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# Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures

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UNTANGLING ETHICS THEORY FROM ATTORNEY  
CONDUCT RULES: THE CASE OF INADVERTENT  
DISCLOSURES

*Andrew M. Perlman\**

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## INTRODUCTION

Imagine your surprise to learn that you mistakenly sent a privileged client letter to a litigation adversary during discovery. To avoid a disaster for your client and a potential malpractice suit, you call opposing counsel and ask her to return the document unread. Should she follow your instructions? Or should she take advantage of your mistake by retaining the document, reading it, and trying to use it in court? Even though inadvertent disclosures of this sort are becoming increasingly common because of fax machines, email, and electronic discovery,<sup>1</sup> the law governing the subject is still unsettled. Courts,<sup>2</sup> rules drafters,<sup>3</sup> and ethics opinions<sup>4</sup> have offered

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<sup>1</sup> See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992) [hereinafter ABA Formal Op. 92-368] (observing that "the availability of xerography, and the proliferation of facsimile machines and electronic mail make it technologically ever more likely that through inadvertence, privileged or confidential materials will be produced to opposing counsel"); Ass'n of the Bar of the City of New York Comm. of Prof'l and Judicial Ethics, Formal Op. 2003-04, 2003 WL 23789274, at \*2 (2004) [hereinafter New York City Op. 2003-04] (asserting that it is "not surprising that the legal ethics community first began to devote attention to the problem of the misdirected communication in the late 1980s, when the fax became a widespread method of communication"); D.C. Bar Ass'n Op. 256 (1995) (concluding that the issue is a "consequence of an increasingly electronic world"); Fla. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 93-3 (1994) (claiming that "a growing number of Florida Bar members have faced ethical problems in connection with inadvertent receipt or disclosure of attorney-client or work product privileged documents from an adversary").

<sup>2</sup> Compare, e.g., *State Comp. Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799, 807-08 (Cal. Ct. App. 1999) (requiring lawyers to stop reviewing a document upon realizing its privileged status and to notify

conflicting advice about what receiving lawyers must do under these circumstances.

This article contends that one of the reasons for the conflicting advice is that the legal profession has not developed an effective method for deriving its own regulations. The problem with existing approaches is that commentators have tended to assume that ethics theories, such as the zealous advocacy model,<sup>5</sup> can tell us the appropriate content of black letter rules. For example, one prominent ethicist has argued that the profession should adopt a rule that requires lawyers to take advantage of inadvertent disclosures, reasoning that such a rule would be consistent with the requirements of zealous representation.<sup>6</sup> This type of analysis incorrectly assumes that a prevailing ethics theory, like zealous advocacy, is a theory about the appropriate content of ethics regulations. Rather, such theories should serve a more limited role: they should merely tell lawyers how to behave when the rules do not offer clear guidance.

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the sender) *with* *Corey v. Norman, Hanson & Detroy*, 742 A.2d 933, 941 (Me. 1999) (requiring the receiving lawyer not only to notify the sender and to stop reading the document, but to return it to the sender as well).

<sup>3</sup> Compare, e.g., MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2002) (requiring the receiving lawyer to notify the sending lawyer of the mistake but imposing no other obligations) *with* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. m (imposing duties beyond notification when the disclosure does not result in a waiver of privilege) *and* N.J. RULES OF PROF'L CONDUCT R. 4.4(b) (requiring the receiving lawyer not only to notify the sender, but to stop reading the document and return it to the sender). Moreover, in June 2005 the Judicial Conference's Standing Committee on Rules of Practice and Procedure approved a provision that would address inadvertent disclosures for the first time in the Federal Rules of Civil Procedure. That rule allows the sending lawyer to regain possession of the mistakenly sent document in some cases. See Memorandum from the Honorable David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure, to Lee Rosenthal, Chair, Advisory Comm. on Federal Rules of Civil Procedure, at 12-13 (Aug. 3, 2004), <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf> [hereinafter Civil Procedure Rule Proposal].

<sup>4</sup> Compare, e.g., ABA Formal Op. 92-368, *supra* note 1 (requiring recipients of inadvertent disclosures to stop examining the materials, notify the sender, and comply with the sender's instructions) *and* Ky. Bar Ass'n Ethics Op. 374 (1995) *with* Colo. Bar Ass'n Ethics Comm., *Formal Opinion 108: Inadvertent Disclosure of Privileged or Confidential Documents*, 29 COLO. LAW. 55, 58 (Sept. 2000) (concluding that a lawyer should not examine the document and should comply with the sender's instruction, but only when the recipient learns of the mistake before reading the document; in all other cases, the receiving lawyer merely has a duty to notify the sender). Note that, in light of the adoption of Rule 4.4(b), the ABA recently withdrew Opinion 92-368. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).

<sup>5</sup> For fuller descriptions of this model, see MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (2d ed. 2002); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); and Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

<sup>6</sup> Monroe Freedman, *The Errant Fax*, Legal Times, Jan. 23, 1995, at 26.

To correct this mistaken reliance on conventional ethics theories as the primary generators of the positive law, this article develops an alternative model. The model suggests that, when creating professional regulations, we should draw on a wider range of values, including not only zealous advocacy, but also justice, morality, professionalism, consumer protection, consistency with other law, and the numerous considerations that go into lawmaking more generally, such as the reduction of contracting costs. By identifying and then weighing these various factors, this article concludes that the profession can provide a better framework for the development of professional regulations in general and a clearer answer to the inadvertent disclosure issue in particular. In the end, the profession needs to decouple its analysis of ethically ambiguous situations, where individual theories of ethics prove useful, from the creation of black letter rules, where a more nuanced examination of plural values is necessary.<sup>7</sup> Unfortunately, ethicists and the profession's rulemakers have failed to do so.<sup>8</sup>

Through the creation of a framework of this sort, it becomes apparent that we need to make two significant revisions to the Model Rule in this area, which at present only obligates recipients of inadvertent disclosures to notify senders about their mistakes.<sup>9</sup> First, the Rule should be revised to require lawyers to return inadvertent disclosures when the senders request such returns, but only if the senders make the request before the recipients have reviewed the documents. Second, in those cases where senders do not discover their own mistakes, the Rule should not require recipients to bring those mistakes to the senders' attention. The article contends that these pro-

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<sup>7</sup> Pluralism receives attention in theories about how lawyers should behave in the absence of a clear rule. See, e.g., W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113 (2000). Only rarely is pluralism understood as a theory of the positive law. For one notable exception, see Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 679-80 (1989) (asserting that ethical pluralism appears to lie at the core of the Model Rules of Professional Conduct).

<sup>8</sup> The reasons for this failure are not entirely clear. One possibility is that the focus on traditional theories is an artifact from when lawyer ethics consisted primarily of aspirational provisions. When professional ethics was simply a matter of aspiration, drafters had little need to refer to the considerations that would typically accompany rule-drafting in other fields. The goal was simply to create guidelines that were consistent with the existing views of the lawyer's role, such as zealous advocacy. As lawyer ethics morphed into concrete black letter rules with disciplinary consequences, the ethics codes increasingly began to resemble the law of any other field. See generally Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision Making*, 48 EMORY L.J. 1255, 1279-80 (1999) (describing this evolution); Nancy Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 15 (1989) (similar). This transformation, however, does not appear to have caused rulemakers to broaden their understanding of the kinds of factors that should affect the content of the rules themselves.

<sup>9</sup> MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2002).

posed revisions are consistent with the wide range of policy rationales that should underlie professional rulemaking.

Part I explains why the issue of inadvertent disclosures has received so much attention in recent years. In particular, technological advances have made it easier, cheaper, and faster to send documents. These advances, in combination with the increasingly time-pressured nature of law practice and the growing number of documents involved in legal matters today, have conspired to make inadvertent disclosures more common.

Part II summarizes the law that has developed to address the problem of inadvertent disclosures by identifying two distinct questions that typically arise. First, does an inadvertent disclosure waive the attorney-client privilege or the work product doctrine? And second, what are the receiving lawyer's ethical obligations upon receiving an inadvertently disclosed privileged document? Despite the importance and difficulty of the two questions,<sup>10</sup> court opinions and scholarship have focused extensively on the first question and have offered relatively little guidance as to the second.<sup>11</sup>

Part III contends that existing theories of legal ethics cannot, by themselves, generate answers to the second question. The primary purpose of existing theories is to explain how a lawyer should behave in the absence of binding disciplinary rules or in the face of an ambiguous obligation. For example, proponents of the dominant view (i.e., zealous advocacy) argue that lawyers should err on the side of pursuing a client's interests when faced with ethical gray areas.<sup>12</sup> In contrast, critics of zealous advocacy contend that lawyers faced with ethically ambiguous situations should pursue other objectives, such as justice or morally acceptable outcomes.<sup>13</sup> The key point is that these theories do not necessarily tell us what the content of ethics regulations should be in the first place.

The profession, therefore, needs a framework for resolving the various and often conflicting principles that underlie the rules of professional conduct. Part IV posits that such a framework cannot turn on any single consideration, such as zealous advocacy or justice. The rules must—and often do—reflect a number of principles that, in some circumstances, point in

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<sup>10</sup> With respect to the first question, see *infra* Part II.A. As for the second question, see *infra* Part II.B.

<sup>11</sup> Jones, *supra* note 8, at 1272 (observing that courts “focus almost exclusively on the legal question of whether inadvertent disclosure waives the attorney-client privilege”); New York County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 730, 2002 WL 31962702, at \*2 (2002) (making a similar observation).

<sup>12</sup> See *supra* note 5.

<sup>13</sup> See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) (presenting a critique based on morality); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998) (offering a justice-based approach).

different directions.<sup>14</sup> Part IV identifies these principles in an effort to clarify and make more explicit the considerations that rulemakers should take into account when crafting professional regulations.

Part V then examines how these principles can shed more light on the particular issue of mistakenly sent privileged documents. By considering a number of examples, Part V shows that the rules in this area do not correctly balance the competing values at stake and should be revised.

Based on this analysis, Part VI contains a proposal to revise the Model Rule. The proposal suggests that lawyers should have a more affirmative obligation to return inadvertent disclosures, but only when senders discover their mistakes before recipients have reviewed the relevant documents. In cases where senders do not discover their mistakes, the proposal rejects an obligation that Model Rule 4.4(b) imposes on recipients to notify senders about their own errors.

An examination of the inadvertent disclosure issue ultimately reveals that ethicists have relied too heavily on traditional “monistic”<sup>15</sup> theories to explain the content of professional regulations and should instead draw more explicitly on the numerous values that are implicated by professional conduct rules.<sup>16</sup> This consideration of plural values will not only help the profession resolve the inadvertent disclosure issue, but also other controversial ethics questions that tend to involve conflicting principles, such as the duty of candor to the tribunal, the duty of confidentiality, and statutory obligations such as those recently imposed by the Sarbanes-Oxley Act.<sup>17</sup> The subject of inadvertent disclosures thus raises some fundamental questions relating to the professional regulation of lawyers and can ultimately help the bar to identify a method for resolving a variety of regulatory disagreements.

## I. THE INCREASING PREVALENCE OF INADVERTENT DISCLOSURES

Recent technological advances have made the inadvertent disclosure of privileged information far more common.<sup>18</sup> For much of the last century, these disclosures could only occur in a limited number of ways, most com-

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<sup>14</sup> See Schneyer, *supra* note 7, at 679-80.

<sup>15</sup> Professor Wendel uses this term to describe ethics theories that urge lawyers to rely predominantly on a single value, such as zealous advocacy, when making discretionary professional judgments. See Wendel, *supra* note 7, at 114-15.

<sup>16</sup> See Jones, *supra* note 8, at 1307 (criticizing approaches to the inadvertent disclosure problem that “utilize [only] one principle”).

<sup>17</sup> Sarbanes-Oxley Act, 15 U.S.C.S. § 7245 (LexisNexis 2005) (requiring lawyers for publicly traded companies to report material unlawful conduct to the corporation’s leadership).

<sup>18</sup> Jones, *supra* note 8, at 1264 (making a similar observation).

monly by mailing a privileged document to an adversary. Today, new technology has made it easier, cheaper, and faster to send documents. Despite the obvious benefits of these new methods of document distribution, the changes have led to an increased risk that lawyers will misdirect privileged information.<sup>19</sup>

The first major enhancement in document distribution was the fax machine, which became widely used only within the last twenty years.<sup>20</sup> Because the device enabled lawyers to transmit documents nearly instantaneously and with greater ease, the fax machine led to a growing number of mistakes. Indeed, the bar began to discuss inadvertent disclosures with more frequency at about the same time that fax machines became prevalent.<sup>21</sup>

The problem is now even more pervasive, with an ever-increasing number of ways that lawyers can disclose confidential information. With just a click of a computer mouse, a lawyer can instantly email a privileged document to the wrong person. So-called “auto-complete” features in many email programs make it easy for an adversary’s email address to mistakenly appear as the recipient of an email message or document attachment. The use of email address groups can create similar problems; for example, lawyers or their assistants can inadvertently send an email to all lawyers in a case instead of just a subset of co-counsel. There are numerous variations of these types of inadvertent disclosures.<sup>22</sup>

Although email raises the most obvious problem, hidden information in an electronic document—known as metadata—raises similar concerns, even in the non-litigation context. Imagine, for example, that you are negotiating a contract with opposing counsel through the exchange of an electronic document created in WordPerfect, a popular word processing program. During the negotiations, your client instructs you to make an important concession in one of the contract’s provisions. You make the change in the electronic version of the document, but before emailing the proposed

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<sup>19</sup> See *supra* note 1.

<sup>20</sup> Given how commonplace the Internet and electronic document distribution has become, it is easy to forget that fax machines were not commonly used until the 1980s. See, e.g., New York City Op. 2003-04, *supra* note 1, at \*2 (observing that it is “not surprising that the legal ethics community first began to devote attention to the problem of the misdirected communication in the late 1980s, when the fax became a widespread method of communication”).

<sup>21</sup> See, e.g., *supra* note 1.

<sup>22</sup> Even a photocopier can be a source of danger; many copiers have scanning features that allow someone to scan a document and then accidentally email it. See Jones, *supra* note 8, at 1264-65 (citing a few other examples). It is worth pointing out one variation that this article does *not* address: the disclosure of an adversary’s privileged information by a third party. Compare ABA Formal Op. 92-368, *supra* note 1, with ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-382 (1994) (dealing with third party disclosures).

change to opposing counsel, your client decides not to offer the concession. You edit the document back to its original state and send it to the other party's attorney.

