to all students of the incomparable Cornell Law Professor Rudolph Schlesinger on the third day of Civil Procedure in September of 1974, when he rebuked a classmate who was unable to proceed in a Socratic dialogue because of an unfortunate confession to not having read the footnotes in the case at hand. With his finger pointing at the offending student (it shook, due to his advanced age), Professor Schlesinger ominously intoned: "Lawyers who do not read footnotes...[dramatic pause], their children will *starve*!"

14. *See* C.E. Stewart, "Thus Spake Zarathustra (and Other Cautionary Tales for Lawyers)," *NY Business Law Journal* (Winter 2010).

15. "Reasonableness" appears to be in the eye of the judicial beholder. *Compare Rhodes Industries, Inc. v. Building Materials Corp. of America*, 254 F.R.D. 216 (E.D. Pa. 2008) *with Sitterson v. Evergreen School District No. 114*, 196 P.3d 735 (Wash. Ct. App. 2008), *with Mt. Hanley Ins. Co. v. Felman Prod. Inc.*, 2010 WL 1990555 (S.D. W. Va. May 18, 2010), *with Edelen v. Campbell Soup Co.*, 265 F.R.D. 676 (N.D. Ga. 2010). Interestingly, the claw-back safe haven provided by F.R.E. 502(d) has not appeared to have had much effect in obviating the risks of the "reasonableness" standard. *See Spicker v. Quest Cherokee*, 2009 WL 2168892 (D. Kan. 2009). *See also* John Rosans, "6 Years In, Why Haven't FRE 502(d) Orders Caught On?," *Law360* (July 24, 2014).

16. E.g., Alabama, Arizona, Arkansas, California, Idaho, Indiana, Iowa, Kansas, Maryland, Minnesota, Montana, New Mexico, North Dakota, Ohio, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wyoming.

17. *See* CPLR §§3101 & 4503. With respect to the "reasonableness" standards adopted by F.R.E. 502(b), New York courts have traditionally followed those standards. *See, e.g., New York Times v. Lehrer McGovern Bovis*, 752 N.Y.S. 2d 642 (1st Dept. 2002); *Manufacturers & Traders Trust Co. v. Servotronics, Inc.*, 522 N.Y.S. 2d 128 (4th Dept. 1987).

18. Presumably, to attempt to enforce such obligations, where none are specifically set forth, one would have to proceed under CPLR §3103(c) (protective orders: suppression of information improperly obtained).

19. Beyond the Federal Rules themselves, lawyers also need to be on the lookout for the local rules of specific federal courts. *See, e.g.*, U.S. District Court of Western District of Pennsylvania, Local Rules of Court 16.1(D).

20. As set forth above, there are a number of states that require a lawyer to stop reading the inadvertent document as soon as she realizes it is privileged or confidential. *See supra* notes 6 & 7 and accompanying text. Of course, "[o]nce [the receiving lawyer] ha[s] acquired the information..., he cannot purge it from his mind." *Aerojet-General Corp. v. Transport Indemnity Inc.*, 18 Cal. App. 4th 996, 1006 (Cal. App. 1st Dist. 1993).

21. For other cases where courts have not been quite as nice to the government in this situation, *see United States v. Gangi*, 1 F. Supp. 2d 256 (S.D.N.Y. 1998); *SEC v. Cassano*, 189 F.R.D. 83 (S.D.N.Y. 1999).

22. When it has no ethical rule to govern a situation (*see supra* note 9), California looks to the ABA Model Rules. *See* W.L. Patrick, "Inadvertent disclosure and the attorney-client privilege," *California Bar Journal* (August 2011).

23. Presumably, *State Comp. Ins. Fund v. WPS. Inc.*, 82 Cal. Rptr. 2d 799 (Cal. Ct. App. 1999), is no longer good law in California. There, the receiving lawyer (i) failed to notify the sender lawyers of the inadvertent production of privileged materials, and (ii) immediately sent the materials on to his expert (who then sent them on to another law firm that had also retained him). On appeal, the appellate court lifted the trial court's sanction on the receiving lawyer, on the ground that California's ethics rules were not clear. *See also Clark v. Superior Court*, 125 Cal. Rptr. 3d 361 (Cal. Ct. App. 2011) (court disqualified receiving lawyers who reviewed privileged materials and then used them to advance their client's case).

24. Practitioner James Altman has been particularly "vocal" in this regard. *See* "Model Rule Should be Amended," *Professional Lawyer* Vol. 21, No. 1 (2011); "Inadvertent Disclosure and Rule 4.4(b)'s Erosion of Attorney Professionalism," *NYSBA Journal* (Nov/Dec 2010). Indeed, Mr. Altman has prepared a revised Model Rule 4.4(b):

> A lawyer who receives a document in connection with the representation of a client and has reasonable cause to believe that the document may contain confidential information that may have been inadvertently disclosed,
>
> (1) shall not read or examine the document or, if the lawyer already has begun to do so, shall stop reading or examining the document;
>
> (2) shall notify the author or sender of the document of its receipt;
>
> (3) shall promptly return, sequester or, to the extent appropriate and reasonably practicable, destroy the document and any copies of it;
>
> (4) shall not use or disclose the confidential information contained in the document until permitted by a court order; and
>
> (5) shall take reasonable steps to retrieve any copies of the document that the lawyer disclosed before having reasonable cause to believe that the document contained confidential information.

25. *See* Anthony Davis, "Inadvertent Disclosures —Regrettable Confusion," *New York Law Journal* (November 7, 2011).

26. *Id.*

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Mr. Stewart would like to acknowledge the significant contributions of his former law student, Robert Bolcome III (Fordham Law School '15), to this article.