Many lawyers do not realize that the electronic document contains metadata that could reveal your client's initial instructions. Through the simple use of the "undo" command, the adversary can view the earlier changes. This example is a simple one, but there are many types of metadata that appear in most electronic documents.<sup>23</sup> And because lawyers are still largely unaware of the metadata problem, they are frequently and unknowingly making otherwise confidential information available to opponents.<sup>24</sup>

Electronic discovery has created even more problems. In addition to the existence of metadata, which makes hidden privileged information difficult to redact before production, the enormous volume of responsive electronic documents makes it challenging to locate obviously privileged information.<sup>25</sup> Even with electronic search tools, lawyers and paralegals can have difficulty sifting through each document to identify every instance of privileged material. In fact, the ABA's Digital Evidence project recently conducted a survey on electronic discovery issues, which revealed that 12% of corporate lawyers had encountered an inadvertent disclosure issue in the litigation that they had most recently completed.<sup>26</sup>

In addition to the various ways in which someone can misdirect a privileged document, the receiving lawyer's situation can vary as well. This article's initial hypothetical was relatively straightforward: the sending lawyer asks the receiving lawyer to return a document that she has not yet read. But what if she had read the document despite the document's blatantly privileged status? Does that change the analysis? Must the receiving lawyer be disqualified? Alternatively, what if the document was not obviously privileged, but the reader only discovered that fact after reading the critically privileged information? For instance, assume a lawyer mistakenly faxes an adversary a document that was intended for the lawyer's client,

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<sup>23</sup> See generally David Hricik & Robert R. Jueneman, *The Transmission and Receipt of Invisible Confidential Information*, 15 No. 1 PROF. LAW. 18 (2004) (describing the nature of the metadata problem).

<sup>24</sup> *Id.*

<sup>25</sup> See Civil Procedure Rule Proposal, *supra* note 3, at 8. See also MICHELE C.S. LANGE & KRISTIN M. NIMSGER, *ELECTRONIC EVIDENCE AND DISCOVERY: WHAT EVERY LAWYER SHOULD KNOW* 48 (2004) (making a similar observation).

<sup>26</sup> ABA *Digital Evidence Project Survey on Electronic Discovery Trends and Proposed Amendments to the Federal Rules of Civil Procedure, Preliminary Report* 22 (2005), <http://www.digev.e-symposium.com/papers/karticle5.pdf> [hereinafter Digital Evidence Project]. Although the survey had a low response rate, *id.* at 4, the inadvertent disclosure problem has clearly become more common. See *supra* note 1.

which reads: "I understand your instructions to settle for no more than \$5 million. My initial offer will be \$2.5 million."<sup>27</sup> Once the receiving lawyer discovers the privileged nature of this communication, the damage is done. What can or should be done at this point? These questions reveal that inadvertent disclosures occur in a variety of ways and raise difficult remedial issues.

## II. THE CURRENT STATE OF INADVERTENT DISCLOSURE LAW

Inadvertent disclosures typically raise two questions.<sup>28</sup> First, does the disclosure waive the attorney-client privilege? And second, does a lawyer who receives such documents have an ethical obligation to return them? Courts have focused significant attention on the first question and have developed several possible answers, with a trend toward an equitable balancing test. In contrast, the second question is still very much unresolved, with little agreement among courts and bar associations.

### A. *Waiver of the Attorney-Client Privilege and Work Product Doctrine*

Courts have adopted three different views on whether an inadvertent disclosure waives the attorney-client privilege and work product doctrine.<sup>29</sup> First, some courts take the "always waived" approach, where an inadvertent disclosure automatically results in waiver.<sup>30</sup> Proponents of this view believe that it encourages lawyers to take great care of privileged information.<sup>31</sup> One court has explained that the approach "instill[s] in attorneys the need for effective precautions against . . . disclosure."<sup>32</sup> According to this view, the inadvertence of the disclosure is irrelevant;<sup>33</sup> privilege only survives if

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<sup>27</sup> See New York City Op. 2003-04, *supra* note 1, at \*6 (posing a similar hypothetical). For another example of how a lawyer could learn critical information before discovering the privileged nature of the document, see *In re Kagan*, 351 F.3d 1157, 1160-62 (D.C. Cir. 2003).

<sup>28</sup> Jones, *supra* note 8, at 1265.

<sup>29</sup> See generally EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 309-16 (4th ed. 2001).

<sup>30</sup> *Id.* at 309-10.

<sup>31</sup> See Jones, *supra* note 8, at 1275 (describing other justifications for this approach).

<sup>32</sup> *Int'l Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 450 (D. Mass. 1988).

<sup>33</sup> See, e.g., *id.*; *In re Standard Fin. Mgmt. Corp.*, 77 B.R. 324, 330 (Bankr. D. Mass. 1987).

the information remains confidential.<sup>34</sup> If confidentiality is lost, even inadvertently, the document loses its privileged status.<sup>35</sup>

Other courts take precisely the opposite view, concluding that waiver does not occur unless a party affirmatively and knowingly waives the privilege.<sup>36</sup> The Maine Supreme Judicial Court recently explained this “never waived” approach:

A truly inadvertent disclosure cannot and does not constitute a waiver of the attorney-client privilege. The issue for counsel and the court upon a claim of inadvertent disclosure must be whether the disclosure was actually inadvertent, that is, whether there was intent and authority for the disclosure . . . If receiving counsel understands the disclosure to have been inadvertent, no waiver will have occurred.<sup>37</sup>

The Court reasoned that “the client holds the privilege, and [so] only the client, or the client's attorney acting with the client's express authority, can waive the privilege.”<sup>38</sup> Because inadvertent disclosures are not “knowing disclosures” under this definition, they do not result in a waiver of the attorney-client privilege.<sup>39</sup>

Finally, an increasing number of courts have taken an intermediate approach, where waiver occurs only under certain circumstances.<sup>40</sup> This approach, which appears to represent the modern trend,<sup>41</sup> examines a number of factors, “including (1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the amount of time it took the producing party to recognize its error, (3) the scope of the production, (4) the extent of the inadvertent disclosure, and (5) the overriding interests of fairness and justice.”<sup>42</sup>

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<sup>34</sup> See *supra* note 33.

<sup>35</sup> See, e.g., *Int'l Digital Sys. Corp.*, 120 F.R.D. at 450; *Chubb Integrated Sys. Ltd. v. Nat'l Bank of Wash.*, 103 F.R.D. 52, 66-68 (D.D.C. 1984); *Underwater Storage, Inc. v. U.S. Rubber Co.*, 314 F. Supp. 546, 548-49 (D.D.C. 1970).

<sup>36</sup> See, e.g., *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951 (N.D. Ill. 1982).

<sup>37</sup> *Corey v. Norman, Hanson & DeTroy*, 742 A.2d 933, 941 (Me. 1999) (quoting and agreeing with the trial court's adoption of the “never waived” rule in *Mendenhall*, 531 F. Supp. at 954-55); see also *Berg Elecs., Inc. v. Molex, Inc.*, 875 F. Supp. 261, 263 (D. Del. 1995).

<sup>38</sup> *Corey*, 742 A.2d at 941.

<sup>39</sup> See *Jones*, *supra* note 8, at 1276.

<sup>40</sup> See, e.g., *In re Elec. Mut. Liab. Ins. Co.*, 681 N.E.2d 838, 841-42 (Mass. 1997); *Mfrs. & Traders Trust Trading Co. v. Servotronics, Inc.*, 522 N.Y.S.2d 999, 1003-05 (App. Div. 1987) (“The fundamental questions in assessing whether waiver of the privilege occurred are, whether the client intended to retain the confidentiality of the privileged materials and whether he took reasonable precautions to prevent disclosure”). The Restatement also endorses this approach. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79 cmt. h (2000).

<sup>41</sup> *Jones*, *supra* note 8, at 1273.

<sup>42</sup> *Amgen, Inc. v. Hoeschst Marion Roussel, Inc.*, 190 F.R.D. 287, 291 (D. Mass. 2000).

Courts that have adopted this middle ground approach have tended to find waivers when, for example, the lawyer failed to review discovery documents before producing them, or when the number of documents was sufficiently small enough that the lawyer should have identified the privileged documents before their disclosure.<sup>43</sup> Courts are more reluctant to find a waiver in other circumstances, such as when there are a relatively small number of disclosures in an otherwise large number of documents, and when the sending lawyer took precautions against inadvertent disclosures.<sup>44</sup>

Of course, these opinions do not necessarily provide answers to other questions that might arise. For example, what if the sender never discovers her mistake? Should the recipient alert the sender about the document's disclosure? And what if the disclosure occurs in the non-litigation context, where a waiver determination would not normally take place? The next section explains that the law governing waiver does not resolve these questions and that other sources offer more guidance.

#### B. *The Ethical Obligation to Return Documents*

There is an important distinction between the waiver issue and the receiving lawyer's ethical obligations.<sup>45</sup> Moreover, the law regarding the latter subject is even more unsettled than it is in the waiver context.<sup>46</sup>

##### 1. Distinguishing the Waiver and Ethics Issues

To see how the waiver and ethics issues differ, consider again a contract negotiation where one lawyer mistakenly sends a letter containing a client's negotiating instructions to the other side. Assume now that the sending lawyer does not discover the error. Because the sending lawyer does not know about the disclosure, the receiving lawyer has to decide whether to notify the sender. Waiver law does not offer any guidance on this issue, so the answer turns exclusively on the receiving lawyer's ethical obligations.

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<sup>43</sup> See, e.g., *Eigenheim Bank v. Halpern*, 598 F. Supp. 988 (S.D.N.Y. 1984).

<sup>44</sup> See, e.g., *In re Grand Jury Investigation*, 142 F.R.D. 276, 279 (M.D.N.C. 1992).

<sup>45</sup> See, e.g., Colo. Bar Ass'n Ethics Comm., Formal Op. 108, 29 COLO. LAW. 55, 58 (Sept. 2000) (concluding that "issues of legal ethics are separate and distinct from the evidentiary issue of waiver of privilege or confidentiality"); Freedman, *supra* note 6, at 26 (noting that the ethics of returning the document is a "different issue" from waiver); Jones, *supra* note 8, at 1278-79.

<sup>46</sup> Jones, *supra* note 8, at 1272 (observing that courts "focus almost exclusively on the legal question of whether inadvertent disclosure waives the attorney-client privilege").

In addition, even if the sender had become aware of the disclosure, the law of waiver does not explain what the recipient should do in a contract negotiation. Unlike the litigation context, where waiver would result in the admissibility of a document, a transaction does not raise any admissibility issues.<sup>47</sup> The recipient's obligations would not depend on the existence of waiver as a matter of evidence law, but rather on whether there is some other source of law that would require the document's return, such as a rule of professional conduct or an applicable bar opinion.<sup>48</sup>

In fact, even if the disclosure occurred in litigation, the law of waiver does not resolve every issue. Recall the lawyer who mistakenly sent a privileged document to an adversary during discovery and asked for its return. Assume that in the relevant jurisdiction, an inadvertent disclosure results in an automatic waiver of the attorney-client privilege. It is tempting to conclude that, because waiver has occurred, the receiving lawyer's ethical obligations become largely irrelevant. That is, the lawyer has the right to use the document and should do so.<sup>49</sup>

But the "should do so" part of the reasoning is not obvious and has a distinctly ethical flavor. Just because there is a legal right to use a document does not mean that the ethics rules should allow the lawyer to take advantage of that right. Even when the privilege is waived, we nonetheless might want the lawyer to refrain from using a particular document for any number of reasons, such as professionalism or morality. These considerations may be viewed by some as minor relative to concerns such as zealous advocacy,<sup>50</sup> but the basic point is that the lawyer's ethical obligations are not necessarily tied to the waiver determination.<sup>51</sup>

The disconnect between a legal right and an ethical obligation is not unique to this context. There are many examples of ethics rules that create

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<sup>47</sup> In this sense, the disclosure may constitute a violation of the sending lawyer's duty of confidentiality, but such a violation is different from waiver of the privilege. EPSTEIN, *supra* note 29, at 15.

<sup>48</sup> It is not entirely clear what procedure the sender would use to recover the document. In the non-litigation context, parties seek court orders when a conflict of interest has arisen, so perhaps a party could seek a court order requiring the recipient to return the document. Regardless of the procedure, the key point is that the outcome would not turn on whether the privilege was waived, but on whether the recipient has any independent ethical obligation to return the document.

<sup>49</sup> See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. m (2000) (assuming a link between a lawyer's duties and whether privileged remains intact).

<sup>50</sup> See, e.g., Freedman, *supra* note 6, at 26 (emphasizing zealous advocacy as the key factor).

<sup>51</sup> Even when the privilege is not waived, the ethics issue is not clearly resolved. The absence of waiver merely means that the recipient will not be able to introduce the document into evidence. Waiver does not address whether the recipient should be allowed to review the document and use the information contained in it. See ABA Formal Op. 92-368, *supra* note 1 (asserting that "there is a significant difference between a lawyer's knowing the contents of documents and that lawyer's being able to use them . . . at trial"). Indeed, plenty of documents are not admissible as a matter of evidence but are nonetheless discoverable for adverse parties.

certain obligations that the law does not otherwise impose. For instance, Model Rule 4.2 prohibits lawyers from talking with individuals who are represented by counsel about the subject of the representation,<sup>52</sup> even though it is not otherwise illegal or impermissible for a lawyer to contact a represented party. Even if a court might conclude that there is no legal impediment to contacting a particular person, this does not mean that a lawyer should be allowed to contact whomever she wants as a matter of ethics.

Another example is Model Rule 8.3(a),<sup>53</sup> which requires a lawyer to report to the Bar any attorneys who have engaged in misconduct raising serious questions about their honesty or trustworthiness.<sup>54</sup> One ordinarily has no legal obligation to report the misconduct of another,<sup>55</sup> so Rule 8.3 imposes a duty that would not otherwise exist in most jurisdictions.

A third example is the rule regarding perjured testimony.<sup>56</sup> A lawyer does not suborn perjury by putting someone on the stand if the lawyer merely believes, but does not know, that the witness intends to commit perjury. The ethics regulations nonetheless allow lawyers under these circumstances to refuse to offer the testimony of such a witness.<sup>57</sup> Thus, the ethics rule suggests that a lawyer can refuse to take advantage of potentially helpful testimony, even when the lawyer would not be suborning perjury by offering it into evidence.<sup>58</sup> Although Rule 3.3(a)(3) is discretionary in a way that Rule 4.2 and Rule 8.3(a) are not, these rules all illustrate an important point: ethics regulations can and do impose obligations on attorneys that do not otherwise exist in other areas of the law.<sup>59</sup>

The new Model Rule 4.4(b), which for the first time addresses inadvertent disclosures, appears to reflect this distinction between ethics and other law. Many courts have found that inadvertent disclosures constitute a waiver of privilege as a matter of evidence law, but nothing in that body of

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<sup>52</sup> MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002).

<sup>53</sup> *Id.* R. 8.3(a).

<sup>54</sup> *Id.*

<sup>55</sup> Only a small number of jurisdictions require citizens to report violent crimes that they have witnessed. See Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 689 n.66 (1994).

<sup>56</sup> MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002).

<sup>57</sup> *Id.* R. 3.3(a). The rule carves out a narrow exception for criminal defendants, who have the right under the rule to offer their testimony, even if their lawyers reasonably believe (but do not know) the testimony is false. *Id.*

<sup>58</sup> FREEDMAN & SMITH, *supra* note 5, at 167 (noting that this conduct would not constitute subornation of perjury).

<sup>59</sup> See, e.g., Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923, 940 (2002) (noting that disciplinary rules sometimes impose more stringent obligations than other law requires). But see Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 247 (1985) (contending that the Rules largely duplicate existing legal obligations).

law requires the recipient of an inadvertently disclosed privileged document to notify the sender about the mistake. Nonetheless, Model Rule 4.4(b) requires such a notification.<sup>60</sup> Thus, Model Rule 4.4(b) recognizes the appropriateness of imposing ethical obligations that might adversely affect a client, even though no other source of law, including the law of waiver, imposes that duty on lawyers.

In the end, waiver law does not determine the obligations of lawyers who have received inadvertently disclosed, privileged information from an adversary. The issue, instead, falls more directly within the province of professional ethics.

## 2. The Receiving Lawyer's Ethical Duties

Bar opinions, court rulings, and even a new Model Rule have described a lawyer's ethical obligations upon receipt of an inadvertent disclosure. In addition, the United States Judicial Conference's Advisory Committee on Civil Rules recently proposed changes to the Federal Rules of Civil Procedure that would address this issue as well.<sup>61</sup> These authorities reflect a number of different approaches.

### a. *Proposed Rule of Civil Procedure 26(b)(5)*

Proposed Rule of Civil Procedure 26(b)(5) says that, if a lawyer receives inadvertently disclosed privileged information in the course of discovery, and if the sender asks the receiving lawyer not to look at the document, the receiving lawyer must comply, at least initially, with the sender's instructions.<sup>62</sup> If a court subsequently determines that the disclosure constitutes a waiver of either privilege or the work product doctrine, the recipient can then use the document in the proceedings.<sup>63</sup> Thus, the proposed rule imposes a kind of stay: the recipient has an initial duty to comply with the

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<sup>60</sup> MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2002).

<sup>61</sup> The advisory committee officially proposed these rules in June 2005, and they were published for comment in August 2005. For more information, see U.S. Courts, Standing Comm. Action, <http://www.uscourts.gov/rules/#standing0605> (last visited Nov. 15, 2005).

<sup>62</sup> Civil Procedure Rule Proposal, *supra* note 3, at 13-14 and app. at 7. A recent version of the proposal contained the following language: "When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies." *Id.* No Federal Rule of Civil Procedure previously addressed this issue.

<sup>63</sup> Civil Procedure Rule Proposal, *supra* note 3, at 13-14 and app. at 7.

sender's instructions, such as to return the document to the sender, but the sender has to retain the document pending the court's determination of waiver. If a court ultimately finds that waiver has occurred, the sender would return the document to the original recipient, who can then make full use of it.<sup>64</sup>

Although the proposed Rule offers some guidance, it applies only in federal court and only in the litigation context. Moreover, it does not take into account the numerous settings in which inadvertent disclosures occur. For example, it does not describe what the recipient's obligations should be if the sender of the privileged information does not discover her mistake. If the privileged nature of the disclosure is obvious, does the recipient have an obligation to notify the sender? Would the recipient have to stop reading the document even before the sender realizes the error? The proposed rule leaves these questions unanswered.

b. *A Modest Model Rule: Rule 4.4(b)*

A new Model Rule of Professional Conduct addresses the notice issue, but it leaves other issues unresolved. The ABA's Commission on Evaluation of the Rules of Professional Conduct (the Ethics 2000 Commission) drafted Model Rule 4.4(b), which the ABA House of Delegates adopted in 2002.<sup>65</sup> The Rule 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."<sup>66</sup>

Before the adoption of Model Rule 4.4(b), court decisions and ethics opinions were the exclusive source of authority in this area, so Rule 4.4(b) marks an important development. It also answers the question left unresolved in the Federal Rule proposal by explicitly creating an obligation to notify. Moreover, the Model Rule addresses situations that the Federal Rule was not designed to address, such as the inadvertent disclosure of privileged information in a non-litigation setting.

Unfortunately, the Model Rule does not give much guidance to the receiving attorney beyond the notification obligation. This omission was intentional. A member of the Ethics 2000 Commission noted that the "Commission decided against trying to sort out a lawyer's possible legal obligations in connection with examining and using confidential documents that

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<sup>64</sup> *Id.*

<sup>65</sup> See Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 443, 469 (2002).

<sup>66</sup> MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2002).

come into her possession through the inadvertence or wrongful act of another.”<sup>67</sup> In keeping with this theme, the Comment to the Rule notes that any “additional steps” are “beyond the scope of these Rules.”<sup>68</sup>

There are two problems with the idea that Model Rule 4.4(b) should not take a stand on additional obligations. First, the receiving lawyer’s obligations are not primarily “legal obligations,” as the Comment suggests. Legal obligations, such as those found in the laws of evidence or waiver, do not address many of the issues that arise.<sup>69</sup> If recipients of inadvertent disclosures are to find guidance, it will be in the ethics rules or opinions, not in other statutes or rules.

A related problem is that Model Rule 4.4(b) fails to explain why obligations other than notification are “beyond the scope of [the] Rules.” In fact, the inadvertent disclosure issue turns on values that ethics regulations typically address: the attorney-client relationship, zealous advocacy, the interests of justice, and professionalism. Ethics lies at the very heart of the issue.

The ethical neutering of the subject is especially difficult to justify given that bar associations, including the ABA, have consistently concluded that this topic directly implicates ethical concerns. Notably, an earlier and recently withdrawn ABA ethics opinion gave quite specific guidance, advising lawyers to refrain from examining inadvertent disclosures, to notify the sender, and to abide by the sending lawyer’s instructions.<sup>70</sup> State bar associations also have viewed this issue as sufficiently ethics-related to justify detailed guidance.<sup>71</sup> The idea that inadvertent disclosures are now somehow more appropriately dealt with outside of the realm of legal ethics is a dubious departure from past practice and is hard to understand as a conceptual matter.

Admittedly, the Commission did not leave this issue entirely to other areas of law. Comment 3 of the Model Rule states that “[w]here a lawyer is not required by applicable law to do so, the decision to voluntarily return [an inadvertently disclosed] document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.”<sup>72</sup> The Commis-

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<sup>67</sup> Love, *supra* note 65, at 469. Indeed, the Commission rejected an earlier version of the Rule that included much more detailed guidance. Moore, *supra* note 59, at 942 n.119.

<sup>68</sup> MODEL RULES OF PROF’L CONDUCT R. 4.4(b) cmt. 2 (2002).

<sup>69</sup> Although the proposed Federal Rule creates some legal obligations, the Rule would only apply in federal courts. Moreover, it has no applicability in non-litigation settings.

<sup>70</sup> ABA Formal Op. 92-368, *supra* note 1.

<sup>71</sup> See, e.g., *supra* notes 1 and 4; see also *infra* notes 75, 78, and 82.

<sup>72</sup> MODEL RULES OF PROF’L CONDUCT R. 4.4(b) cmt. 3 (2002). The commentary associated with the new Model Rule elaborates on this point:

[The Rule] lends support to those lawyers who voluntarily choose to return a document unread when they know or reasonably believe that the document was inadvertently sent. The Commission believes that this is a decision ordinarily reserved to the lawyer under Rules 1.2

sion, though, did not explain why the bar should relegate this issue to professional judgment instead of creating explicit guidance in the Rules themselves.

In the end, Model Rule 4.4(b) has not resolved the issue of an attorney's ethical responsibilities. To the contrary, the Model Rule gives even less guidance than bar associations, including the ABA, have traditionally offered. The justification for this omission—that the issue is not within the scope of the rules—is not explained, is not supported by the traditional treatment of the subject, and is belied by the variety of ethics-related issues raised by inadvertent disclosures. A more plausible explanation is that the Commission could not resolve the various interests at stake and, rather than offering a solution, ultimately generated a rule that offers only limited guidance to lawyers who receive inadvertently disclosed information.<sup>73</sup>

### c. *Bar Opinions and Case Law*

So far, fifteen jurisdictions have adopted Model Rule 4.4(b),<sup>74</sup> and four others have court or bar opinions that effectively mirror what Rule 4.4(b) prescribes.<sup>75</sup> Of the thirty-two jurisdictions that have not yet adopted the

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and 1.4 and that a lawyer commits no act of disloyalty by choosing to act in accordance with professional courtesy.

MODEL RULES OF PROF'L CONDUCT R. 4.4, Reporter's Explanation of Changes, cmt. 3, *available at* <http://www.abanet.org/cpr/e2k-rule44rem.html> (last visited Nov. 5, 2005).

<sup>73</sup> Cf. Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 668-69 (2001) (observing that "when the subject matter of a rule is particularly controversial, the rule has tended to remain a standard that is so broad that it is unenforceable, . . . a discretion-laden rule . . . or . . . phrased in aspirational language").

<sup>74</sup> As of November 1, 2005, thirteen of those jurisdictions have done so without any significant changes from the Model Rule. Those jurisdictions include Arizona (modifying Rule 4.4 slightly to require the recipient not only to notify, but to stop reading the document), Arkansas, Delaware, Iowa, Idaho, Indiana, Montana, Nebraska, North Carolina, Oregon, Pennsylvania, South Carolina, and South Dakota. The fourteenth and fifteenth jurisdictions, Louisiana and New Jersey, have adopted broader versions of Model Rule 4.4(b), requiring the receiving lawyer not only to notify the sender, but to return the privileged document as well. LA. RULES OF PROF'L CONDUCT R. 4.4(b); N.J. RULES OF PROF'L CONDUCT R. 4.4(b). Notably, in several of these jurisdictions, including North Carolina and Pennsylvania, Rule 4.4(b) replaced older opinions that imposed more expansive obligations. North Carolina State Bar Rules of Prof'l Conduct 252 (1997); Penn. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 99-150 (1999).

<sup>75</sup> California, Florida, Ohio, and Utah fit this description. *State Comp. Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799, 807-08 (Cal. Ct. App. 1999) (requiring lawyers to stop reviewing a document upon realizing its privileged status and to notify the sender); Fla. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 93-3 (1994) (obligating the recipients of inadvertent disclosures "to promptly notify the sender"); Ohio Bd. of Comm. on Grievances and Discipline, Op. 93-11 (1993) (stating lawyers "have an ethical duty to notify the source"); Utah State Bar Ethics Advisory Comm., Op. 99-01 (1999) (requiring lawyers to

notification-only approach,<sup>76</sup> either because they have explicitly rejected the Rule or have yet to consider the Ethics 2000 Commission's recommendations, sixteen jurisdictions do not have any other source of authority on this issue.<sup>77</sup> Eight jurisdictions have adopted,<sup>78</sup> in whole or in substantial part, Rule 4.4(b)'s predecessor, ABA Opinion 92-368, which states that lawyers should not only notify the sender of privileged information about the disclosure, but should also follow the sender's instructions regarding what to do with the relevant documents.<sup>79</sup>

The remaining eight jurisdictions have adopted some other approach. For instance, the Massachusetts Bar Association has opined that a lawyer's obligation to pursue zealous advocacy requires her "to reject the opposing counsel's request" to return the document.<sup>80</sup> The opinion even leaves open the question of whether the recipient should notify the sender if the sender has not already discovered the mistake.<sup>81</sup> Other jurisdictions have adopted a

notify opposing counsel). Note that the California Supreme Court may soon issue a new ruling on this subject in *Rico v. Mitsubishi Motors Corp.*, 10 Cal. Rptr. 3d 601 (Cal. Ct. App. 2004), *cert. granted* *Rico v. Mitsubishi Motors Corp.*, 91 P.3d 162 (Cal. 2004). It is also worth noting that an earlier California appellate court decision was even more recipient-friendly, urging recipients to use inadvertent disclosures to their clients' advantage. *Aerojet-General Corp. v. Transport Indem. Ins.*, 22 Cal. Rptr. 2d 862, 867-68 (Cal. Ct. App. 1993).

<sup>76</sup> The total of fifty-one jurisdictions includes the District of Columbia.

<sup>77</sup> As of November 1, 2005, Alaska, Georgia, Kansas, Minnesota, Mississippi, Missouri, Nevada, New Mexico, North Dakota, Oklahoma, Rhode Island, Vermont, West Virginia, Washington, Wisconsin, and Wyoming have no law on this subject, either in the form of court rulings, formal bar opinions, or rules of professional conduct. *But see* *Richards v. Jain*, 168 F. Supp.2d 1195, 1200-01 (W.D. Wash. 2001) (suggesting that Washington State follows ABA Formal Op. 92-368, but offering no authority for that claim); Alaska Bar Ass'n Ethics Op. 97-1 (1997) (implicitly endorsing, although not adopting, ABA Formal Op. 92-368); North Dakota State Bar Ass'n Ethics Comm. Op. 95-14 (1995) (describing but not adopting ABA Formal Op. 92-368). As of July 1, 2005, Missouri and Washington have proposals pending to adopt some version of Model Rule 4.4(b).

<sup>78</sup> These jurisdictions are Alabama, Kentucky, Maine, Michigan, New Hampshire, New York, Tennessee, and Virginia. Letter from L. Gilbert Kendrick, Assistant General Counsel for the Alabama State Bar, to unidentified Lawyer 2 (April 12, 1996) (on file with the author); Kentucky Bar Ass'n, Ethics Op. KBAE-374 (1995); *Corey v. Norman, Hanson & Detroy*, 742 A.2d 933, 941 (Me. 1999); *Holland v. The Gordy Company*, No. 231183, 2003 WL 1985800, at \*8 (Mich. Ct. App. Apr. 29, 2003); New Hampshire Bar Ass'n, Practical Ethics Article (1994); Bd. of Prof'l Resp. of the Sup. Ct. of Tennessee, Bar Adv. Ethics Op. 2004-F-150; Virginia State Bar's Standing Comm. on Legal Ethics, Op. 1702 (1997). As of November 1, 2005, Michigan and New Hampshire have proposals to adopt Rule 4.4(b), although New Hampshire's version resembles ABA Opinion 92-368. In New York, a state bar opinion addresses the related issue of receiving documents from a third party. New York State Bar Ass'n Comm. Prof'l Ethics Op. 700 (1997). New York City lawyers, however, have two sources of authority, both of which adopt the 92-368 approach. New York City Op. 2003-04, *supra* note 1; New York County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 730, 2002 WL 31962702 (2002).

<sup>79</sup> ABA Formal Op. 92-368, *supra* note 1.

<sup>80</sup> Massachusetts Bar Ass'n, Op. No. 99-4 (1999).

<sup>81</sup> *Id.*

more nuanced approach. For example, a Colorado opinion requires lawyers to return a misdirected document if the sender notifies the recipient before the recipient has looked at the relevant document; otherwise, the receiving lawyer simply has a duty to notify the sender.<sup>82</sup> As discussed in more detail in Part V, some of these jurisdictions offer some important insights into the debate and may provide the building blocks for a better approach to the issue.

### III. DISTINGUISHING NORMATIVE AND POSITIVE THEORIES OF ETHICS

Part of the reason for the lack of clarity in this area is that the bar has failed to develop what one might call a positive theory of legal ethics. In contrast to a normative theory, which explains how lawyers ought to behave in the absence of any clear guidance from black letter law, a positive theory would explain what the black letter substantive law of ethics should look like in general and would offer clearer insights into the problem of inadvertent disclosures in particular.

#### A. *Normative Theories: Advising Lawyers How to Exercise Discretion*

The classic case of *Spaulding v. Zimmerman* illustrates the difference between normative and positive theories.<sup>83</sup> The lawsuit involved a minor, David Spaulding, who sustained injuries in a car accident.<sup>84</sup> During the liti-

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<sup>82</sup> Colo. Bar Ass'n Op. 108, 29 COLO. LAW. 55, 58 (Sept. 2000). *See also* TEX. R. CIV. P. 193.3(d) (requiring the recipient to return the misdirected document if the sender makes such a request within ten days of discovering the mistake); D.C. Bar Ass'n, Op. 256 (1995) (requiring the recipient to return the documents if the lawyer knows it is a misdirected document); Illinois State Bar Ass'n Advisory Op. 98-04, 1999 WL 35561, at \*5 (1999) (suggesting a lawyer should not use confidential documents if the lawyer had notice); Maryland State Bar Ass'n Comm. on Ethics Op. 2000-04. *But see In re Meador*, 968 S.W.2d 346 (Tex. 2001) (endorsing a related ABA opinion, 94-382, that discusses the receipt of privileged documents from a third party).

<sup>83</sup> 116 N.W.2d 704 (Minn. 1962). A number of law review articles have examined this case. *See, e.g.*, Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63 (1998); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1606 (1995). Many legal ethics casebooks discuss it as well. *See, e.g.*, GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 3-13 (4th ed. 2004); THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* 492-94 (9th ed. 2003); DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 275-81 (4th ed. 2004). Even a popular television show created an episode modeled on *Spaulding*. *The Practice: Honor Code* (ABC television broadcast, Nov. 18, 2001).

<sup>84</sup> *Spaulding*, 116 N.W.2d at 706.

gation, defense counsel's medical expert discovered that David suffered more severe injuries than his own lawyers suspected; David had a life-threatening aneurysm that required immediate medical attention.<sup>85</sup> David's doctors missed the diagnosis, so even David did not know the severity of his own condition.<sup>86</sup> The defense lawyers thus faced the troubling dilemma of pursuing their client's interests—by not disclosing the condition and settling the case for a nominal amount—or saving David's life.<sup>87</sup>

Normative theories of ethics help to explain how lawyers should behave in cases like *Spaulding*, particularly when the existing rules do not offer clear guidance. For instance, the dominant theory of legal ethics favors zealous advocacy and an unwavering commitment to clients, even if that commitment produces immoral or unjust results in particular cases.<sup>88</sup> Assuming that the relevant rule gave Zimmerman's lawyers the discretion to disclose and the client insisted on confidentiality, the dominant view implies that Zimmerman's lawyers acted ethically by not disclosing the condition.<sup>89</sup>

Alternatively, theories critical of the dominant view posit that lawyers should consider non-client interests like justice,<sup>90</sup> morality,<sup>91</sup> or the inherent authority of law<sup>92</sup> when making professional judgments. These theories suggest that, if the relevant rule conferred discretion in a case like this one, Zimmerman's lawyers should have exercised their discretion in favor of disclosure, even if the defendant insisted on maintaining confidentiality.<sup>93</sup>

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<sup>85</sup> *Id.* at 707.

<sup>86</sup> *Id.* at 707-08. Although the lawyers did not disclose the injury, David fortuitously discovered the problem himself when he had a checkup a short time after the case settled. *Id.* at 708. The checkup "was required by the army reserve, of which [David] was a member." *Id.*

<sup>87</sup> Interestingly, the opinion does not reveal whether defense counsel consulted with the defendant, Zimmerman (a friend of the Spauldings and the driver of the car in which David was a passenger) to see if Zimmerman would have agreed to the disclosure. *Spaulding*, 116 N.W. 2d at 706-09. Recent scholarship suggests that the conversation never occurred and that Zimmerman's insurance company also may not have known about the issue. Cramton & Knowles, *supra* note 83, at 69. Thus, the defense lawyers apparently decided not to disclose the information on their own, raising a host of ethics issues beyond the scope of this article. *Id.*; Pepper, *supra* note 83, at 1606.

<sup>88</sup> See *supra* note 5.

<sup>89</sup> See, e.g., FREEDMAN & SMITH, *supra* note 5, at 147. But see *id.* at 145-46 (explaining why Freedman, a zealous advocacy proponent, disagrees with this conclusion).

<sup>90</sup> See, e.g., SIMON, *supra* note 13.

<sup>91</sup> See, e.g., LUBAN, *supra* note 13.

<sup>92</sup> See, e.g., W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 365-66 (2004). According to this position, lawyers should normally treat legal rules as reflecting socially agreed upon norms. In the face of ambiguities, lawyers should act in a way that is the most consistent with the spirit of the law, and not in a way that is merely in the client's interests or in the interests of justice.

<sup>93</sup> In the case of the authority conception, the answer is not as clear. *Id.* at 404-05.

B. *Positive Theories: Prescribing the Content of the Rules*

A positive theory of ethics, by contrast, would answer a distinct question. Instead of telling us what lawyers should do when confronted with regulatory ambiguities or omissions, a positive theory would describe what the rules should require *ex ante*. For example, whereas a normative theory would tell us how a lawyer should behave in the *Spaulding* case if the relevant confidentiality rule were unclear, a positive theory would explain what the duty of confidentiality should mandate at the outset. Should the rule explicitly require disclosure under these circumstances? Should it mandate silence? Should disclosure be discretionary?

These questions are not necessarily answered by the normative theories. For instance, someone might adopt zealous advocacy as a normative theory and contend that the lawyer in *Spaulding* should not disclose the boy's injuries if the relevant rule confers discretion and the client demands non-disclosure, even after consultation.<sup>94</sup> At the same time, one might think that the rules should, in fact, require disclosure. That is, one might think that the rule should require disclosure as a matter of positive law, but at the same time believe that if the rule is not clear, the lawyer should resolve any ambiguities in favor of the client.

The division between positive law and normative theory rests on the idea that rulemakers should take into account different considerations at the rulemaking stage than lawyers should consider when faced with ethical ambiguities. For rulemaking, drafters should examine a wide range of public policy considerations, including not only zealous advocacy or justice, but also values such as efficiency, professionalism, consumer protection, confidence in the justice system, and consistency with analogous legal doctrines.

At the same time, these considerations should not influence lawyers when they represent individual clients. The profession cannot expect lawyers to consider the implications of their actions in each of these areas and balance them before taking action.<sup>95</sup> Such a complicated analysis is difficult enough for rulemakers, who often have committees to study the appropriate content of regulations; it is simply unrealistic for practicing lawyers, who frequently lack the time and resources to engage in such an inquiry. Rule-

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<sup>94</sup> For more on an attorney's obligation to engage in moral dialogue with a client, even when following the zealous advocacy model, see Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181, 192-96 (1999).

<sup>95</sup> Cf. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 7-8 (1955) (contending that actors within an institutional system may not be bound by the same sorts of considerations that justify the institution itself). *But see* SIMON, *supra* note 13, at 198-203 (arguing that lawyers and the system as a whole should both seek justice).

making, in short, reflects different concerns and should produce different answers than lawyers should reach when representing clients in cases raising ambiguous ethical requirements.

Unfortunately, ethicists do not often acknowledge the divide between their normative theories and the actual rules that govern lawyer conduct. As Professor William Simon has noted, “[d]iscussions of legal ethics have a tendency to collapse into discussions of lawyer regulation. This happens when people assume that an ethical criticism of lawyering could be plausible only if it were susceptible to formulation and enforcement as a disciplinary rule. This tendency should be resisted.”<sup>96</sup>

Although Simon recognizes that normative theories do not necessarily offer clear implications for positive regulations, he nevertheless offers a proposal for how his normative theory could be “institutionalized.”<sup>97</sup> In doing so, he suggests that a “disciplinary regime inspired [by his approach] would start with the ‘promote justice’ maxim and develop it into a set of more definitive precepts.”<sup>98</sup> The goal would be to develop norms in codes that “take the form of general standards, rebuttable presumptions, and illustrative cases.”<sup>99</sup>

The problem with Simon’s institutionalization recommendations is that they rely primarily, if not exclusively, on the normative theory that he proposes. For the reasons mentioned above, normative theories such as Simon’s cannot by themselves explain the most appropriate content of professional rules. One could adopt Simon’s view that lawyers should resolve ambiguities in favor of achieving justice in particular cases, while also believing that lawyer regulations should take into account other considerations, such as economic efficiency or any number of broader public policy considerations that would not (and should not) concern lawyers during their representation of particular clients in specific cases.<sup>100</sup>

Consider again the duty of confidentiality. One might think that the duty should be quite broad, in order to ensure that clients trust their lawyers and convey all of the necessary information about a particular matter.<sup>101</sup> That is, one might want a duty of confidentiality that reflects the zealous advocacy ideal. At the same time, one might also believe that if the duty does not clearly apply in a particular instance, a lawyer should resolve ambiguities in favor of achieving justice in that case. Simply because “justice”

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<sup>96</sup> SIMON, *supra* note 13, at 195.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 197.

<sup>99</sup> *Id.*

<sup>100</sup> For other criticisms of Simon’s institutionalization recommendations, see W. Bradley Wendel, *Busting the Professional Trust: A Comment on William Simon’s Ladd Lecture*, 30 FL. ST. U. L. REV. 659 (2003).

<sup>101</sup> See, e.g., FREEDMAN AND SMITH, *supra* note 5, at 127-28.

may be an appealing touchstone for lawyers faced with difficult ethical situations does not mean that justice should be the exclusive—or even primary—rulemaking consideration. Although Simon makes a strong case for justice as a normative theory, he seems to assume, rather than prove, that his theory should be “institutionalized.”

Simon is not alone. Advocates of zealous advocacy also assume a link between their normative and positive theories. Professor Monroe Freedman, perhaps the most visible and widely cited proponent of zealous advocacy, not only urges lawyers to pursue their client’s lawful objectives with single-minded determination, but he calls for many rules to reflect this commitment to zealous advocacy as well. For example, he believes that “in the relatively small number of cases in which the client who has contemplated perjury rejects the lawyer’s advice and decides to proceed to trial, to take the stand, and to give false testimony,” lawyers should knowingly allow their clients to lie on the stand through the usual question and answer technique (i.e., not in the narrative).<sup>102</sup> Though Freedman acknowledges that other values, such as morality, are relevant to deciding the appropriate content of the rule,<sup>103</sup> he places such a strong emphasis on zealous advocacy that morality only rarely trumps advocacy concerns.<sup>104</sup> Similarly, Freedman’s co-author, Professor Abbe Smith, does not view even human life as sufficiently important to warrant adjusting the duty of confidentiality to allow disclosure, believing that zealous advocacy requires a particularly robust rule.<sup>105</sup>

The problem is that Freedman and Smith do not explain why the rules should reflect a nearly exclusive concern for zealous advocacy. Even if we assume that we want lawyers to act zealously in the event of regulatory ambiguities, we should still want rulemakers to examine a broader range of public policy considerations, such as economic efficiency or just results, when crafting the rules. In sum, the considerations that are relevant for rule drafting are different than the considerations that lawyers should take into account when faced with ambiguous ethical requirements.<sup>106</sup>

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<sup>102</sup> *Id.* at 164.

<sup>103</sup> *Id.* at 165-67.

<sup>104</sup> *Id.* at 146-47, 165-66.

<sup>105</sup> *Id.* at 147. Professor Freedman expressly disagreed with Professor Smith on this point.

<sup>106</sup> Even this author has overlooked the distinction. Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977 (2003) (using conventional ethics theories to propose changes to the rules of professional conduct).

C. *The Consequences of Limiting Normative Theories to the Context of Discretionary Decisionmaking*

The distinction between normative and positive theories has implications for legal ethics generally and for the issue of inadvertent disclosures in particular. One important general conclusion is that the zealous advocacy model, to the extent it is a dominant view at all,<sup>107</sup> is only a dominant normative theory. Contrary to what some commentators have implied, zealous advocacy only appears to drive the way in which many lawyers behave in the absence of regulatory clarity; it does not appear to be the exclusive touchstone for professional regulations themselves.<sup>108</sup>

Ample evidence supports the idea that ethics rules turn on many different values.<sup>109</sup> For example, regulations related to confidentiality,<sup>110</sup> candor to the tribunal,<sup>111</sup> and the no-contact rule,<sup>112</sup> all imply that lawyers should, under certain circumstances, pursue interests that do not advance a client's objectives. Consider Model Rule 1.6, which now permits lawyers to disclose confidential information in order to prevent serious bodily harm to a third person, even when the client is not the potential cause of the third person's injury.<sup>113</sup> If zealous advocacy were the primary regulatory rationale, the ABA would have rejected this proposed change and retained the older version of the Rule, which limited discretionary disclosures to instances where the client intended to commit a criminal act that would seriously injure or kill another person.<sup>114</sup> By allowing lawyers to place greater weight on the harm to third parties than on their allegiance to a client's law-

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<sup>107</sup> Although there is significant evidence that this model did not dominate before the latter half of the nineteenth century, see Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 703-09 (1988), Professor Luban has demonstrated convincingly that this view dominates (for the most part) among modern practitioners. LUBAN, *supra* note 13, at 393-403. *But see* Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 118-29 (1990) (reviewing LUBAN, *supra* note 13); Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1542-44.

<sup>108</sup> See Schneyer, *supra* note 7, at 687 (observing that the dominant view "represents a major theme in the bar's ethical tradition but cannot fully account for the content of the ABA codes").

<sup>109</sup> See, e.g., Jones, *supra* note 8, at 1281 (noting that "ethical rules represent a collective and shared understanding among members of the profession as to how lawyers should balance the many competing obligations they face").

<sup>110</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

<sup>111</sup> *Id.* R. 3.3.

<sup>112</sup> *Id.* R. 4.2. See also Jones, *supra* note 8, at 1307-08 (making a similar observation about the no-contact rule).

<sup>113</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2002).

<sup>114</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (1999).

ful activities, the new version reflects a clearer emphasis on considerations beyond zealous advocacy.

As this example illustrates, the ethics rules appear to—and should—incorporate a number of competing considerations beyond servicing a particular client's interests. The problem is that rulemakers have relied on broader policy concerns without clearly identifying those concerns or explaining how they should be balanced.

This distinction between rulemaking and discretionary judgment also has important implications for the issue of inadvertent disclosures. For example, consider Professor Monroe Freedman's argument that zealousness requires lawyers to take advantage of an opponent's misdirected documents.<sup>115</sup> The problem with Professor Freedman's argument is that he assumes that zealous advocacy should be the nearly exclusive factor when generating the positive law in this area.<sup>116</sup>

Notably, the authors of ABA Opinion 92-368 avoided this type of single-value reasoning. They instead relied on a number of values to develop their approach to misdirected documents, including existing normative principles (e.g., zealous advocacy) and analogies to other law.<sup>117</sup> Unfortunately, the opinion did not consider a number of other values that offer insights into the appropriate content of the positive law in this area. The next section identifies those other values.

#### IV. DEVELOPING A POSITIVE THEORY: PRINCIPLES FOR THE REGULATION OF LAWYERS

In every area of law, drafters of legal texts take into account a number of factors, and professional regulations should be no different. As Professor Trina Jones pointed out in her excellent article on inadvertent disclosures, "ethical rules represent a collective and shared understanding among members of the profession as to how lawyers should balance the many competing obligations they face."<sup>118</sup> The challenge here is to identify the competing obligations and explain how they should be balanced.

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<sup>115</sup> See, e.g., Freedman, *supra* note 6.

<sup>116</sup> In this sense, Professor Freedman shares a great deal in common with his critics: he assumes that his normative theory can be imported into the realm of professional rulemaking.

<sup>117</sup> ABA Formal Op. 92-368, *supra* note 1.

<sup>118</sup> Jones, *supra* note 8, at 1281.

## A. *Principles Derived from Normative Theory*

### 1. Zealous Advocacy

Ethics rules should reflect a number of important considerations. First, and perhaps most obviously, rules should reflect a commitment to zealous advocacy. Even though zealousness should not be the sole criterion when creating a rule, zealousness is nonetheless significant. Rules related to conflicts of interest,<sup>119</sup> diligence,<sup>120</sup> and confidentiality<sup>121</sup> all reflect, at least to some degree, the profession's commitment to zealous advocacy.

Zealous advocacy is a product of the adversarial system,<sup>122</sup> and it is a critical feature of the agency and fiduciary responsibilities that lie at the core of the attorney-client relationship.<sup>123</sup> As Professors Freedman and Smith have convincingly demonstrated, zealous advocacy furthers human dignity and autonomy,<sup>124</sup> due process rights,<sup>125</sup> and clients' trust and confidence in their lawyers.<sup>126</sup> Thus, any regulations governing lawyer conduct should reflect this value and give it significant weight.

### 2. Justice

Despite the obvious need to ensure zealous representation, professional regulations should also promote other important values.<sup>127</sup> One such value is drawn from another normative theory: the pursuit of justice.<sup>128</sup>

A variety of rules emphasize justice, such as the rules relating to perjured testimony.<sup>129</sup> Even though putting on perjured testimony may sometimes be in a client's best interests, the rules allow, and sometimes require, a lawyer to prevent the perjury from occurring.<sup>130</sup> The rules also spell out

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<sup>119</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

<sup>120</sup> See, e.g., *id.* R. 1.3.

<sup>121</sup> See, e.g., *id.* R. 1.6.

<sup>122</sup> See, e.g., Jones, *supra* note 8, at 1288-92.

<sup>123</sup> See, e.g., FREEDMAN & SMITH, *supra* note 5, at 258.

<sup>124</sup> *Id.* at 56-57, 69-70. See also Jones, *supra* note 8, at 1292-93.

<sup>125</sup> FREEDMAN & SMITH, *supra* note 5, at 27.

<sup>126</sup> *Id.* at 127-28.

<sup>127</sup> See ABA Formal Op. 92-368, *supra* note 1 (observing that zealous advocacy always has been subject to exceptions).

<sup>128</sup> See SIMON, *supra* note 13.

<sup>129</sup> E.g., MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002).

<sup>130</sup> *Id.* R. 3.3(a).

what a lawyer must do to correct perjury that already has occurred.<sup>131</sup> These rules illustrate the occasional primacy of justice over zealous advocacy.<sup>132</sup>

### 3. Morality

According to a third theory, lawyers should not be restricted by zealous advocacy or notions of justice; rather, a lawyer's ultimate touchstone should be basic morality. Professor David Luban presents one of the most commonly cited and persuasive versions of a morality-based normative theory of ethics.<sup>133</sup> According to Luban, a lawyer, at least outside the criminal defense arena, should seek morally worthy ends using morally justifiable means.<sup>134</sup> He explains:

The morally activist lawyer shares and aims to share with her client responsibility for the ends she is promoting in her representation; she also cares more about the means used than the bare fact that they are legal. As a result, the morally activist lawyer will challenge her client if the representation seems to her morally unworthy; she may cajole or negotiate with the client to change the ends or means; she may find herself compelled to initiate action that the client will view as betrayal; and she will not fear to quit. She will have none of the principle of nonaccountability, and she sees severe limitations on what partisanship permits.<sup>135</sup>

According to this theory, morality should dictate how lawyers behave in the absence of clear professional regulations.

Morality can also be a value worth considering for rulemakers. Recall that in *Spaulding*, the defendant's lawyers would not have caused the boy's aneurism, but they could have prevented it from happening. A rule drawing only on zealous advocacy would not permit disclosure under these circumstances because it would sacrifice the client's interests. Similarly, a rule relying on justice alone would not permit disclosure here either. Justice, according to Professor Simon, turns on "legal judgments grounded in the methods and sources of authority of the professional culture."<sup>136</sup> Because the law generally says that people do not have an obligation to help others

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<sup>131</sup> *Id.* R. 3.3(a)(3).

<sup>132</sup> Of course, justice and zealous advocacy do not always conflict. As Professors Freedman and Smith note, zealous advocacy is generally an effective way to produce correct and just results. See FREEDMAN & SMITH, *supra* note 5, at 49. That said, the two values do conflict in many circumstances, such as in the previously mentioned *Spaulding* case. 116 N.W.2d 704 (Minn. 1962).

<sup>133</sup> LUBAN, *supra* note 13. The attempt to enrich legal ethics with conceptions of morality has a long history. *E.g.*, DAVID HOFFMAN, A COURSE OF LEGAL STUDY (photo. reprint 1985) (1836).

<sup>134</sup> LUBAN, *supra* note 13, at xxii.

<sup>135</sup> *Id.*

<sup>136</sup> SIMON, *supra* note 13, at 138.

in need,<sup>137</sup> justice would not necessarily require or even permit disclosure under these types of circumstances. The current Model Rule, however, takes into account moral considerations and allows disclosure.<sup>138</sup>

## B. *Other Considerations*

In addition to drawing on normative theories, rulemakers should also take into account a variety of other factors.

### 1. Efficiency

Rulemakers should—and sometimes do—promote efficient use of resources. For example, a rule of civil procedure prohibits frivolous pleadings,<sup>139</sup> and states typically have an ethical prohibition that mirrors the procedural rule. Model Rule 3.1 states that “[a] lawyer shall not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous.”<sup>140</sup>

Ethics rules also have a law and economics dimension. Provisions like Model Rule 3.1 not only ensure a justice system uncluttered with frivolous suits, but they reduce the costs to parties of having to defend frivolous claims, thus generally having a wealth maximizing effect.<sup>141</sup>

Other rules are useful because they cut down on transaction costs.<sup>142</sup> For instance, many conflicts of interest rules reflect what most lawyers and clients would bargain for if left to their own devices, so the rules eliminate

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<sup>137</sup> E.g., Eric H. Grush, Comment, *The Inefficiency of the No-Duty-To-Rescue Rule and a Proposed “Similar Risk” Alternative*, 146 U. PA. L. REV. 881, 881 (1998) (observing that “[o]ne of the most settled and basic common-law rules that all law students learn is that there is no general duty to rescue someone”).

<sup>138</sup> See FREEDMAN & SMITH, *supra* note 5, at 146-47.

<sup>139</sup> FED. R. CIV. P. 11.

<sup>140</sup> MODEL RULES OF PROF’L CONDUCT R. 3.1 (2002).

<sup>141</sup> Several scholars have examined the implications of economics for ethics rules. See, e.g., RANDAL N.M. GRAHAM, *LEGAL ETHICS* (2004) (looking at professional regulation through the lens of law and economics); Richard A. Epstein, *The Legal Regulation of Lawyers’ Conflicts of Interest*, 60 *FORDHAM L. REV.* 579 (1992) (applying an economic analysis to conflict of interest rules); Daniel Fischel, *Lawyers and Confidentiality*, 65 *U. CHI. L. REV.* 1 (1998) (proposing an economic rationale for confidentiality); Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 *IOWA L. REV.* 965 (1997) (arguing that the Model Rules governing conflicts of interest are consistent with economic theory).

<sup>142</sup> Painter, *supra* note 73, at 684-85.

the need for lawyers and clients to negotiate these issues in advance of every representation.<sup>143</sup>

## 2. Consumer Protection

Consumer protection is another value that should factor into professional rulemaking. Although zealous advocacy overlaps to a significant degree with consumer protection concerns, the two concepts are nonetheless distinct. Consider the rule requiring lawyers to charge a reasonable fee:<sup>144</sup> one could imagine a very effective and zealous lawyer nonetheless charging a client an unreasonable fee.<sup>145</sup> Similarly, Model Rule 6.1, which urges lawyers to commit fifty hours per year to pro bono work, does not directly promote zealous advocacy. Rather, the rule emphasizes the importance of consumers having legal representation in the first place. In short, rules can protect the public, even if they do not directly promote the interests of zealous advocacy.

## 3. Consistency with Other Law

Rulemakers also try to ensure at least three types of consistency with other law.<sup>146</sup> First, rulemakers want consistency with other legal obligations. For example, Model Rule 3.1 mirrors Rule 11 of the Federal Rules of Civil Procedure. Of course, the ethics rules do not necessarily have to mirror other law or legal principles, but consistency with other law is a relevant consideration.

Second, rulemakers try to craft ethics regulations that are consistent with legal principles in other contexts. For example (and as explained in more detail later), contract and property law doctrines reflect certain principles that can help to determine the appropriate obligation of lawyers who receive misdirected documents.<sup>147</sup>

Finally, ethical rules should also be consistent with each other. For instance, Professor Freedman has argued that an obligation to return misdirected documents conflicts with the notion that lawyers have no duty to

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<sup>143</sup> *See id.*

<sup>144</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5 (2002).

<sup>145</sup> *See, e.g., In re Fordham*, 668 N.E.2d 816 (Mass. 1996).

<sup>146</sup> *See Gillers, supra* note 59, at 247-48 (observing that many ethics rules merely restate obligations that lawyers already have elsewhere in the law). *See also* New York City Op. 2003-04, *supra* note 1 (relying on legal principles in other areas to craft an approach to inadvertent disclosures).

<sup>147</sup> *See* ABA Formal Op. 92-368, *supra* note 1 (analogizing to property law).

inform an opponent of an imminent statute of limitations deadline.<sup>148</sup> Freedman argues that an obligation to return an inadvertent disclosure is inconsistent with the idea that lawyers have no duty to help opponents to avoid mistakes.<sup>149</sup> This argument is taken up in more detail below, but for now, it suffices to note that consistency is yet another valuable rulemaking factor.

One could identify many other values as well,<sup>150</sup> some of which have no doubt been a part of the rulemaking process in the past.<sup>151</sup> But some of these values, such as protectionism, are much less desirable than the values mentioned above. The question then becomes: how can one translate the key values into concrete doctrinal prescriptions for the law of inadvertent disclosures?

## V. IMPLICATIONS FOR THE LAW OF INADVERTENT DISCLOSURES

By drawing on the plural values described above, the inadvertent disclosure puzzle becomes easier to solve. This Part explores three situations in which inadvertent disclosures occur, identifies the various interests at stake, balances those interests, and explores what a lawyer's ethical obligations should be in each case.<sup>152</sup>

### A. *The Quickly Discovered Mistake*

Assume that a lawyer sends a fax, an email, or an overnight package to an adversary and immediately realizes that she included a privileged client letter by mistake. Before the recipient reviews the document, the sending

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<sup>148</sup> Freedman, *supra* note 6.

<sup>149</sup> *See id.*

<sup>150</sup> Commentators have referenced the importance of fostering confidence in the justice system, protecting the profession's image, and guarding the profession's financial interests. *E.g.*, FREEDMAN AND SMITH, *supra* note 5, at 6, 9; *see also* Schneyer, *supra* note 7, at 705-06 (documenting the role of politics in rulemaking); Joshua K. Simko, Note, *Inadvertent Disclosure, the Attorney-Client Privilege, and Legal Ethics: An Examination and Suggestion for Alaska*, 19 ALASKA L. REV. 461, 482-84 (2002) (applying pragmatism and distributive justice to the inadvertent disclosure problem).

<sup>151</sup> *See generally* Schneyer, *supra* note 7 (offering a political account of the process that led to the creation of the Model Rules of Professional Conduct).

<sup>152</sup> Professor Trina Jones wrote an article that balanced competing interests in this context. Her article, however, differed in two ways. First, Professor Jones only sought to balance two principles: confidentiality and partisanship. Jones, *supra* note 8, at 1306-07. Second, and more importantly, she sought to give lawyers guidance about how to resolve the inadvertent disclosure problem on their own. For reasons explained below, that approach seems to place too little emphasis on the development of a rule that can address a large number of cases.

lawyer calls the receiving lawyer and asks her to return the privileged document. What should the receiving lawyer do? A first step is to consult with the client, because if the client wants to return the document, the lawyer should do as the client wishes.<sup>153</sup> But assuming that the client insists on using the document, what should the receiving lawyer do then? The following discussion contends that, although some factors weigh in favor of using a misdirected document, the relevant values ultimately suggest that the receiving lawyer should not look at the document and should be required to comply with the sending lawyer's instructions.

### 1. Factors Favoring Review and Use

Several important factors weigh in favor of taking advantage of an inadvertent disclosure. Most notably, Professor Freedman makes a strong case that, by not taking advantage of these mistakes, lawyers would “devalue[ ] . . . the ethic of zealous representation.”<sup>154</sup> Indeed, lawyers make use of their adversaries' mistakes all the time. The point of an adversarial system is that each side does its best, and mistakes can sometimes determine the outcome.

In addition to zealous advocacy, truth seeking and justice are also arguably furthered by allowing the recipient to retain and read the document. The document may contain the “smoking gun” that reveals the truth in the case.<sup>155</sup> At the very least, the document will contain information that ordinarily would not come to light in the course of litigation. To the extent that more information produces a greater likelihood of a “correct” outcome,<sup>156</sup> the retention of the document and its review by the recipient furthers the interests of justice and truth-seeking. There are holes in this argument that are explored later, but the position plausibly supports the idea that the recipient should have no duty to return the document.

The goal of consistency also supports a rule that allows for review and retention of the document. Freedman points out that when an adversary is unaware of an imminent statute of limitations deadline, a lawyer has no

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<sup>153</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) (2002) (requiring lawyers to “reasonably consult with the client about the means by which the client's objectives are to be accomplished”); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. m (suggesting that the “[r]eceiving lawyer may be required to consult with that lawyer's client . . . about whether to take advantage of the lapse”).

<sup>154</sup> Freedman, *supra* note 6.

<sup>155</sup> *See id.* (contending that an obligation to return an inadvertent disclosure “overrides the search for truth”).

<sup>156</sup> This assumption is debatable. As explained below, the additional information can just as easily distort the truth.

duty to inform that adversary of the deadline, even if a meritorious claim might go unheard as a result.<sup>157</sup> If there is no duty to help an opponent in that context, why should a lawyer have a duty to inform an opponent about an inadvertent disclosure and further aid the opponent by returning the document unread? In fact, the refusal to help the opponent avoid a privilege waiver is even more justifiable than the refusal to alert an opponent about an imminent statute of limitations deadline. Whereas the statute of limitations may hurt an opponent who has a meritorious case, an inadvertent disclosure only does so if the disclosure contains harmful information (i.e., the opponent's case is less meritorious than it seemed).

Consistency with the law of waiver also appears to support Freedman's position. Freedman points out that it would be odd for the ethics rules to require the recipient to return the document unread if a court in that jurisdiction would find automatic waiver under the circumstances.<sup>158</sup> A "comply with the sender's instructions" rule would instruct lawyers to return a document that a jurisdiction might no longer deem to be privileged. In contrast, a "take advantage of the mistake" rule would present no such conflict and is, therefore, arguably more desirable.

Efficiency considerations also appear to favor a "take advantage of the mistake" rule. If the rule required compliance with the sender's instructions, failure to comply could lead to excessive satellite litigation, such as the filing of numerous disqualification motions on the grounds that the recipient actually looked at the document without permission.<sup>159</sup>

A final consideration is that a "comply with the sender's instructions" rule would be difficult to enforce. How do we know if the recipient of an inadvertent disclosure reviewed the document before destruction? Many lawyers would look at the document, since nobody would be the wiser. Arguably, the rule should reflect this reality.

In all, several important considerations that underlie professional rulemaking appear to favor a regulation that allows the recipient to reject the sender's request and to take advantage of the mistake to the fullest extent possible.

## 2. Factors Favoring Destruction or Return

Zealous advocacy supports a "take advantage of the mistake" rule, but the other factors mentioned above offer less support for that rule than it

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<sup>157</sup> Freedman, *supra* note 6.

<sup>158</sup> *Id.*

<sup>159</sup> *See, e.g.,* State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 808 (Cal. Ct. App. 1999) (identifying this potential concern).

might at first appear. Moreover, several other factors weigh in favor of complying with the sender's instructions. Ultimately, the various rulemaking considerations favor compliance with the sender's wishes, at least in the case where the sender discovers the error before the recipient has reviewed the relevant document.

a. *The Ambiguous Implications of Many Considerations*

It is at first plausible to believe that the disclosure of a privileged document will produce additional information and that the information will lead to a more accurate and just outcome. But there are two problems with this argument. First, there is a distinction between accuracy and justice. If we had a drug that we could forcibly administer to criminal defendants, inducing them to tell us definitively whether they committed a crime, the drug would certainly increase accuracy. Whether the accurate result is also a just one is another question entirely. In the same way, using an inadvertent disclosure might increase accuracy, but the outcome—achieved through the use of information that would normally remain protected from public scrutiny—is not necessarily more just. Surely, a forced confession is considerably more unjust than using an inadvertent disclosure, but an increase in accuracy is not necessarily in the interests of justice.

Second, there is a serious question as to whether the additional information really would improve the accuracy of the outcome. In most cases, each side has certain adverse information that it would prefer the adversary not to have. Lawyers play the discovery game and seek to protect that information within the bounds of the law. It is reasonable to believe that trials rarely reflect all of the information that each side has about the case. If privileged information is disclosed from one side and not the other, accuracy is not necessarily improved. In fact, the disclosure of privileged information from one side—and only one side—has as much of a chance of distorting the facts as it does of revealing the truth.<sup>160</sup> In short, it is far from clear that the recipient's retention of a privileged document promotes either truth or justice.

The implications of seeking legal consistency are also more ambiguous than they first appeared. As for Freedman's statute of limitations hypo-

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<sup>160</sup> Cf. *State v. Van Bulow*, 475 A.2d 995, 1007 (R.I. 1984) (observing that “[w]here a privilegeholder has made assertions about privileged communications, but has attempted to bar other evidence of those communications, there is a serious danger that his assertions are false or misleading” (quoting *United States v. Aronoff*, 466 F. Supp. 855, 862 (S.D.N.Y. 1979))). In the case of misdirected documents, there is less of a concern that the party has disclosed material with the intent of being misleading. Nevertheless, the disclosure of a random privileged document can still create a misconception regarding the “truth” in a case.

thetical, it is distinguishable from the quickly discovered inadvertent disclosure. In the limitations example, a lawyer is unaware of her imminent error, and Freedman (correctly) notes that the prospective beneficiary of the mistake should have no duty to bring the error to her adversary's attention. Unlike the limitations example, the receiving lawyer in the present hypothetical is not being asked to alert an opponent about her mistake or to overlook a right that she has acquired. Rather, in the current scenario, the sender has discovered the mistake herself, before the recipient has even reviewed the relevant document.

Freedman also analogized to waiver, noting that if we require the return of the inadvertently disclosed documents, such a rule would conflict with the law in jurisdictions that find automatic waiver. This argument is not persuasive for three reasons. First, with respect to the present hypothetical, Freedman's argument turns on the assumption that the mere delivery of the document would result in waiver. In fact, it seems more reasonable to assume that waiver occurs only upon the recipient's review of the document, not upon delivery.<sup>161</sup> If so, a requirement to return the document under these circumstances does not conflict with the law of privilege waiver.<sup>162</sup>

Second, even if inadvertent delivery might result in waiver, the ethics rule just describes the receiving lawyer's obligations up until the court makes the official waiver determination. If the ethics rule requires the recipient to return the document unread and the court later concludes that waiver occurred, the recipient would have the right to get the document back from the sender. The ethics rule simply explains the recipient's obligations in the meantime.<sup>163</sup>

Third, the argument assumes that inadvertent disclosures occur only during litigation. In fact, these sorts of disclosures occur in all types of settings, such as contract negotiations, where waiver determinations are not necessarily applicable. In these types of circumstances, the ethics rules would be the primary source of authority.

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<sup>161</sup> See *Chubb Integrated Sys. Ltd. v. Nat'l Bank of Wash.*, 103 F.R.D. 52, 63 (D.D.C. 1984) (holding that a document is only deemed to be disclosed if a non-privileged party has learned the "gist" of the document's contents); D.C. Bar Ass'n, Op. 256 (1995) (asserting that there is no disclosure until the receiving lawyer has read the document); New York City Op. 2003-04, *supra* note 1 (asserting that disclosure does not occur until the recipient actually reviews the document). *But see In re Victor*, 472 F. Supp. 475, 476 (S.D.N.Y. 1976) (concluding that privilege was destroyed by placing documents in a public hallway where they could have been viewed).

<sup>162</sup> See *Kondakjian v. Port Auth. of N.Y. & N.J.*, No. 94 Civ. 8013, 1996 WL 139782, at \*8 (S.D.N.Y. Mar. 28, 1996) (making a similar point).

<sup>163</sup> The proposed change to the Federal Rules of Civil Procedure anticipates a similar process. See *supra* Part II.B.2.a.

The economic efficiency argument is also more ambiguous than it first appears. Although a “follow the sender’s instructions” rule might lead to an increase in disqualification motions, the opposite rule would lead to an increase in malpractice lawsuits against attorneys who inadvertently disclosed their clients’ privileged documents. Moreover, there is evidence that most lawyers would agree prior to the start of litigation that they would return privileged documents under these circumstances,<sup>164</sup> so a rule requiring such conduct would save the parties the time and expense of having to bargain for such a rule.<sup>165</sup> Accordingly, the economic efficiency argument does not clearly support a “take advantage of the mistake” rule and might actually favor a “follow the sender’s instruction” requirement.

Finally, enforceability concerns about a “follow the sender’s instructions” rule are overstated. Just because a rule is difficult to enforce does not mean that it is not worth having. Take, for example, the rule against knowingly offering perjured testimony.<sup>166</sup> It is very difficult to prove when a lawyer “knows” a witness is going to lie. Indeed, many of the cases addressing the issue have very unusual facts, such as where a lawyer is overheard discussing the perjury by a nearby microphone.<sup>167</sup> Despite the difficulty of enforcement, the rule is widely adopted and recognized as an important feature of the rules of professional conduct.<sup>168</sup> Thus, enforcement difficulty alone is not a particularly persuasive justification for adopting a recipient-favorable rule.

Ultimately, the only consideration that clearly favors the “take advantage of the mistake” position is zealous advocacy. That is not a minor value, but there are several competing considerations that favor the adoption of a rule that requires compliance with the sender’s instructions, at least when the sender discovers her mistake before the recipient reviews the relevant document.

#### b. *Values with Clearer Implications*

A contract law analogy not only offers clearer guidance than the previously mentioned statute of limitations analogy, but it strongly supports a

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<sup>164</sup> See ABA/BNA Manual on Prof’l Conduct 13:15 (1997) (reporting the results of an informal survey that found two-thirds of respondents believing that that lawyers should have to return inadvertent disclosures).

<sup>165</sup> See *infra* notes 224-226 and accompanying text.

<sup>166</sup> MODEL RULES OF PROF’L CONDUCT R. 3.3 (2002).

<sup>167</sup> *In re Attorney Discipline Matter*, 98 F.3d 1082 (8th Cir. 1996).

<sup>168</sup> *But see* FREEDMAN & SMITH, *supra* note 5, at 164 (taking issue with the traditional approach to perjury).

rule that favors compliance with the sender's instructions.<sup>169</sup> In one of the few thorough articles to address the ethics of inadvertent disclosure (as opposed to the waiver issue), Professor Trina Jones compares mistakenly sent documents to the law of unilateral mistake and uses that comparison to convincingly argue that lawyers should return mistakenly disclosed documents.<sup>170</sup>

Jones explains that in contract law, courts will typically void a contract "if the other party knew or should have known of the mistake, reasoning that if the nonmistaken party is aware of the mistake, then that party truly has no legitimate expectations to protect."<sup>171</sup> She gives the example of a sale where the parties agreed to a purchase price of \$55,000 for an item, but a typographical error causes the contract to state a purchase price of \$35,000.<sup>172</sup> She explains that if the buyer is "either aware of the mistake or promptly notified of it [by the seller] and can be placed in status quo ante . . ., the contract may be rescinded."<sup>173</sup> Professor Jones notes that courts will not grant rescission, however, if the "mistake involves a question of judgment,"<sup>174</sup> such as when someone sells a violin at a garage sale for \$50 and then discovers it is a very valuable Stradivarius.<sup>175</sup> Courts have found that parties are responsible for their mistakes when they reflect "mistakes in judgment going to the heart of the transaction" but not where the mistakes are "more readily characterized as clerical errors."<sup>176</sup>

Jones concludes that inadvertent disclosures are very similar to clerical-type unilateral mistakes. By definition, the sender of an inadvertently disclosed privileged document does not intend for that document to end up in the recipient's hands. In this sense, the disclosure is unlike the sale of the Stradivarius, where the seller intended to sell the violin, but misunderstood its value.<sup>177</sup> Rather, inadvertent disclosure of a privileged document is more like a scrivener's error; it happened as a result of a mistaken key stroke, an additional fax number, or a misplaced staple. Just as a court will rescind a contract because of a clerical mistake (i.e., put the parties in the same position as they were in before the mistake), Jones contends that a lawyer

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<sup>169</sup> Jones, *supra* note 8, at 1316-27.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1320.

<sup>172</sup> *Id.* at 1317.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 1321.

<sup>175</sup> Jones, *supra* note 8, at 1315.

<sup>176</sup> *Id.* at 1324.

<sup>177</sup> The Stradivarius example is more like a lawyer knowingly giving over a document during discovery and later realizing that the document is of great value to the other side. Even if the sending lawyer might now have some kind of reason for not having disclosed the document (e.g., a burdensomeness objection), the objection comes too late.

should have to return a document that she received inadvertently due to a clerical error.

The analogy, of course, is not perfect. In some ways, the case could be made that unilateral mistake is more useful in determining whether waiver has occurred, rather than whether a lawyer has an obligation to return the document. Jones's point, though, is that the law recognizes the idea that parties should not benefit from errors that are merely clerical. If that concept is reasonable as a matter of contract law, it is reasonable as a matter of the law of lawyering.<sup>178</sup>

Arguably, an even better analogy can be made to erroneously delivered property. For example, a variety of courts have concluded that if a bank mistakenly deposits money into someone's account, the bank can go to court and force the account holder to return the funds.<sup>179</sup> Courts have reasoned that "an action to recover money paid under a mistake of fact . . . [is] based on equitable principles, requiring those who receive money under certain circumstances to repay the moneys . . . [because] the retention of such moneys would be against equity and good conscience."<sup>180</sup> An inadvertent disclosure is, in many ways, the same as a bank's mistaken deposit of money into someone else's account. In both cases, the sender makes a mistake and does not intend for the recipient to have the property. In both cases, the recipient knows that the sender has made a mistake. And in both cases, the sender has requested the return of the property. Thus, it is arguably against equity and good conscience for the recipient of an inadvertent disclosure to retain a privileged document in the face of a request by the document's owner to return it.<sup>181</sup>

For similar reasons, justice also supports the return of the document. Recall that Professor Simon defines justice as "legal judgments grounded in the methods and sources of authority of the professional culture."<sup>182</sup> Given the legal analogies described above, the relevant sources of authority define

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<sup>178</sup> Cf. *Resolution Trust Corp. v. First of Am. Bank*, 868 F. Supp. 217, 220 (W.D. Mich. 1994) (holding that lawyers should not take advantage of another lawyer's "clerical mistake" by using a mistakenly sent document).

<sup>179</sup> See, e.g., *Citibank, N.A. v. Warner*, 449 N.Y.S.2d 822, 823-24 (N.Y. Sup. Ct. 1981).

<sup>180</sup> *Id.* at 823. See also *New York City Op.* 2003-04, *supra* note 1 (analogizing to mistaken bank deposits to make a similar point); *ABA Formal Op.* 92-368, *supra* note 1 (analogizing to the law of bailments); *D.C. Bar Ass'n., Op.* 256 n.9 (1995) (analogizing to the law of conversion).

<sup>181</sup> Obviously, a distinction between the cases is that, in the inadvertent disclosure context, we have zealous advocacy considerations that do not exist for the bank account holder. The question then becomes: how much weight should we place on the legal analogy relative to the interests of zealous advocacy? Although the legal analogy is probably not enough by itself to override zealous advocacy as a matter of black letter law, it is a factor that, when combined with the other considerations mentioned here, is enough to override the value of zealousness.

<sup>182</sup> SIMON, *supra* note 13, at 138.

justice to require the return of the mistakenly disclosed documents to their owner. Of course, justice is part of Simon's normative theory, but to the extent that a positive theory should incorporate justice, that value would support a sender-favorable rule.

In addition to the analogies and Simon's justice-based reasoning, morality also supports returning the document. With both the contract and property law analogies, the courts referred to the equities of the situation and even referred to matters of conscience. Professor Jones has pointed out that, in these cases, the courts are effectively taking into account the morality of the circumstances. She writes:

The law of mistake . . . illustrates that courts have incorporated and do incorporate common morality principles into analyses of substantive law issues. Courts have developed a well-established legal doctrine embracing the principle that it is unfair to capitalize on another's mistake when the potential beneficiary knows or should know of the mistake and when the mistaken party did not assume the risk of the mistake which has occurred.<sup>183</sup>

Thus, morality also favors the party who has made the mistake.

A rule that requires recipients to return the document unread would also protect consumers. A client's interests are damaged when a lawyer mistakenly sends privileged documents to an adversary, but this particular error is easily corrected by having the recipient return the document unread. The consumer's (i.e., the client's) injury can be avoided without any harm to the receiving lawyer or her client, especially when the recipient has not read the document in question at the time of the request for its return.<sup>184</sup> Although lawyers do not generally have a duty to protect another lawyer's privileged information,<sup>185</sup> *rule drafters* should care about the impact of lawyers' mistakes on consumers (i.e., clients).<sup>186</sup>

Another possible concern is that a recipient-favorable rule would have an adverse effect on the willingness of clients to share confidential information with their lawyers.<sup>187</sup> If clients know that simple and increasingly common mistakes will result in the disclosure of their confidential informa-

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<sup>183</sup> Jones, *supra* note 8, at 1324.

<sup>184</sup> ABA Formal Op. 92-368, *supra* note 1 (concluding that damage to clients can be avoided when the receiving lawyer learns of the mistake before reading the document in question).

<sup>185</sup> Freedman, *supra* note 6.

<sup>186</sup> Other ethics rules also show a concern for consumers by limiting a lawyer's zealotry. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.2 (prohibiting lawyers from contacting an adversary directly when that adversary is represented by counsel).

<sup>187</sup> *See, e.g.*, State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 808 (Cal. Ct. App. 1999) (expressing a concern that clients might become "fearful that an inadvertent error by . . . counsel could result in the waiver of privileged information or the retention of the privileged information by an adversary who might abuse and disseminate the information with impunity").

tion, clients will arguably become more circumspect about what they communicate to their attorneys.<sup>188</sup>

There are two possible criticisms of this argument. First, Professor Freedman contends that it assumes that lawyers should have a responsibility for preserving an opponent's confidentiality.<sup>189</sup> Again, although Freedman is right as a matter of normative theory, we might want to take these sorts of effects into account when creating the black letter law.

A second and more plausible criticism is that, as an empirical matter, it is questionable that clients are sufficiently aware of the law in this area or the frequency with which inadvertent disclosures occur to have any meaningful effect on their communications with counsel. Clients' willingness to communicate with counsel is certainly a factor that favors a sender-favorable rule, but the weight of this factor is reduced by how much the risk of disclosure really impacts communications.

A final, albeit minor, factor that supports a sender-favorable rule is professionalism. The recent professionalism movement has focused on, among other things, the collegiality and civility of the bar.<sup>190</sup> Although the value of the professionalism movement has been debated,<sup>191</sup> collegiality is likely another factor that rule drafters would and arguably should consider. A rule that requires the return of inadvertent disclosures would further this interest in collegial relationships.<sup>192</sup> In fact, one court, while endorsing a sender-favorable rule, observed that "it has long been recognized that 'an attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.'"<sup>193</sup>

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<sup>188</sup> See ABA Formal Op. 92-368, *supra* note 1 (explaining the importance of confidentiality in the context of misdirected documents); Jones, *supra* note 8, at 1310-1313.

<sup>189</sup> Freedman, *supra* note 6.

<sup>190</sup> ABA COMM'N ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, 112 F.R.D. 243, 248 (1986).

<sup>191</sup> RICHARD L. ABEL, AMERICAN LAWYERS (1989); FREEDMAN & SMITH, *supra* note 5, at 337 (identifying "professionalism" as "a euphemism for public image"); LAWYERS' IDEALS/LAWYERS' PRACTICES 16-18 (Robert L. Nelson et al. eds., 1992) (citing MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM (1977) for the proposition that professionalism serves the economic interests of professional elites).

<sup>192</sup> See Oregon State Bar Ass'n, Formal Op. 1998-150, 1998 WL 199531, at \*3 (1998) (asserting that professionalism supports the return of documents under these circumstances). Note, however, that Oregon has since adopted Rule 4.4(b), thus overriding its earlier bar opinion. An informal poll of lawyers provides additional support for what professionalism requires. In the poll, nearly two-thirds of respondents believed that lawyers should return inadvertently disclosed documents to the sender. ABA/BNA Lawyers' Manual, vol. 13, 252-53 (Aug. 20, 1997).

<sup>193</sup> State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 808 (Cal. Ct. App. 1999) (quoting Kirsch v. Duryea, 578 P.2d 935, 939 (Cal. 1978)).

Ultimately, zealous advocacy favors a rule that would allow the recipient to ignore the sender's request to return the document unread, but justice, morality, legal analogies, consumer protection, maintaining clients' trust in confidentiality, and even professionalism cut the other way. This conflict between zealous advocacy and other values makes the issue a difficult one for commentators, courts, and bar associations. Nevertheless, a close examination of the various interests at stake suggests that, on balance, a rule requiring the document's return is more consistent with the values that should underlie professional rulemaking, at least when the mistake is discovered before the recipient has read the document.<sup>194</sup>

### B. *The Undiscovered Mistake*

Now change the facts slightly and assume that the sender does not discover her mistake or discovers the mistake after the recipient has read the document. The values that previously supported the return of a misdirected document now favor a different conclusion.

For the moment, consider a situation where the privileged nature of the document becomes apparent only after the lawyer has finished reading it.<sup>195</sup> This situation differs from the previous example in several ways. First, zealous advocacy is even more strongly implicated. A lawyer cannot simply forget what she has seen, so the damage is done.<sup>196</sup> It would be quite difficult as a matter of zealous advocacy to ask the receiving lawyer not to act on the knowledge that she has acquired, and it would be unfair to the recipient's client to force the receiving lawyer to withdraw from the case as a result of the learned information.<sup>197</sup> Because returning the document would not erase what the receiving lawyer already learned, a rule requiring the document's return would accomplish very little.

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<sup>194</sup> See, e.g., Colo. Bar Ass'n Op. 108, 29 COLO. LAW. 55, 58 (Sept. 2000) (reaching a similar conclusion regarding quickly discovered mistakes); D.C. Bar Ass'n., Op. 256 (May 16, 1995); New York County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 730, 2002 WL 31962702, at \*6 (2002).

<sup>195</sup> See, e.g., *In re Kagan*, 351 F.3d 1157, 1162 (D.C. Cir. 2003).

<sup>196</sup> See *Aerojet-General Corp. v. Transport Indem. Ins.*, 22 Cal. Rptr. 862, 867-68 (Cal. Ct. App. 1993) (concluding that a lawyer "cannot purge [a misdirected document] from his mind"); Illinois State Bar Ass'n Advisory Op. 98-04, 1999 WL 35561, at \*3 (1999) (asserting that ABA Formal Opinion 92-368 is "unrealistic" because "once confidential material has been read, the information cannot be purged from the memory of the receiving lawyer"). Moreover, asking the lawyer not to use the information in any way would raise a conflict of interest. See D.C. Bar Ass'n., Op. 256 (1995).

<sup>197</sup> D.C. Bar Ass'n Legal Ethics Comm., Op. 256 (1995) (suggesting that a conflict of interest can arise requiring withdrawal if the rule required lawyers to forget what they had learned from a misdirected document).

In addition, some of the factors that favor returning the document in the quickly discovered mistake context do not support the document's return here. First, the legal analogies are no longer as appropriate. Professor Jones's contract analogy relied on the idea that rescission should occur when the parties could be placed back in the status quo *ex ante*.<sup>198</sup> Although the status quo can be restored when the recipient has not yet read the document, it is much more difficult to do so once the recipient has read the privileged information. Thus, unilateral mistake is not a persuasive analogy.<sup>199</sup>

The property analogy is also not on point. In the banking situation, forcing the account holder to return the misdirected money puts account holders back in their *ex ante* position. In contrast, if the recipient of an inadvertent disclosure has read part of a privileged document, she cannot simply purge her mind of what she has learned.<sup>200</sup> The simple return of property does not remedy the situation.

Some bar opinions suggest that there is another analogy, to what can best be described as briefcase searching. Because we do not allow lawyers to search an opposing lawyer's briefcase when it is mistakenly left behind, we should not allow lawyers to review misdirected documents.<sup>201</sup> But the briefcase scenario is distinguishable, because the lawyer who is rifling through an opponent's briefcase knows that the opponent did not intend to leave the briefcase behind. In contrast, the present hypothetical assumes

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<sup>198</sup> Jones, *supra* note 8, at 1317.

<sup>199</sup> This discrepancy creates an incentive for lawyers to look at the inadvertently disclosed documents in the initial hypothetical, even in the face of a request not to do so. If looking at the document would enable the recipient to keep it, why should the recipient follow the sender's instructions? See New York City Op. 2003-04, *supra* note 1 (raising this question). This incentive can be addressed through remedial measures, such as disqualification. See, e.g., Rico v. Mitsubishi Motors Corp., 10 Cal. Rptr. 3d 601, 615-617 (Cal. Ct. App. 2004) (disqualifying a lawyer for reviewing obviously privileged documents), *depublished by* Rico v. Mitsubishi Motors Corp., 91 P.3d 162 (Cal. 2004); Richards v. Jain, 168 F. Supp. 2d 1195 (W.D. Wash. 2001); Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Decor, Inc., 724 So. 2d 572 (Fla. Dist. Ct. App. 1998); see also *In re Meador*, 968 S.W.2d 346, 351-53 (Tex. 1998) (suggesting disqualification in a related context); State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 807-08 (Cal. Ct. App. 1999) (suggesting that "in an appropriate case, disqualification might be justified if an attorney inadvertently receives confidential materials and fails to conduct himself or herself in the manner specified [by the law], assuming other factors compel disqualification"). But see New York City Op. 2003-04, *supra* note 1, at n.5 (criticizing disqualification as a sanction because it would allow lawyers to profit from their own mistakes).

<sup>200</sup> See *Allread v. City of Grenada*, 988 F.2d 1425, 1433-34 (5th Cir. 1993); *Int'l Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D 445, 448-50 (D. Mass. 1988).

<sup>201</sup> See, e.g., *Kondakjian v. Port Auth. of N.Y. & N.J.*, No. 94 Civ. 8013, 1996 WL 139782, at \*6 (S.D.N.Y. Mar. 28, 1996); ABA Formal Op. 92-368, *supra* note 1; N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 730, 2002 WL 31962702, at \*6 (2002).

that the recipient does not know the documents in question were misdirected until after she has read them.<sup>202</sup>

Justice and morality also have less clear implications. As mentioned earlier, justice is defined by the legal culture, and morality is at least to some degree reflected in the equitable principles embedded in that culture. Because the previously discussed legal analogies are not as useful here, the values of justice and morality also have much less clear implications than they had in the quickly discovered mistake context.

Consumer protection also has more ambiguous implications. Consumers are still injured by their lawyers' inadvertent disclosures, but unlike the earlier example, much of the damage to the consumer cannot be undone. The recipient already knows the content of the information, so a rule requiring the return of a document that an adversary has read does not do much to improve consumer protection.

In all, zealous advocacy more strongly favors the receiving lawyer under these circumstances. Moreover, the other factors that previously favored a sender-favorable rule have more ambiguous implications. With this re-balancing of factors, zealous advocacy becomes the overriding concern, making a rule favoring the recipient a better option.

#### 1. Should the Recipient Read the Entire Document?

Assume now that the receiving lawyer realizes the privileged nature of the document before reading it, or after reading only a portion of it. Should the lawyer refrain from reading any more of the document than is necessary to determine whether the document was inadvertently sent?

Once the recipient realizes the sender's mistake, the rationales that applied in the original example (the quickly discovered mistake) would apply. The recipient knows the document contains inadvertently sent privileged material, and the recipient has not yet read that material. Thus, the legal and other analogies (such as the briefcase analogy), as well as the considerations of justice, morality, and consumer protection, all favor a rule that forbids looking at the rest of the document.<sup>203</sup>

Figuring out when a lawyer became aware of a document's privileged status may be difficult in certain cases, but this problem is no different than what arises in the perjury context, where rule violations turn on what law-

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<sup>202</sup> *Kondakjian*, 1996 WL 139782, at \*6.

<sup>203</sup> See D.C. Bar Ass'n Legal Ethics Comm., Op. 256 (1995) (concluding that a lawyer should stop reading a document upon discovering that it is privileged and was inadvertently produced); New York City Op. 2003-04, *supra* note 1.

yers “know.” Moreover, in some cases, the issue of knowledge will be quite clear.<sup>204</sup>

It also may be difficult as a practical matter for lawyers to keep themselves from reading the rest of a document that they know is privileged and is in their possession. But if lawyers know that the possible repercussions of peeking include disqualification,<sup>205</sup> they would be more inclined to resist the temptation and to secure any copies of the document that may have been circulated to colleagues. In short, lawyers should stop reading documents when they learn—either on their own or as a result of notice from the sender—that the document is privileged.<sup>206</sup>

## 2. Should the Recipient Notify the Sender?

The final question is whether the recipient should notify the sender about her mistake if the sender has not discovered it herself. Although Model Rule 4.4(b) and many state provisions and opinions suggest that notification is required,<sup>207</sup> there is a strong case for making notification discretionary.

Consider a non-litigation disclosure, where the recipient receives confidential information about another party’s contract negotiation strategies. If the recipient discloses the mistake, the recipient could seriously damage her client’s position. For example, if the sender knows that the recipient has information about the sender’s true bargaining position, the sender could decide not to pursue a deal. But even if negotiations continue, the recipient’s client is likely to be adversely affected because the sender can take protective measures regarding the disclosure. The same is true for litigation settings, where the recipient might have to forego strategic advantages by

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<sup>204</sup> See *Kondakjian*, 1996 WL 139782, at \*7. For example, the sending lawyer may speak with the receiving lawyer before a package has arrived or before an email has been opened. In either case, it would be easy to prove that the receiving lawyer knew about the misdirection before receiving the documents.

<sup>205</sup> See *supra* note 199.

<sup>206</sup> At least one bar opinion has reached a similar conclusion. *Kondakjian*, 1996 WL 139782, at \*7 (appending an opinion by the Association of the Bar of the City of New York that proposes this approach); N.Y. County Lawyers’ Ass’n Comm. on Prof’l Ethics, Op. 730, 2002 WL 31962702, at \*5-6 (2002).

<sup>207</sup> Colo. Bar Ass’n Ethics Comm., Formal Op. 108; 29 COLO. LAW. 55, 56 (Sept. 2000) (observing that “almost all” courts and bar associations “require the receiving lawyer to notify the sending lawyer that documents which appear on their face to be privileged or confidential have been disclosed”). *But see* *Aerojet-Gen. Corp. v. Transp. Indem. Ins.*, 22 Cal. Rptr. 2d 862, 867-68 (Cal. Ct. App. 1993) (suggesting that a lawyer has an ethical obligation *not* to notify the sender under these circumstances); Mass. Bar Ass’n Ethics Comm., Op. No. 99-4 (1999) (leaving open the question of whether notification should be required in Massachusetts).

revealing the mistake. For these reasons, zealous advocacy is implicated to at least the same degree as in the earlier examples.

Moreover, unlike the quickly discovered mistake, there are few conflicting values here. With respect to legal analogies, the only issue is whether the recipient has a duty to notify another party about a mistake that has benefited the recipient. Even in the unilateral mistake and misdirected property cases, the courts do not suggest that the beneficiary of a mistake has to alert the other side of the problem. Rather, the cases typically involve parties discovering their own mistakes and seeking to remedy them. As mentioned earlier, the law generally rejects the idea that someone has a duty to aid a third party.<sup>208</sup>

The best analogy may be to Model Rule 1.6(b), which permits—but does not require—lawyers to disclose confidential information to prevent someone from suffering serious bodily harm or death.<sup>209</sup> Like Rule 4.4(b), Rule 1.6(b) describes what a lawyer can do with information that, if undisclosed, would benefit the client and, if disclosed, would help another party. And critically, Rule 1.6 does not require disclosure (i.e., notification), even when another person's life is at stake. If lawyers have no obligation to volunteer confidential information to save another person's life, lawyers should have no duty to report an adversary's mistaken disclosure of privileged documents.<sup>210</sup>

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<sup>208</sup> See *supra* notes 55 and 137 and accompanying text. Some states, however, do impose obligations on people who receive misdirected property. For example, Maine considers it a crime for someone to exercise:

control over the property of another that the person knows to have been lost or mislaid or to have been delivered under a mistake as to the identity of the recipient . . . and, with the intent to deprive the owner of the property at any time subsequent to acquiring it, the person fails to take reasonable measures to return it.

ME. REV. STAT. ANN. Tit. 17-A, § 356-A (2005). In fact, an older Maine ethics opinion used identical language in an earlier version of section 356-A to justify requiring lawyers to notify the senders of misdirected documents. Me. Ethics Op. 146 (1994). Section 356-A, however, does not necessarily require notification in a misdirected documents case, because the recipient has typically received only a copy of the document. Thus, the owner is usually not deprived of ownership of property in the way that the drafters of the statute likely intended. The point, however, is that some states do have statutes that could plausibly require notification in the inadvertent disclosure context.

<sup>209</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2002).

<sup>210</sup> One possible distinction between Rule 1.6 and 4.4(b) is that a mandatory obligation in the 1.6 context could force lawyers to disclose adverse information about their own clients. This possibility has a greater potential to interfere with the principle of zealous advocacy. In contrast, notification of inadvertent disclosures hurts one's own client to a much less significant degree. Nevertheless, the moral value of human life adds so much weight on the side of disclosing confidential information that the values supporting disclosure in the Rule 1.6 context are at least as strong as in the case of a misdirected document. Accordingly, if Rule 1.6 does not require notification, Rule 4.4(b) arguably should not do so either.

Because of the Rule 1.6(b) analogy and the general legal culture's rejection of a duty to help other people, justice—defined as generally accepted legal principles—also weighs against notification. So at this point, zealous advocacy, legal analogies, and justice all favor a version of Rule 4.4(b) that does not require notification.

On the other hand, consumer protection favors giving notice to the sender. The sender would have an opportunity to mitigate the damage from the mistake by, for example, making sure the client is aware of the disclosure prior to her own deposition.

Morality probably supports notification as well. Although we may not want to impose a legal obligation to assist someone in need, many conceptions of morality typically impose duties that go beyond general legal requirements. For example, in the *Spaulding* case, one might agree that no lay person has a legal obligation to tell someone that he has a life threatening condition that can be corrected through surgery. But one might also believe that the person with this kind of information has a moral obligation to reveal it.<sup>211</sup> Of course, notification about a mistake raises far different moral questions than notification about a potentially fatal condition, but moral obligations also apply to less dire circumstances. For example, in the event of a mistaken bank deposit, there is a good moral argument that the account holder should inform the bank of its error, even in the absence of a legal obligation to do so. It is, therefore, arguable that morality requires the recipient of a mistakenly sent privileged document to notify the sender of the error.

Ultimately, zealous advocacy, legal analogies, and justice weigh against a legal obligation to notify, while consumer protection and morality appear to favor notification. Consumer protection and morality are not insignificant factors, but they do not clearly override the values that weigh against notification. At the same time, consumer protection and morality are strong enough considerations that the rule should not forbid notification. Accordingly, a rule that makes notification discretionary would most effectively reconcile the conflicting values.

As a practical matter, the recipient of a mistakenly sent privileged document might want to use the document as evidence. In that case, the recipient would have to bring the disclosure to the adversary's attention in order to litigate the waiver issue. As a result, there would likely be many circumstances, particularly in the litigation context, where the recipient would decide to notify the sender in order to pursue the client's interests. This notification, though, should not be mandatory.

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<sup>211</sup> Even zealous advocate Monroe Freedman agrees with this proposition. FREEDMAN & SMITH, *supra* note 5, at 146-47.

### C. *Dealing with Metadata*

Recall that metadata consists of embedded information in an electronic document, such as who wrote it and the content of past edits. The question is whether a lawyer who receives an electronic document should be allowed to look at the metadata without the sender's permission.

To date, only one ethics opinion directly addresses the recipient's obligations under these circumstances.<sup>212</sup> The New York State Bar Association's Committee on Professional Ethics asserted that a "lawyer may not make use of computer software applications to surreptitiously 'get behind' visible documents . . . ."<sup>213</sup>

In reaching this conclusion, the opinion relied heavily on the New York State Bar Association's approach to inadvertent disclosures, which requires recipients of misdirected documents to notify sending counsel of the mistake and to return those documents if requested to do so.<sup>214</sup> The opinion reasoned that metadata typically contains inadvertently disclosed information because, "absent an explicit direction to the contrary[,] counsel plainly does not intend the [opposing] lawyer to receive the 'hidden' material or information [in an electronic document]."<sup>215</sup> Thus, the Committee opined that lawyers should not be allowed to examine embedded electronic information.<sup>216</sup>

There are a few potential problems with this opinion when applied to the non-litigation context (to which it appears to have been intended).<sup>217</sup> First, lawyers are becoming increasingly aware of metadata's existence,<sup>218</sup>

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<sup>212</sup> N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 749 (2001). More recently, the New York State Bar Association issued an opinion that addresses a sender's obligations. It states that lawyers have a duty of reasonable care when transmitting documents electronically and that reasonable care requires "stay[ing] abreast of technological advances." N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 782 (2004). The two opinions together are a bit odd. On the one hand, a lawyer has an obligation to take reasonable care when sending electronic documents, which presumably includes an obligation to check for metadata. (If it does not include checking for metadata, one would expect that it will include such checking as the metadata issue becomes even more well-known.) Yet if a sending lawyer has a duty to remove non-discoverable metadata, the receiving lawyer should be able to take advantage of the sending lawyer's negligence in this regard.

<sup>213</sup> N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 749 (2001).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> In litigation, the considerations are somewhat different, because a court is typically available to make a determination about the discoverability of metadata. *See, e.g., Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640 (D. Kan. 2005).

<sup>218</sup> *See Hricik & Jueneman, supra* note 23 (making a similar observation). Indeed, it is more reasonable to expect attorneys today to check for privileged metadata in electronic documents than it would have been just a few years ago. *See, e.g., Jason Krause, Hidden Agendas: Unlocking Invisible Electronic*

so the New York opinion's assumption that the disclosure of metadata is "unknowing and unwilling" is not as accurate as it once was, making the inadvertent disclosure analogy less appropriate. In fact, it is now more reasonable to assume that, when a lawyer delivers an electronic document, the sending lawyer removed any privileged metadata and left any non-privileged metadata intact.

Moreover, even if the sending attorney is not aware of the metadata that she sent, the vast majority of documents with metadata probably do not contain privileged information, again making inadvertent disclosure law a questionable analogy.

Finally, to the extent that inadvertent disclosure law addresses a similar issue, the New York opinion's conclusion turns on the appropriateness of New York's approach to misdirected documents, which requires their return under all circumstances. As explained earlier, a better approach would be to limit an attorney's duty to return misdirected documents to cases where the sender notifies the recipient before the recipient has reviewed the document's metadata.

If we take the inadvertent disclosure analogy seriously, a lawyer should be able to take an initial look at the metadata, assuming that the sending lawyer has not made a request to the contrary. If the metadata includes protected information, the situation becomes more like the undiscovered mistake example earlier, and the lawyer should stop reading the document. The New York opinion assumed that all metadata should automatically be out of bounds, but a nuanced approach is more consistent with the values at stake.

## VI. A NEW RULE FOR INADVERTENT DISCLOSURES

The current version of Rule 4.4 imposes a modest obligation on receiving lawyers: notification to the sender of the inadvertent disclosure. The above discussion reveals that the often mentioned duty to notify does not correctly balance the competing interests at stake. Moreover, Rule 4.4(b) overlooks some obligations that lawyers should have when faced with a quickly discovered mistake. By taking into account the various ways in which inadvertent disclosures occur and the multiplicity of values involved, the following proposal suggests a more context-dependent approach.

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*Codes Can Reveal Deleted Text, Revisions*, 90 A.B.A. J. 26, 27 (2004) (quoting a technology specialist who believes that "[l]awyers can't plead ignorance when it comes to [metadata] anymore").

*Proposed Revision to Model Rule 4.4(b)*

4.4(b). If a lawyer receives a document relating to the representation of the lawyer's client and:

(1) the sender notifies the receiving lawyer that the document was inadvertently sent and the notification occurs before the receiving lawyer has read the document, the receiving lawyer shall not read the document and shall comply with the sender's instructions regarding the document.

(2) the lawyer knows from an examination of the document that it contains inadvertently sent privileged information or work product, the lawyer:

- (a) shall immediately stop reading the document; and,
- (b) has the discretion whether to notify the sender about the mistake.

First, consider what the rule does not say: it does not prohibit lawyers from agreeing in advance about how to deal with inadvertent disclosures.<sup>219</sup> If lawyers want to agree at the outset of the case about how they will handle the issue, they should be allowed to do so. Neither does the rule foreclose the applicability of other law. For example, even if the receiving lawyer returns the document under Rule 4.4(b)(1), a court could still subsequently determine that waiver occurred and order the sender to give the document back to the recipient.<sup>220</sup>

One possible objection to this approach is that it codifies an issue that should be left to the discretion of individual lawyers. Because the underlying values tend to point in different directions, one might contend that the existing rule should leave the tough questions, such as whether to return the document, to the lawyer's discretion. For example, Professor Jones believes that the inadvertent disclosure issue illustrates that "a set of rules cannot capture the myriad circumstances in which ethical conflicts can arise."<sup>221</sup>

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<sup>219</sup> It is not uncommon for lawyers to forge these sorts of agreements. Digital Evidence Project, *supra* note 26, at 22 (finding that 18.7% of in-house counsel had reached some sort of *ex ante* agreement regarding inadvertent disclosures in the case that they most recently completed). In fact, the proposed rule of civil procedure recommends these agreements. Civil Procedure Rule Proposal, *supra* note 3, at app. 9.

<sup>220</sup> As with most Model Rules, the proposed rule does not explain how to deal with violations. An obvious sanction for a blatant violation (e.g., a quickly discovered mistake where the recipient refuses to return the document and instead reads it) might be disqualification. See Jones, *supra* note 8, at 1317. But one could imagine lesser sanctions as well, including monetary penalties or corrective jury instructions. See Cecil E. Morris, *Inadvertent Disclosure of Privileged and Confidential Documents*, 30 COLO. LAW. 59, 61 (Feb. 2001) (describing such sanctions).

<sup>221</sup> Jones, *supra* note 8, at 1282.

She thus concludes that lawyers must struggle with this problem on their own and that an attempt to codify the solution is flawed.<sup>222</sup>

With respect to proposed Rule 4.4(b)(1) and 4.4(b)(2)(a), the underlying rulemaking values do conflict, but they do not conflict to such a degree that discretion makes sense here. The values strongly favor requiring the receiving lawyer to stop reading a document upon becoming aware of its privileged status. In fact, an earlier draft of the ABA's Rule 4.4 proposal contained a very similar requirement before it was deleted in favor of the notification-only approach.<sup>223</sup>

Moreover, there is reason to believe that many lawyers would agree to a rule of this sort *ex ante*.<sup>224</sup> If true, the rule would remove the time-consuming and expensive process of negotiating such a rule at the outset of litigation or a transaction. In an important article, Professor Richard Painter describes this type of rule as a majoritarian default rule, in that it reflects what "most lawyers and clients would choose if they bargained for the rule" at the start.<sup>225</sup> For example, clients and lawyers would generally agree in advance to most conflicts of interest rules. Inserting these obligations in the Model Rules prevents the majority of lawyers and clients from having to negotiate these issues, saving clients time and money and furthering the interests of efficiency. As Professor Painter notes, "[m]ajoritarian rules save transaction costs because the majority prefers the rule and does not have to contract around the default."<sup>226</sup> Because the obligation to return a quickly discovered mistake is both consistent with professional values and would reduce transaction costs, the obligation is best framed as a rule rather than as a matter of discretion.<sup>227</sup>

In contrast, the issue of notification presents a much closer question. Because the values at stake are so much more in conflict and do not clearly

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<sup>222</sup> *Id.* at 1279-85, 1304-05. Put differently, Jones's view is explicitly a normative position. She explains how lawyers should use legal analogies to determine how they should behave upon receiving an inadvertent disclosure, and does not spend much time developing a rule to govern the area.

<sup>223</sup> Moore, *supra* note 59, at 942 n.119.

<sup>224</sup> *Cf.* ABA/BNA Manual on Prof'l Conduct, *supra* note 164.

<sup>225</sup> Painter, *supra* note 73, at 684.

<sup>226</sup> *Id.*

<sup>227</sup> Indeed, even Professor Freedman concedes that one of his objections to ABA Opinion 92-368 was that it did not turn on any rule of professional conduct. Freedman, *supra* note 6. At least one bar opinion also has recognized the importance of codifying the law in this area. *Kondakjian*, 1996 WL 139782, at \*7 (attaching a proposal by the New York City Bar Association that recognizes the importance of codifying this subject); *see also* Gloria Kristopek, *To Peek or Not to Peek: Inadvertent or Unsolicited Disclosure of Documents to Opposing Counsel*, 33 VAL. U. L. REV. 643, 680 (1999) (advocating for the adoption of a rule in this area).

tip the scales in one particular direction, the rule should make notification discretionary.<sup>228</sup>

Finally, the proposed rule does not explicitly address a case where the recipient of a document discovers critical privileged information before the sender realizes the error and before the recipient could know that the document is privileged.<sup>229</sup> Proposed Rule 4.4(b)(2)(b) makes clear that the recipient does not have to inform the sender about the error, but what if the sender belatedly realizes the mistake and asks the recipient to return the document? At this point, there is little to be gained from returning the document; the damage to the sender is already largely done. As a result, many of the considerations that applied to the Rule 4.4(b)(1) situation do not apply here, and the recipient should not have an obligation to return the document.<sup>230</sup>

## CONCLUSION

The law of inadvertent disclosures raises many difficult doctrinal and theoretical issues. This article sorts through those issues by fully identifying the values that should underlie professional rulemaking and by illustrating how rule drafters should balance those values when they conflict.

This balancing of conflicting values reveals that the existing Model Rule governing inadvertent disclosures should be revised in two significant ways, one which enhances the recipient's obligations and another which reduces them. First, the Rule should require the recipient to comply with the sender's instruction regarding how to handle misdirected documents when the recipient has not yet reviewed those documents. Second, the Rule should not require a recipient of an inadvertent disclosure to notify the sender about the mistake.

These two revisions are more consistent with the principles that lie at the core of the law of lawyering. Moreover, they ultimately reveal the utility of a framework that more effectively addresses some of the most controversial and difficult questions facing the regulation of lawyers today.

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<sup>228</sup> Jones, *supra* note 8, at 1281.

<sup>229</sup> See *supra* note 27 and accompanying text.

<sup>230</sup> A similar situation arises when the sender notifies the recipient about a mistake while the recipient is reading the relevant document, but before the recipient has read the protected portions. Given the logic described earlier, the lawyer's obligation to return the document could turn on whether the recipient had learned the protected information at the time of notification. Comments to the rule could explain these types of nuances.